



# A Job Left Undone: Allegheny County's Fork in the Road

**An Analysis of Problems at the Allegheny County Office of the Public Defender that Cause Systemic Violations of Clients' Constitutional Right to Adequate Representation**



# Acknowledgements

The ACLU of Pennsylvania's effort to correct severe systemic deficiencies at the Allegheny County Office of Public Defender (OPD) began fifteen years ago, but the task of bringing the OPD's practices up to constitutional standards remains a job left undone. This report follows the admonition of former U.S. Supreme Court Justice Louis Brandeis, who once said that, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." This report is designed to shine the light on the operations of an important government agency, one that serves approximately 25,000 people a year and which is responsible for whether people go to jail and if so for how long. The problems plaguing the agency cry for sunlight. We trust this report will begin illuminating the problems and thus lead to completion of the reforms started by the ACLU fifteen years ago.

This report would not have been possible without the help of many people. I want to thank my co-authors, attorneys Claudia Davidson and Thomas J. Farrell, who were also co-counsel in the ACLU's lawsuit against the OPD. Thanks also go to ACLU-PA Legal Fellow and chief scrivener, Alexandra Morgan-Kurtz. Lastly and most importantly, we wish to thank the countless people who cooperated in our investigation, from both inside and outside the County's criminal justice system and from within the OPD itself, who gave us insight into current operations and largely validated the findings of the Kalmanoff report, but who cannot be identified for fear of retaliation. You know who you are. We are lucky to have so many responsible people with an abiding commitment to justice and civil liberties.

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October 17, 2011

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# Introduction

Fifteen years ago, the American Civil Liberties Union (“ACLU”) sued Allegheny County in *Doyle v. Allegheny County Salary Board* (“Doyle”), alleging that the Office of the Public Defender (“OPD”) failed to provide constitutionally adequate representation to indigent criminal defendants, juveniles charged with delinquency and people subject to involuntary mental health commitments, and that County officials were ignoring these serious deficiencies. The lawsuit was triggered by two events. First, a 1995 American Bar Association study concluded that the OPD had suffered from years of neglect and was one of the most underfunded urban public defenders in the country. Then in 1996, new County commissioners not only refused to adopt reforms suggested in the ABA report, but they further cut the OPD’s budget, exacerbating an already dire situation.

After two years of contentious litigation, the lawsuit resulted in an agreement designed to improve the OPD, which called for increased funding, staffing, training and management, as well as written policies promoting best practices. The litigation was expensive, costing the county a million dollars just in attorneys’ fees to the ACLU. While the County met the funding and staffing requirements, the OPD has never adopted the necessary standards, maintained high-level training or implemented the practices that are an indispensable part of a constitutionally adequate indigent defense system.

Fifteen years later, Allegheny County stands at a similar fork in the road, confronted by a need to save money and a choice to continue to ignore the OPD’s acute systemic dysfunction or to take concrete action to finish the reforms contemplated by the 1996 ACLU lawsuit. The parallel with 1996 is strong, except now the requisite changes would not be nearly so costly and even arguably would save the County money.

This time there is again a report documenting the OPD’s failings, except that the County has buried it. Using Pennsylvania’s public records law, the ACLU uncovered a secret 2009 report, commissioned by Allegheny County itself, which concluded that “[m]any of [the problems addressed in the ACLU lawsuit] persist today, contributing to a dysfunctional office culture where normative or even minimal performance expectations do not exist.”<sup>1</sup> The report, known by the lead investigator’s name, Alan Kalmanoff, also stated that:

Leadership in the office needs to be improved. The OPD Director has not been trained in how to manage a large defense office, and is not a natural manager. More importantly, he appears virtually disinterested in administration and management, and as a result, holds infrequent meetings, does not assign or oversee supervisors to help manage, and fails almost completely to even try to identify and to address the major system problems that plague his office.<sup>2</sup>

A lack of leadership and efficiency also drives excessive client jail time, *costing millions*, and wastes staffing resources. Immediate actions must be taken to break the cycle of delay, end gaps in coverage, reduce inefficiency, lower jail crowding, and avoid liability.<sup>3</sup>

The single biggest problem the ACLU attempted to correct through the *Doyle* litigation was the OPD’s failure to have attorneys meet with clients early in the process – within days of arrest – at which time they would assess the case, initiate essential investigation and legal research, draft necessary motions and begin thinking strategically about how best to defend the client. This early case evaluation and preparation is the hallmark of a constitutionally adequate defense. Sadly, the Kalmanoff report found the problem had not been fixed, and indeed had worsened:

The [OPD] system, and particularly the way that indigent persons are provided representation ... is inadequate and poorly managed. In many routine cases, there is little or no contact with a person the defendant can regard as “my lawyer” until just before or at the first courtroom appearance. ... There is a nearly total lack of representation for about four months between the first stages and the trial. During this time inmates are languishing with literally no attorney of record, no one to update their files, and no real advocacy.<sup>4</sup>

Even judges were reported to hold “a general ‘consensus’ or shared view that public defenders are not meeting with their clients prior to some key appearances in court.”<sup>5</sup>

The ACLU’s independent investigation over the past year has revealed that conditions at the OPD have deteriorated since Kalmanoff’s report. Despite Kalmanoff’s stark warnings, Allegheny County has not implemented any of Kalmanoff’s thirty specific recommendations for fixing the serious systemic problems. The County’s failure to act becomes even more perplexing in light of Kalmanoff’s projection that the changes and improved efficiencies could save the County millions of dollars. Seemingly repeating the mistakes of 1996, the County is beginning to reduce the agency’s budget by, for instance, delaying or refusing to fill staff vacancies, cutting supplies and

“Because the right to counsel is fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”

*Evits v. Lucey*, 469 U.S. 387, 395 (1985).

discouraging attorneys' purchase of important preliminary hearing transcripts and the use of experts, practices that will further undermine the quality of representation provided by the OPD. Those who forget the history of fifteen years ago are doomed to repeat it.

The three arms of the Allegheny County criminal justice system must work together with the County Executive and County Council to implement the changes recommended by the Kalmanoff report. Only with cooperation of County elected officials, the Office of the Public Defender, the District Attorney's Office and the Court of Common Pleas can the County change the systemic deficiencies that deny the people of Allegheny County their constitutional rights. The ACLU calls on County and Court leaders, including the County Executive candidates, to (1) pledge to complete the OPD reforms mandated by the *Doyle* settlement, which also would largely satisfy the American Bar Association's Ten Principles for public indigent defense systems; and (2) implement the Kalmanoff report's plan to streamline and improve the operation of the County's criminal justice system while saving the County money. The OPD has many fine, dedicated public defenders who are shackled by a broken and mismanaged system, prevented from fulfilling their professional responsibility to provide clients with a constitutionally adequate defense. Without change, the County exposes itself to liability for the ongoing deprivation of indigent defendants' constitutional rights.

# I. Standards for Criminal Indigent Defense Systems

## A. Constitutional Right to Counsel

Almost fifty years ago, the United States Supreme Court held that the Sixth Amendment to the U.S. Constitution gives individuals subjected to state criminal prosecution a fundamental right to appointed counsel.<sup>6</sup> This right applies to the full spectrum of charges that can lead to the imprisonment of poor defendants, from less serious crimes to the most serious of felonies. It applies to all phases of the prosecution including preliminary hearings, trial, sentencing, and appeal.<sup>7</sup> Criminal defendants are entitled to "more than just the opportunity to be physically accompanied by a person privileged to practice law."<sup>8</sup> Similar rights to counsel have been extended to minors facing delinquency charges<sup>9</sup> and people subjected to loss of liberty through involuntary mental health commitment.<sup>10</sup>

"[T]he essential aim of the [Sixth] Amendment is to guarantee an *effective* advocate for each criminal defendant."<sup>11</sup> As a result, it envisions defense counsel forcing prosecuting attorneys to "survive the crucible of meaningful adversarial testing."<sup>12</sup> Unless an accused has an attorney "able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself."<sup>13</sup> "Because the right to counsel is fundamental to a fair trial, the Constitution

cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."<sup>14</sup> "A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."<sup>15</sup>

## B. The ABA Ten Principles

In 2002, the American Bar Association's ("ABA") Standing Committee on Legal and Indigent Defendants established the "Ten Principles of a Public Defense Delivery System."<sup>16</sup> These principles describe the fundamental requirements of an indigent defense system capable of providing representation that satisfies an individual's Sixth Amendment right to counsel.<sup>17</sup> The standards include general proscriptions, like independence

- 1. Independence:** The public defense function must be independent from both political and judicial influence.
- 2. State Funding & Structural Integrity:** The public defense delivery system may consist of both a public defender office and participation from the private bar. The State has the duty to provide funding and a uniform structure.
- 3. Eligibility & Early Appointment:** Potential clients must be screened for eligibility and assigned defense counsel as soon as possible.
- 4. Confidentiality & Early Client Interviews:** Counsel must have sufficient time and space to meet with the client confidentially. Counsel should meet with and interview their client as soon as practicable before preliminary hearings or trial.
- 5. Availability:** The workload of public defenders must be controlled to ensure that counsel can provide all clients with adequate representation.
- 6. Competency:** Public defenders should never be assigned cases which they lack the experience or training to handle competently.
- 7. Consistency:** The same attorney should represent the client continuously from the initial hearings through trial and sentencing.
- 8. Resources:** Defense counsel, whether assigned or a member of the public defender's office, should be provided with sufficient resources so that they can operate as an equal partner in the criminal justice system.
- 9. Training:** Defense counsel is required to attend continuing legal education.
- 10. Quality & Accountability:** Defense counsel must be supervised and reviewed for quality representation in light of local and national standards.

for the public defender office (free from political and judicial interference) and sufficient resources to ensure that lawyers can prepare a constitutionally adequate defense. But they also call more specifically for early interviews with clients (before both preliminary hearing and trial), manageable case loads, training for the lawyers and supervision to ensure quality representation.

There has been a growing movement across the country to ensure that public defenders offices adhere to these principles. By instituting reforms in line with these foundational principles, states have not only increased the fairness of their criminal justice systems and reduced prison populations, but have increased economic efficiency and saved money.

## **II. The ACLU's 1996 Lawsuit Against Allegheny County**<sup>18</sup>

### **A. An Already Underfunded Public Defender's Budget is Cut**

In late 1995, a private consulting group sponsored by the American Bar Association ("ABA"), the Spangenberg Group, issued a report reviewing the Allegheny County OPD.<sup>19</sup> The report concluded that due to "years of neglect" "the overall conditions of the office create a major impediment to providing quality representation to indigent defendants."<sup>20</sup> The report highlighted deficiencies in staffing, office space, resources and written standards, plus excessive caseloads. In terms of necessary resources, the Allegheny County OPD ranked at the bottom of comparable offices in similar jurisdictions.<sup>21</sup>

Notwithstanding the major concerns expressed by the Spangenberg Group, Allegheny County failed to implement any of the recommended changes. Instead, newly elected leadership in the County drastically reduced the Public Defender's budget by over twenty-five percent.<sup>22</sup> These budget cuts led to the dismissal of 15 attorneys from the original staff of 49, 20% of the clerical staff and dismissal of all social workers and investigators.<sup>23</sup>

### **B. The ACLU Files a Class Action Lawsuit that Leads to a Settlement Agreement**

In response to the Spangenberg report, the subsequent budget cuts and numerous complaints from OPD clients, the ACLU filed a class action lawsuit alleging that the Allegheny County Salary Board, County Commissioners and the Chief Public Defender had failed to provide a constitutionally adequate system for indigent defense.<sup>24</sup> The complaint detailed a variety of long-standing systemic problems such as overwhelming caseloads,

severe understaffing and flawed policies that were resulting in a denial of constitutionally adequate legal representation. The complaint alleged that the County was aware of these deficiencies and failed to provide the needed resources or make necessary changes to improve the situation.

The lawsuit ended with a court-enforceable "Settlement Agreement" in 1998, providing for many changes to the OPD.<sup>25</sup> These changes included a doubling of the budget and staff, development of written personnel policies and practice standards, a system of supervisory performance monitoring and providing new and current staff with extensive training. In addition to their own litigation expenses, the County paid the ACLU nearly \$1 million dollars in attorneys' fees. Aside from the mandated budgetary and staffing increases, however, the County never fully complied with the provisions of the settlement agreement aimed at changing how attorneys are trained, managed and, ultimately, how they represent clients.

### **C. Settlement Agreement and Court Monitoring of OPD is Terminated in 2005**

In June 2003, the ACLU filed a motion requesting the Defendants be held in contempt for failing to comply with the terms of the settlement agreement.<sup>26</sup> The ACLU noted that some positive changes had occurred in the Allegheny County OPD since the initial filing of the lawsuit, but several problems remained unaddressed. Crucial among the neglected provisions were the County's failure to implement written practice standards that modeled national standards, to create a system of employee oversight, to maintain training and to properly deploy investigators.

In response to the ACLU's contempt motion, the Court appointed a pro bono arbitration panel to analyze the County's compliance with disputed provisions of the settlement agreement.<sup>27</sup> While the arbitration panel recommended that the Court deny the ACLU's motion, it recommended further steps to improve representation within the Allegheny County OPD. The panel advised the OPD to employ the "Client Interview" form utilized by the Defender Association of Philadelphia, which should be completed during the initial client interview and updated by each attorney subsequently representing the client with important information, including jury trial demand, alibi witnesses, and the need for and/or results of investigation and legal research. The panel advised that the questionnaire should follow the case and be reviewed by counsel prior to court appearances. The use of this document would reduce confusion and ensure that each attorney would be well informed about the case and the client's wishes. Supplementary recommendations included adopting a form letter informing clients about the purpose and procedures of the preliminary hearing and increased accountability for attorneys. The County never implemented even these simple changes suggested by the arbitration panel.

# III. Serious Problems in OPD Operations Persist

Problems with the OPD's representation persist to this day and have worsened. The ACLU's assessment is based on a report commissioned by Allegheny County that was released in 2009, but never made public, and a year-long investigation by the ACLU's Pittsburgh office. The investigation relied on dozens of complaints received from public defender clients, documents obtained through public records requests, and interviews with people who work in the Allegheny County criminal justice system, including assistant public defenders. The problems identified by the 2009 report, complained of by OPD clients, and confirmed by people inside the system show remarkable consistency.

## A. The 2009 "Kalmanoff Report"

In 2008, the Allegheny County Solicitor requested an assessment of the OPD from the Institute for Law and Policy Planning, led by Professor Alan Kalmanoff, to analyze "concerns expressed by judges and others about the high rates of continuances and operational inefficiencies in the County's criminal defense function."<sup>28</sup> The Kalmanoff report was completed in late 2008 and slated for release in 2009, but for unknown reasons was never released publicly. Its thirty recommendations for improving the performance and efficiency of both the OPD and the entire criminal justice system, while saving the County substantial funds, have been ignored. The problems cited within the report virtually mirror those the *Doyle* litigation sought to remedy fifteen years ago.

Kalmanoff criticizes nearly every phase of the OPD's operations, saying "the agency's current program is dysfunctional"<sup>29</sup> and that the "management" of it is "dysfunctional" and "getting worse."<sup>30</sup> He writes that "almost all agree that the amount of training is inadequate,"<sup>31</sup> and that "practice standards are not employed beyond initial orientation, nor are they enforced by supervisors and managers over time, thereby demonstrating a lack of the most basic management oversight."<sup>32</sup> The problems with inadequate representation identified in *Doyle* and the subject of post-settlement monitoring have not been corrected and have worsened. Kalmanoff notes that "[d]efenders do not meet their clients after they are booked into the jail,"<sup>33</sup> and that "there is an unacceptable period of approximately four months, between the pre-trial conference and the preliminary hearing of a case, when jailed offenders do not see their lawyer," a practice "labeled by some as the 'OPD's hidden shame.'"<sup>34</sup>

Although the Kalmanoff report's focus is on the OPD, the study also assessed the performance of other agencies within the County's criminal justice system and identified improvements to the practices of the District Attorney's Office and Allegheny County's criminal courts that would help the OPD increase the

quality of representation and save the County additional monies.<sup>35</sup> The ACLU's investigation focused on problems at the OPD, as does this report, but obviously the other components of the County's criminal justice system that strain the OPD's performance need to be addressed by County and Court leaders as well.

## B. Kalmanoff's "Action Plan"

Kalmanoff proposed a broad "Action Plan" consisting of thirty recommended changes in how the OPD and, to a lesser extent the criminal courts and District Attorney's Office, operate in order to upgrade the quality of OPD representation, improve the entire criminal justice system's efficiency and, simultaneously, save millions of tax dollars. The report states that some of the changes, most notably ones that involved improving the OPD's operations, would result in major (defined as millions of dollars annually) or substantial (defined as hundreds of thousands of dollars) savings.<sup>36</sup>

For instance, Recommendations 2 and 3 call for hiring someone to "[r]espond to an acknowledged core deficiency in management expertise and capability," which will over time result in significant savings.<sup>37</sup> Recommendation 13 calls for improving OPD office systems, including the application and enforcement of practice standards, which in the short term will result in "substantial" savings and "major" ones in the long term, i.e., millions of dollars.<sup>38</sup> Recommendation 15 calls for improving and bringing into line with the District Attorney's Office the OPD's informational technology ("IT") systems, something that over time will result in "major" savings.<sup>39</sup> Simply improving quality control by instituting basic management concepts like file reviews will result in substantial savings in the short and long term.<sup>40</sup>

Despite these potentially significant savings, the ACLU has learned that more than two years after receipt of the Kalmanoff report the County has yet to implement any of these vital changes. The ACLU has been unable to ascertain why Allegheny County never released the Kalmanoff report publicly, or never adopted the thirty recommendations for reform contained in the report. The recommendations are not only sensible and likely to improve OPD representation without significantly increasing the budget, but could save Allegheny County taxpayers millions of dollars.

# IV. The OPD's Serious Problems Must be Fixed

The ACLU's investigation over the past year has confirmed most of the findings of serious deficiencies in OPD operations described in the Kalmanoff report, which translate into probable constitutional violations involving OPD clients. We discuss below the most serious problems based on the Kalmanoff report and ACLU's investigation.

## A. Ineffective Management

Kalmanoff's greatest concern was OPD's management, or lack thereof, especially by the Chief Public Defender. "His management skills are clearly lacking, which is evident from almost every aspect of the OPD operation reviewed for this study, including a lack of actual knowledge of what is going on in the office and courtrooms, and a lack of effort to identify and remedy the most serious and obvious OPD and system problems."<sup>41</sup> The report remarked that he "is not a natural manager," cannot communicate effectively and "appears virtually disinterested in administration and management." This disinterest manifests itself through infrequent meetings, non-involvement in overseeing supervisors and "fail[ing] almost completely to even try to identify and to address the major system problems that plague his office."<sup>42</sup>

There is a perception from many persons spoken to that the Chief Public Defender is minimally present, unresponsive to concerns, avoids friction, avoids making decisions and avoids responsibility. Essentially, his actions are focused on ensuring that he does not rock the political boat on which his position is based.<sup>43</sup> He is perceived as being unsupportive of his team, staff, office and the clients. When advocacy is needed to overcome problems with the District Attorney's Office or an unreasonable judge, he rarely takes up the battle to champion his staff or the clients.

The rest of the management team has no common mission, no strategic plan, poor communication, a lack of consistency and a lack of accountability. Many within the OPD are unsure how managers are identified. While some members of management obviously care deeply, and try against all odds, many others can rarely be located and are nonresponsive to the concerns of assistant public defenders and the support staff.

Poor management infects and exacerbates other OPD operational systems: "Poor administration furthers the problems caused by shortfalls in space, equipment and technology, a long-standing culture of private practice and lawyer autonomy, inadequate management supervision and incentives, and an absence of adequate policies and procedures."<sup>44</sup> Management deficiencies lead to other problems as well. There is no "plan for managing or transferring caseloads when case numbers increase and exhaust the allocated funding," "[c]rucial mechanisms for identifying conflicts and scheduling issues are lacking," and "[t]here are no procedures for maximizing the usefulness of expensive attorney staffing."<sup>45</sup> Kalmanoff concludes that while the "dysfunctional management" in the overall court system "is improving," at the OPD it "is getting worse."<sup>46</sup>

The Kalmanoff report proposed that all members of the leadership of the OPD undergo management and supervision training to improve the management of the OPD and strengthen communication within the agency.<sup>47</sup> It expressed doubts that the current Chief Public Defender could be trained to be an

effective leader of the OPD as it was "apparent that the Director was not aware of or interested in management or leadership."<sup>48</sup> It encouraged that "other personnel changes should be investigated," such as hiring a strong manager from outside of the OPD.<sup>49</sup>

## B. Essential Personnel Management Functions are Practically Non-Existent

The OPD's deficiencies are perhaps nowhere more noticeable (and damaging) than in the area of personnel management. Training programs are grossly deficient, there is no mentoring or other program to aid junior lawyers in preparing and trying cases, practice standards that set expectations and guide performance are ignored or non-existent, case loads are not monitored and performance evaluations are rarely employed. Part-time attorneys are largely unmonitored and unaccountable. The number of essential support staff, like investigators and social workers, has been allowed to decrease through attrition and non-replacement. The almost complete absence of personnel management may be the single biggest drag on the ability of the office to provide effective representation. As will be discussed below, the consequence of these personnel management failures is that representation is inconsistent at best and in too many cases unconstitutional. These are flaws that should be fixed quickly and can be repaired without substantial expense.

### 1. Virtually Non-Existent Attorney Training

The Kalmanoff report found a "widespread perception among judges that there is little or no training of assistant public defenders."<sup>50</sup> There is minimal formal training within the office for new attorneys. Unlike well-run public defender offices like the one in Philadelphia, the OPD has no formal mentoring program to assist young lawyers in learning the idiosyncrasies of criminal defense practice generally and in Allegheny County particularly. The OPD does encourage lawyers to attend "brown-bag-lunch CLE's" (continuing legal education) on criminal law and practice, but those are often ineffectual because they are presented for and to both prosecutors and criminal defense lawyers, which means that important practice tips unique to defense lawyers are omitted. Periodically, but with no real planning or strategy, the OPD sends small numbers of trial lawyers to good quality training programs, such as one run annually by the Public Defender Association of Pennsylvania (PDA of PA), but far more lawyers could benefit from that education.

In the past a "Trial Advocacy Program" was required for attorneys transitioning between the Pre-Trial and Trial Divisions. This program was viewed as a useless formality by those who went through it and has not been held in over a year. Attorneys at OPD believe that the training they receive is inadequate by any measure, but astonishingly so in comparison to the extensive training provided at comparable offices, such as the Defender Association of Philadelphia. Moreover, attorneys transfer



between divisions without any preparation or training on how to proceed in matters that decide the ultimate fate of their clients. In sum, attorneys new to the office or a division are essentially left to learn by trial and error, at the expense of the clients.

Kalmanoff concluded that the OPD needs to provide training in the basics, including ethics and motions and trial practice.<sup>51</sup> The report noted that additional training in legal ethics, including regular refresher classes, was “badly needed.”<sup>52</sup> The report suggested the office create a “Training Coordinator” position to streamline ongoing development of training programs for all attorneys.<sup>53</sup> There is simply no replacement for a rigorous introductory training program, supplemental in-house training for attorneys moving to new units, and an ongoing mentoring program.

## 2. Unused Written Practice Standards

Practice standards complement and inform the training program, and the OPD’s failure to conform its practice to minimum national and constitutional standards is a major problem. National standards emphasize the importance of an *early* client interview, case assessment, investigation and preparation.<sup>54</sup> It is vitally important to perform these activities early in the life of the case to ensure that valuable evidence and testimony is not lost, and that the lawyer gains familiarity with the client, knows the client’s response to the charges, and can begin necessary fact investigation and legal research. This information arms the defense lawyer with the crucial knowledge necessary to advocate effectively for the client in a number of ways, including seeking pre-trial release, moving to dismiss charges, negotiating a fair plea bargain and preparing a trial defense.

Presently, practice standards established after *Doyle* are not actively utilized. The standards are “not employed beyond orientation, nor are they enforced.”<sup>55</sup> Kalmanoff observed a “lack of norms concerning baseline practice management or expectations.”<sup>56</sup> Standards introduced at orientation only, without subsequent repetition and enforcement, might as well not exist at all. This is evident in that many attorneys and staff of the OPD are unaware that the practice standards even exist. Only a handful of employees would know where to find a copy of the standards if they were interested in doing so.

In addition to the inattention paid to the existing standards, there are no procedures for identifying conflicts of interest or scheduling issues. Kalmanoff’s Action Plan included the development of a comprehensive Office Manual comprised of job descriptions, qualifications, trial practice standards and performance standards as a critical change that would provide the County with substantial immediate savings and major savings over time.<sup>57</sup>

## 3. Workload

Management has an obligation to ensure that lawyers’ caseloads are not overwhelming and that the work is distributed equitably among staff. Under the NLADA’s Guidelines “counsel has an

obligation to make sure that they have available sufficient time... to offer quality representation to a defendant.”<sup>58</sup> This obligation was reiterated by the ABA’s Ten Principles, which insists that a public defense delivery system must ensure that workload is controlled to prevent it from interfering with counsel’s ability to render quality representation.

Kalmanoff noted that no one at the OPD manages or controls the adult criminal caseload.<sup>59</sup> The County invested in database software, at great expense, but the system is not being employed office-wide. Attorneys are tasked with the responsibility of maintaining the information, which requires time-consuming data entry work that doesn’t yield a clear benefit for the attorneys or their clients. Attorneys view the software as simply creating more administrative work and do not prioritize updating the system among their responsibilities. Support staff only contribute minimal data entry. As a result, there is no reliable way to track case or workload. There is no balance to the caseload of Pre-Trial Attorneys. Attorneys are assigned to particular courts based on what has historically been done and not the volume of the cases. Consequently, some attorneys are routinely swamped while others are consistently underutilized.<sup>60</sup> Nothing undermines effective representation more or promotes employee burnout quicker than giving lawyers an overwhelming and unmanageable workload.

## 4. Absence of Performance Reviews

At the back end of the personnel management system is the performance review, which instructs lawyers on proper practice, corrects problems and provides employee accountability. As with the written practice standards, performance review of assistant public defenders and support staff remain practically non-existent. Allegheny County OPD never complied with the settlement agreement by implementing a supervisory system with periodic and systemic monitoring. Without any system of oversight the OPD lacks a mechanism to ensure accountability and quality representation. Kalmanoff concluded that problems with chronically deficient representation are attributable directly to a “lack of the most basic management oversight.”<sup>61</sup>

In the past nine months, after the ACLU began submitting public records requests focused on the agency, the OPD has required that every division conduct at least some performance reviews of the attorneys. Attorneys within the office view these reviews as “superficial” or “shams.” There are no uniform standards for what the performance review should contain. The Chief Public Defender has acknowledged to members of the OPD that the divisions need not put significant time or effort into these reviews, as they will not be used for any particular purpose.

Outside of these “sham” reviews, current members of the OPD do not recall any other time when their performance has been reviewed by a supervisor or other member of the management team. No one has asked to look over their case files, read over a motion, or watched them in court. No supervisor has provided advice on what the attorneys can do to improve their

performance or criticized them when they've done poorly. Supervisors cannot critique performance because they simply don't know the actual quality of the work of the attorneys they are "supervising." Without frequent substantive performance reviews, assistant public defenders' performance will remain variable and in some cases patently unacceptable.

Kalmanoff recommended that the OPD begin conducting regular performance reviews (at least annually) for all employees to promote a better use of resources, identify training needs and motivate attorneys to provide a higher level of representation to clients.<sup>62</sup> These performance reviews must be rigorous and regular. The report also advised the OPD to establish a Quality Assistance Protocol that involves periodic random review of case files by a supervisor that would "provide an on the spot remedy for potential problems."<sup>63</sup> These changes would result in significant short and long term savings for the County.<sup>64</sup>

## 5. Staffing Issues

Fifteen years ago, the OPD had no investigators or social workers on staff and lacked paralegals and clerical personnel. The settlement agreement mandated that the OPD raise its staffing levels of attorneys and support staff. For years the OPD had maintained staffing levels mandated by the settlement; however, in recent years the process to fill open spots in the OPD has become bogged down, with no transition plans to compensate during the prolonged staffing shortages. Currently, the OPD employs less than the 79 full-time-equivalent attorneys mandated by the settlement agreement, and has been slow to fill vacancies.<sup>65</sup>

Investigators are an integral part of effective representation, and thus were addressed separately in the *Doyle* settlement agreement. The agreement required the OPD to hire one investigator for every six lawyers, for a total of thirteen investigators. The OPD currently has an Investigative Division consisting of approximately nine investigators; however only seven actually conduct investigations, barely half of the total in 1998.<sup>66</sup> Attorneys, who are not trained on how to best engage the services of investigators, unsurprisingly find it difficult to get the level of cooperation necessary for productive investigation. The lack of investigators makes it difficult if not impossible to adequately serve the attorneys' needs for timely and effective investigation.

Social work staff is essentially nonexistent. There is one social work related position in the entire OPD, an "Ombudsman" who works exclusively in the Juvenile Division. Her contribution to the improvement of juvenile cases is minimal. In other public defender offices, social workers serve an essential function by investigating a client's eligibility for alternative justice programs that reduce or alleviate the extent of a client's jail time. The absence of social workers at the OPD is a significant void in the quality of service provided to its clients.

Moreover, the remaining support staff in place is inefficient at best. The staff is viewed as minimally skilled, incompetent,

and disorganized. Many attorneys write their own letters, do their own photocopying, type up simple motions, as well as numerous other clerical tasks because they fear the quality of the final product if left to the clerical staff. As with the attorneys, there are no office-wide standards ensuring accountability for support staff.

## 6. Conflicted Part-time Lawyers

Fifteen years ago the public defender system consisted exclusively of fifty-five part time attorneys.<sup>67</sup> At that time, Allegheny County was the only large metropolitan area that still followed this "relic of the 50's and 60's."<sup>68</sup> The problem with this type of system is the enormous potential for abuse. The size and complexity of the caseload can overwhelm a part-time attorney and interfere with their ability to work on cases for private clients. The resulting conflict of interest leaves the attorney with limited choices: work on neither group of cases competently, provide public defender clients with inadequate representation while tending to the needs of paying private clients, or work full time on public defender cases for part-time pay. In recognition of the shortcomings of a system of part-time public defenders, the settlement agreement in *Doyle* provided that no future attorneys hired by the OPD or appointed to a supervisory position would be permitted to maintain a private practice.

While no new part-time attorneys have been hired, many of those who worked in the office at the time of *Doyle* remain.<sup>69</sup> It is important to note that the part-time public defenders were, and had to be, "grandfathered" into the system for collective bargaining reasons, which continue in effect. In other words, any changes must take into account the realities of the collective bargaining agreement and the laws related to it.<sup>70</sup>

Nevertheless, in practice there is continued friction between full-time public defenders and part-time attorneys. The Kalmanoff report noted continued allegations that the part-time lawyers do not put in a sufficient amount of time on their public defender cases.<sup>71</sup> A culture has developed where the attorneys prioritize the needs of their private clients and their own schedules above the needs of their public defender clients.<sup>72</sup> The report cautioned that this culture could only be eliminated by discontinuing the part-time practice as soon as legally feasible.<sup>73</sup>

## C. Unequal Partner in the Justice System

To ensure fair trials, the ABA's Ten Principles stresses that public defender systems must be included as an equal partner in the justice system. This means that there should be parity of workload, salaries and other resources, including technology, facilities, support staff and access to forensic services and experts between the prosecution and public defense. The presumption is that the only way for public defenders to properly participate in the adversarial system is if they start on equal footing. A strong chief public defender who will not succumb to pressure

from his political bosses, like the county executive or the judges, is essential to maintaining the indigent defense function as a strong and independent leg of the criminal justice triad (the courts, prosecution and defense). Unless the chief public defender fights for his agency's coequal station within the criminal justice system, the program will not function properly.

The Spangenberg report observed in 1995 that the District Attorney's "staffing, salaries and resources far outweigh[ed] those of the Public Defender."<sup>74</sup> It described public defender salaries as "miserably low" and their offices as "totally inadequate."<sup>75</sup> While the settlement agreement in *Doyle* initially led to improvements in this area, there has been some backsliding in the OPD's resources today, both in absolute terms and in relation to the District Attorney's Office. In 2011, the District Attorney's office received over \$14 million in funding from the County while the OPD was allocated only \$7.5 million.<sup>76</sup> These budget discrepancies are apparent in the resources available to each office.

## 1. Salary

Perhaps most importantly in the area of resources, the salaries provided to assistant public defenders remain abysmally low. Many public defenders are living paycheck to paycheck, and quite a few attorneys maintain part-time, non-legal, jobs outside of their full-time public defender work to supplement their income. Starting salaries for both assistant district attorneys and assistant public defenders are about \$39,000.

The District Attorney's Office regularly rewards assistant district attorneys with not only the annual cost-of-living adjustment, but with advances in "grade," which amount to more substantial pay increases and serve as an effective retention tool. These "grade" pay raises occur roughly 3-5 years into an assistant district attorney's term in the office, a time frame that roughly corresponds to when many public defenders leave the OPD. In a recent review, the OPD had no "grade 3" lawyers, which is the first grade advancement from the lowest grade of 4. Comparatively, the District Attorney's Office had 33 attorneys at grade 3. The difference in salary is about \$6000, meaning that assistant public defenders with five to six years of experience are making about \$44,000 to \$45,000 while comparably experienced assistant district attorneys are earning about \$51,000. During the current Chief Public Defender's term, financial and job classification grade increases have been unheard of -- employees can only recall a single one -- leaving assistant public defenders making far less than equally seasoned assistant district attorneys. Some of the OPD lawyers who have never received a grade increase were hired 10 or more years ago, and many more have over 5 years experience.

While this has not curbed the recruitment of young attorneys, the lack of gradation in salary and benefits has produced a high turnover rate among more experienced attorneys; "another truly major but largely hidden expense" to the OPD.<sup>77</sup> High turnover further lowers OPD morale and increases the existing "external and internal perception of the OPD as a training ground."<sup>78</sup> The continuing attrition of seasoned public defenders can only

contribute to the office's difficulties in providing constitutionally adequate representation to its clients. In well-run offices "the most experienced trial attorneys in the office are usually the most respected role models for younger inexperienced attorneys," however this is not the case in the OPD.<sup>79</sup> Without the presence of experienced attorneys, younger attorneys have no one to go to for advice and no one from whom to learn best practices. Sadly, as discussed previously, many of the experienced lawyers in the office are pre-*Doyle* part-time holdovers who are rarely in the office and thereby unavailable to assist younger lawyers.

Kalmanoff recommended that the OPD adopt a personnel structure similar to that of the District Attorney's office, "which is divided into specialized units that provide attorneys with the opportunity to increase their income, improve their overall legal skills, and receive good supervision."<sup>80</sup> A revised salary structure that allows for merit based raises and creates a professional development track for career public defenders is needed.<sup>81</sup> This structure would encourage dedicated public defenders to remain with Allegheny County OPD and would provide the OPD with a pool of seasoned skilled litigators who could give needed mentorship and be trained for supervisory roles. Despite the Kalmanoff report's alarm about the salary situation, Allegheny County OPD administrators have shown little concern about lawyers' distress over the low salaries, responding instead that attorneys shouldn't expect to make a life career out of being a public defender.

## 2. Resources

Kalmanoff found that the OPD's resources are "highly limited" and that there are shortages in all areas, ranging from inadequate and poorly maintained office spaces to deficient technologies and low salaries.<sup>82</sup> Supplies are generally scarce. The OPD has been known to run out of paper or pens without the budget capacity to purchase more. The fear of running out of basic supplies has resulted in staff hoarding supplies and not sharing them with another section of the office when it runs out. The shortages force some attorneys to spend their limited personal income purchasing necessary office supplies. Attorneys lack sufficient personal work space and meeting space for private communications with clients. The District Attorney's Office periodically receives new furniture, while the Public Defender's office furniture consists of furniture handed down from law firms.

Kalmanoff observed that the OPD seems to have received "short shrift from the County" in the realm of information management systems and other technologies, receiving only hand-me-down desktop computers for years.<sup>83</sup> Basic office equipment is old, slow and unreliable, while the District Attorney's office has overhead projectors, computers and computer technicians to assist with trial. There are insufficient computers and printers for the OPD attorneys and support staff. There is one ancient fax machine to serve both the juvenile and trial divisions. The report proposed a number of minimum cost changes to the information technology systems at OPD, which would improve overall office efficiency.<sup>84</sup>

## D. Sub-Constitutional Representation Persists

The single biggest problem with OPD representation, one heavily targeted by the *Doyle* lawsuit, is OPD lawyers' failure to meet with clients early in the process to give them advice, begin collecting crucial information, and establish plans for investigation, evidence gathering and legal research. Early case evaluation and preparation is the lynchpin of effective representation, yet sadly the OPD is nowhere near where it needs to be on this score.

### 1. Woefully Inadequate Client Communication -- No One Recognized as "My Lawyer"

Client communication is an integral component of any attorney client relationship. Without ongoing communication between client and lawyer, it is practically impossible for a defense attorney to establish the relationship necessary to create a competent defense.<sup>85</sup> Moreover, a lawyer has an ethical duty to keep her clients informed and to promptly respond to clients' requests for information about their case.<sup>86</sup> The appointment of counsel for an indigent defendant can quickly become a "cruel joke" when that counsel does not take the time to communicate with the client and leaves them in the dark about the progress of their case.<sup>87</sup>

At the time of the *Doyle* litigation, attorneys from the Office of the Public Defender were not keeping their clients reasonably informed about the status of their case. When placing calls to the Allegheny County OPD, individuals were unable to find out who their attorney was, ask for information about their case or provide their attorney with important information. Today this problem is an integrated component of the system, encouraged by the lack of practice standards addressing the issue and the most frequent complaint heard by the ACLU. OPD clients simply do not know who their attorney is. They cannot contact any lawyer, have never met their lawyer – except maybe for a few minutes in the courtroom right before a hearing – and the lawyer they met momentarily at the preliminary hearing will not represent them at trial. Some Pre-Trial attorneys do not give their full names to their clients at preliminary hearings so they cannot be contacted. Clients are notified of their assigned Trial attorney at the formal arraignment stage, but there is often no correlation between the attorney identified to the client and the attorney eventually assigned to represent the client for

trial. Once the case gets to trial, all too often, it is even another public defender that appears to handle the case, sometimes not knowing the client and his or her case details.

### 2. Lawyers do not Conduct Meaningful Client Interviews Before the Preliminary Hearing

An essential stage for effective client representation is the initial meeting with the client. At this meeting an attorney seeks to establish trust with the client and advises them of crucial information, including their rights and the need to not discuss the case with others, especially while in jail.<sup>88</sup> This meeting is the time when the attorney gains critical information about the case, including any alibis, potential witnesses and defenses. Failure to obtain this information at this critical juncture in the case may irrevocably harm the defendant by undermining preparation for the preliminary hearing, compromising crucial physical and testimonial evidence and permanently affecting vital future case decisions. The importance of this interview is highlighted by a detailed description

of the information to be exchanged in the NLADA's Performance Guidelines and specific mention as one of the ABA's Ten Principles.<sup>89</sup>

Courts have also frequently recognized the unique importance of this consultation to effectuating an individual's Sixth Amendment right to counsel. "Informed evaluation of potential defenses to criminal charges and meaningful discussions with one's client of the realities of the case are the cornerstones of effective assistance of counsel."<sup>90</sup> The information an attorney can gain from discussion with his client "is a prime source of the factual bedrock upon which counsel must rely in making strategic choices."<sup>91</sup> Notably, communicating with the client for this purpose has been determined to be a necessary element of adequate assistance of counsel.<sup>92</sup> At a minimum, "the consultation should be sufficient to determine all legally relevant information known to the defendant" and to inform the defendant of his constitutional rights.<sup>93</sup>

The Allegheny County OPD's practice falls far short of this constitutional standard. Pre-Trial attorneys handle a high volume of cases during any given court session, allowing them only a few minutes to meet with each defendant prior to his or her hearing. Likewise, attorneys in the Trial Division only meet with defendants minutes before the pre-trial conference (if at all) and frequently do not engage in subsequent

The appointment of counsel for an indigent defendant can quickly become a "cruel joke" when that counsel does not take the time to communicate with the client and leaves them in the dark about the progress of their case.<sup>87</sup>

communication with the defendants until the next scheduled court appearance. These brief interactions do not provide attorneys with the opportunity to obtain vital information such as alibis, potential defenses or to even hear the defendant's version of events.

Kalmanoff emphasized the extent of the problem when he wrote that there is a general consensus among trial judges that public defenders are not meeting with their clients prior to key court appearances.<sup>94</sup> He found that there is in fact little or no contact with the client before an appearance; sometimes the only conversation that occurs is a mere fifteen seconds of introduction before the hearing.

What little communication that transpires rarely takes place in a confidential environment. Rather, it happens on the day of an appearance in a holding area surrounded by other criminal defendants and law enforcement personnel or in the court room itself. Countless clients are often moved through the entire preliminary hearing phase with no substantive lawyer-client communication and consequently, without any understanding of what has happened or what to expect next. Communication is a key component of representation and there is virtually none between the OPD and its clients. Kalmanoff was so concerned by the poor client communication that the report repeatedly emphasized that the OPD needed to quickly implement mandatory ethics training, focusing specifically on client communication.<sup>95</sup> The OPD has not addressed these deficiencies over the past two years and there remains no mechanism in place to ensure that all public defenders communicate with their clients on a regular and sufficient basis.

### 3. Grossly Deficient Intake Procedures, Investigation and Preparation

According to the U.S. Supreme Court, the pretrial period is "perhaps the most critical period of the proceedings;" the time "when consultation, thorough-going investigation and preparation [are] vitally important."<sup>96</sup> This time of investigation is "perhaps the most critical stage" of a lawyer's representation, because "it provides a basis upon which most of the defense case must rest."<sup>97</sup> "Pretrial investigation and preparation are the keys to effective representation of counsel," and the "exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case."<sup>98</sup>

This requirement of thorough investigation exists because a "careful investigation of a case and the thorough analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at

trial which would otherwise not emerge."<sup>99</sup> A criminal defense attorney "must investigate a case, when he has cause to, in order to provide minimally competent professional representation" within the meaning of the Sixth Amendment.<sup>100</sup> The investigation cannot be a superfluous inquiry; rather defense counsel is obligated to undertake reasonable steps to investigate all apparently substantial avenues of defense.<sup>101</sup>

#### i. Intake Procedures

A foundational step of thorough investigation is the intake process itself. Without comprehensive intake it is nearly impossible to correctly assess and investigate the case. Allegheny County OPD does not have an effective intake process. The OPD intake staff are not lawyers and have not been trained by lawyers. Consequently, they do not obtain necessary information. Intake has been limited primarily to contact information, with little if any discussion of facts important to the case such as possible witnesses and available physical evidence or records. Approximately 1 out of 4 "jailers"<sup>102</sup> go to their preliminary hearing without having spoken even to intake staff.

This ineffective intake process exacerbates the other problems associated with the early stages of indigent client representation by the OPD. The Kalmanoff Action Plan proposed assigning a senior attorney to supervise jail interviews and other intake functions to determine the deficiencies in early stages of intake.<sup>103</sup> Increasing the efficiency at this stage of representation would provide significant time savings, promote a better use of resources and reduce the costs associated with prolonged incarcerations and repeated court appearances.

#### ii. Preparation

Only the most diligent Pre-Trial attorneys review case files or speak with clients in advance of preliminary hearings. Even for these diligent attorneys this practice is limited due to the extreme time constraints between receiving the client file and the hearing itself. Trial attorneys are likewise only provided with limited time to prepare. They are not assigned to a case until the week before the pre-trial conference and do not receive the actual case files until the week of, or even the day before, the conference itself. This timetable does not provide attorneys with adequate time to prepare properly for their cases.<sup>104</sup> Moreover, Kalmanoff contends that a "culture of delay" permeates the system and encourages attorneys to not be fully prepared early

in a case.<sup>105</sup> This results in a "waste of opportunities" and a "loss in justice and monies [that are] hard to justify."<sup>106</sup> "[T]he cost is enormous."<sup>107</sup>

Informed evaluation of potential defenses to criminal charges and meaningful discussions with one's client of the realities of the case are the cornerstones of effective assistance of counsel.<sup>90</sup>

#### 4. The OPD's "Hidden Shame" – The Appalling Gap in Representation

The organizational structure of the Allegheny County OPD continues to result in significant gaps in client representation.<sup>108</sup> Every client is first assigned a Pre-Trial Attorney for the preliminary hearing and then a Trial Attorney to represent them at the Pre-Trial Conference and beyond, but between these two events most incarcerated clients are largely unrepresented.

During the *Doyle* settlement agreement period, the Pre-Trial Attorney's lone duty following the preliminary hearing was to obtain and preserve any evidence that might disappear before the assignment of the Trial Attorney. This task was significantly impaired by office practice. Without an in-depth client interview Pre-Trial attorneys were frequently unaware of crucial evidence that needed to be preserved. The responsibility of developing any theory for the case, including alibis and defenses, was left to the Trial Attorney. On average 45-60 days would pass between the end of the Pre-Trial Attorney's obligations and when a Trial Attorney was assigned to the case. During this period no meaningful evaluation, strategy or investigation of the case took place.

Disappointingly, this gap in representation not only continues, but has widened. Kalmanoff discovered a period of approximately four months between the preliminary hearing and the pre-trial conference during which no attorney is assigned and clients experience a "total lack of representation."<sup>109</sup> Literally no one is assigned to the case and nothing is done. This dead time results in long waiting times, lost communication between clients and attorneys (jail mail) and multiple disciplinary board complaints. This period has been labeled by some public defenders as the "OPD's hidden shame."<sup>110</sup>

Aggravating the effects of this dead period is the complete disorganization associated with the transition between attorneys. For budgetary reasons, Pre-Trial Attorneys are no longer allowed to request preliminary hearing transcripts, arguably the most effective method of communicating to the Trial Attorney what has happened thus far in the case. Additionally, Pre-Trial Attorneys are not required to conduct any follow up work on the case. Many believe that *any* follow up is the responsibility of the Trial Attorney alone and avoid such communication with clients. Clients frequently give their Pre-Trial Attorney critical information, such as names of witnesses or physical evidence, but this information is not always put into the client's file and consequently never seen by Trial Attorneys. Trial Attorneys have no expectation that Pre-Trial Attorneys will contribute notes to the client's file. Therefore, most client files are given to Trial Attorneys without anything more than cursory notes from the Pre-Trial Attorney. The absence of standards requiring early case evaluation and the transmission of notes undermines and in some cases irreparably harms effective representation by the Trial Attorney.

#### 5. Scarce Use of Experts

In addition to a right to expect the *services* of a reasonably competent attorney, an indigent defendant has a right to expect that he will be provided with the "basic *tools* of an adequate defense" if he cannot afford to pay for them.<sup>111</sup> "[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."<sup>112</sup> Among these tools, in appropriate cases, are mental health and other kinds of expert witnesses.<sup>113</sup>

It remains difficult for public defenders to obtain the experts necessary for their cases. Some experts are reluctant to work for the OPD because it has a history of delay in paying for services rendered. There is no clear procedure in place specifying who an attorney should go to for permission to obtain an expert. When requesting an expert, some trial attorneys have been informed by their supervisors that they should simply make the Commonwealth's expert their own instead, a profoundly disturbing suggestion that reflects deliberate indifference to constitutional and ethical obligations. There are still numerous occasions when experts are not being hired, even when a defense expert is absolutely vital to the case.

## V. CONCLUSION

An effective public defender office is an essential component in maintaining the fairness and integrity of the criminal justice system. As documented above, the OPD is sadly lacking in virtually every area of operations. Within the OPD there are attorneys and staff members who are enormously talented and committed to serving the best interests of their clients, but are simply hamstrung by the system in their ability to provide effective representation. Other attorneys and non-legal staff take advantage of the lack of oversight and accountability by doing as little as they can get away with, which in some cases is very little, thereby exacerbating the pressures on the hard-working, responsible staff. Without dramatically improved management, training, practice standards, supervision and employee accountability the situation will not improve, and too many clients will continue to receive sub-constitutional representation.

Kalmanoff made thirty recommendations as part of a strategic plan to improve the quality of the representation provided by the OPD and to increase the general efficiency of the County's criminal justice system. The Action Plan included suggestions for the OPD, the County Executive, the Sheriff's Department and the Court of Common Pleas to address the problems that pervade the entire Allegheny County criminal justice system. The following list combines the unfinished and lapsed reforms mandated by *Doyle* with some of Kalmanoff's recommendations.

## Recommendations for the OPD

- Upgrade OPD management.
- Provide management training for the OPD leadership.<sup>114</sup> Return attorney staffing levels to those mandated by the *Doyle* settlement agreement, i.e., at least 79 full-time-equivalent attorneys.
- Return investigator staffing levels to those mandated by the *Doyle* settlement agreement, i.e., at least 13 investigators.
- Hire and/or appoint a full-time director of training.
- Improve the entry-level training program in the basics of representation,<sup>115</sup> devise training programs for lawyers entering different divisions, and develop a program whereby supervisors and more senior attorneys mentor and assist new and younger lawyers.
- Create a comprehensive office manual, including trial practice and performance standards, and incorporate the standards into daily office culture.<sup>116</sup>
- Institute and enforce practice standards that require attorneys, except in extenuating circumstances, to do intake with clients before preliminary hearings, to develop and use forms that assist in gathering and memorializing important information and strategic decisions for representing the client, and result in clients being assigned during the four-month gap between the preliminary hearing and the pre-trial conference an attorney who will ensure that necessary investigation, legal research and filing of pre-trial motions is accomplished in a timely fashion.
- Assign a senior attorney to supervise intake functions and determine the deficiencies in early stages of intake.<sup>117</sup>
- Conduct meaningful performance reviews of all staff members at least annually.<sup>118</sup>
- Establish a QA Protocol that includes weekly case reviews by a supervisor.<sup>119</sup>
- Improve the office space.
- Discontinue Part Time attorneys “as soon as legally possible,” recognizing the limitations imposed by the collective bargaining system, and in the meantime institute effective procedures to ensure the employees’ accountability.<sup>120</sup>
- Revise the personnel structure to include a grade and step progress with performance criteria so that public defenders receive salary increases similar to those given district attorneys.<sup>121</sup>

## Recommendations for the County Executive

- Upgrade leadership at the OPD.<sup>122</sup>
- Require comprehensive reorganization of the OPD.<sup>123</sup>
- Provide adequate access and space for OPD attorneys, paralegals and investigators to conduct confidential client and witness interviews and to facilitate trial preparation.<sup>124</sup>
- Obtain additional office space for the OPD.<sup>125</sup>
- Update information technology (“IT”) systems and expand contract for computer research services for use by the OPD.<sup>126</sup>
- Ensure that the OPD implements and enforces the changes recommended by Kalmanoff and this report.

## Recommendations for the Court

- Review internal court procedures to ensure timely case management.<sup>127</sup>
- Revise and enforce discovery rules to expedite discovery (preferably electronically) by the D.A.’s Office.<sup>128</sup>

Allegheny County stands at the same fork in the road it encountered in 1996, with a choice of whether to save money by continuing to ignore serious, systemic problems at the OPD or invest in necessary improvements, which will not cost nearly as much as before and that may ultimately save the County substantial sums. County Officials and the three arms of the criminal justice system must work together to make the changes outlined above, which are necessary to improve the OPD’s representation of clients to constitutionally-mandated levels. If the County persists in burying its head in the sand regarding problems at the OPD, in essence choosing the same road taken by Allegheny County in 1996, years of litigation are likely to ensue. But with the benefit of projected savings, even potentially millions of dollars, to be achieved by the changes, the ACLU hopes the County will take the other road, one that will finish the reforms begun but never completed by *Doyle*.

# Endnotes

- 1 Inst. for Law and Policy Planning, Allegheny County Office of the Public Defender Assessment, Final Report, Presented to Michael Wojcik Allegheny County Solicitor 14 (Oct 20, 2008) [hereinafter Kalmanoff]. While the date listed on the report cover is October 2008, the footer on each page of the report notes the date as "January 2009." A copy of the report is attached as Appendix 1, and can be downloaded at <http://www.aclupa.org/opd>.
- 2 *Id.* at 26.
- 3 *Id.* at 6.
- 4 *Id.*
- 5 *Id.* at 21.
- 6 See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).
- 7 *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Starr v. Lockhart*, 23 F.3d 1280, 1284 (8th Cir. 1994).
- 8 *Frazier v. United States*, 18 F.3d 778, 782 (9th Cir. 1984).
- 9 See *In re Gault*, 387 U.S. 1, 41 (1967) (extending the right to counsel to juveniles in delinquency proceedings which may result in the juvenile's loss of freedom); *Argersinger*, 407 U.S. at 36-37 (holding that the right to counsel applies to anyone facing the loss of liberty); 42 Pa. Cons. Stat. § 6337.
- 10 See 50 Pa. Cons. Stat. § 7304(e)(1).
- 11 *Wheat v. United States*, 486 U.S. 153, 159 (1988) (emphasis added).
- 12 See *United States v. Cronin*, 466 U.S. 648, 656 (1984).
- 13 *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).
- 14 *Evits v. Lucey*, 469 U.S. 387, 395 (1985).
- 15 *Id.* at 396.
- 16 ABA Standing Comm. on Legal Aid and Indigent Defendants, ABA Ten Principles of a Public Defense Delivery System (Feb. 2002) [hereinafter ABA].
- 17
- 18 *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Allegheny Co. Ct. Com. Pl., 1996).
- 19 Robert L. Spangenberg & Catherine L. Schaefer, The Spangenberg Group, A Review of the Allegheny County (Pennsylvania) Public Defender Office (Nov 1995) [hereinafter Spangenberg].
- 20 *Id.* at 6.
- 21 *Id.* at 6-7.; At the time of the study Allegheny County's population was approximately 1.3 million, and the OPD's budget was \$3.9 million. Philadelphia County, with a population of approximately 1.6 million had a budget of \$19.6 million; Middlesex County, Massachusetts, population 1.4 million, budget \$14 million. These similarly sized jurisdictions had public defender budgets of almost four times that of Allegheny County before the severe budget cuts. *Id.*
- 22 *Doyle Compl.* 14
- 23 *Doyle Compl.* 15
- 24 *Doyle Compl.* 8
- 25 *Doyle Settlement Agreement.*
- 26 *Doyle Mot. Req. that Defs. Either be Directed to Comply with the Terms of the Settlement agreement Issued in This Case or be Held in Contempt 1.*
- 27 *Doyle Findings of Fact and Recommendations of Pro Bono Panel 2.*
- 28 KALMANOFF, *supra* note 1 at 7,9.
- 29 *Id.* at 6.
- 30 *Id.* at 14 (parentheticals in original).
- 31 *Id.* at 23.
- 32 *Id.* at 28.
- 33 *Id.* at 11.
- 34 *Id.* at 11.
- 35 While the Kalmanoff report expended a fair amount of time discussing the system wide problem of excessive continuances, we will not focus on that issue in this report as we recognize there are sometimes legally sound reasons for defense counsel to seek continuances in a case.
- 36 Kalmanoff, *supra* note 1 at 37.
- 37 *Id.* at 42-44.
- 38 *Id.* at 50.
- 39 *Id.* at 51-52.
- 40 *Id.* at 52. (Recommendation 16)
- 41 *Id.* at 23-4.
- 42 *Id.* at 26.
- 43 This criticism could possibly be true of many individuals placed in the Chief Public Defender's position. Without greater independence from the judiciary and the political machinations of the County, very few individuals would be able to perform the duties of this position effectively and without being influenced by concerns about the political waters upon which their position tenuously floats.



- 44 Kalmanoff, *supra* note 1 at 6.
- 45 *Id.* at 11.
- 46 *Id.* at 14.
- 47 *Id.* at 54.
- 48 *Id.* at 31.
- 49 *Id.*
- 50 *Id.* at 23.
- 51 *Id.* at 33.
- 52 *Id.*
- 53 *Id.*
- 54 National Legal Aid & Deefender Association, Performance Guidelines for Criminal Defense Representation [hereinafter NLADA],, *Guideline 4.2, commentary* (“[d]elay in investigation may result in loss of potential evidence or testimony that would support a defense... investigation may reveal information that could be utilized in plea negotiations, pretrial motions and motions concerning pretrial detention”).
- 55 Kalmanoff, *supra* note 1 at 28.
- 56 *Id.* at 11.
- 57 *Id.* at 50.
- 58 NLADA, *supra* note 53, *Guideline 1.3*.
- 59 Kalmanoff, *supra* note 1 at 11.
- 60 The Kalmanoff report noted that the excessive caseloads have contributed to a trend where “the defense tends to focus primarily on the priorities of the defense attorneys to the point where they have become more concerned in a great many instances with their own personal calendars than with the best interests of the defendant.” *Id.* at 19.
- 61 Kalmanoff, *supra* note 1 at 28.
- 62 *Id.* at 49.
- 63 *Id.* at 52.
- 64 *Id.*
- 65 The figure is derived from an OPD employee roster provided by Allegheny County in response to public record request in July 2011, and has been updated by reports from staff.
- 66 This figure does not include currently empty positions.
- 67 Spangenberg, *supra* note 18 at 4.
- 68 *Id.* at 7,12.
- 69 Information as of June 2011 cites 15 part –time attorneys remaining in the office. At present there appear to be 14.
- 70 A number of the issues discussed in this report would likely require discussion and cooperation with the attorneys’ bargaining agent in the union.
- 71 KALMANOFF, *supra* note 1 at 14.
- 72 *Id.* at 31.
- 73 *Id.*
- 74 SPANGENBERG, *supra* note 18 at 15.
- 75 *Id.* at 5,10.
- 76 Both of these numbers reflect cuts from previous years, however, like before *Doyle*, information shows that the cuts sustained by the OPD were much greater than that to the DA’s office, almost 8% compared to 0.3%.
- 77 Kalmanoff, *supra* note 1 at 25.
- 78 *Id.* at 32.
- 79 *Id.*
- 80 *Id.*
- 81 *See id.* at 48.
- 82 *Id.* at 13.
- 83 *Id.* at 24.
- 84 *Id.* at 33.
- 85 *See Ramseyer v. Blodgett*, 853 F.Supp 1239, 1258 (W.D.Wash. 1994), *aff’d* 64 F.3d 1432 (9th Cir. 1995).
- 86 Pennsylvania Rules of Professional Conduct 1.4(a).
- 87 *Thomas v. Zelker*, 332 F.Supp. 595, 600 (S.D.N.Y. 1971).
- 88 *See NLADA, supra* note 53, *Guideline 2.2*.
- 89 *Id. Guideline 2*.
- 90 *Weekly v. Jones*, 56 F.2d 889, 896 (8th Cir. 1995).
- 91 *Montgomery v. Peterson*, 846 F.2d 407, 412 (7th Cir. 1988).
- 92 *See Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968); *Ramseyer*, 858 F.Supp. at 1259.
- 93 *United States v. Tucker*, 716 F.2d 576, 882 n.12 (9th Cir. 1983); *see Wallace v. Kern*, 392 F.Supp. 834, 846 (E.D.N.Y 1973).
- 94 Kalmanoff, *supra* note 1 at 21.
- 95 *See e.g. id.* at 53.
- 96 *Massiah v. United States*, 377 U.S. 201, 205 (1964) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).
- 97 *House v. Blakcom*, 725 F.2d 608, 618 (11th Cir. 1984).
- 98 *Tucker*, 716 F.2d at 581; *United States v. Williams*, 615 F.2d 585, 594 (3rd Cir. 1980).
- 99 *Moore v. United States*, 432 F.2d 735, 739 (3rd Cir. 1970).

- 100** *United States v. Kaufman*, 109 F.3d 186, 190 (3rd Cir. 1997).
- 101** See *Wallace*, 392 F.Supp. at 846-47, *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987).
- 102** “Jailers” denotes public defender clients who are in jail, not on bond, during their representation.
- 103** Kalmanoff, *supra* note 1 at 56.
- 104** This timetable combined with the heavy caseloads many attorneys experience can be identified as a frequent factor leading to the excessive continuances noted by the Kalmanoff report.
- 105** Kalmanoff, *supra* note 1 at 22. The report found that available data “suggests that repeatedly postponed cases are the rule rather than the exception.” *Id.* at 15.
- 106** *Id.* at 22.
- 107** *Id.*
- 108** The ABA’s Ten Principles recommend a vertical representation system (where one attorney represents the defendant through all proceedings) in part to avoid this issue of gaps in representation.
- 109** Kalmanoff, *supra* note 1 at 11,21.
- 110** *Id.* at 11.
- 111** See *Ake v. Okla.*, 470 U.S. 68, 70 (1985) (quoting *Britt v. North Carolina*, 404 U.S. 226, 226 (1970)) (emphasis added).
- 112** Kalmanoff, *supra* note 1 at 77.
- 113** See *id.* at 83, 86.
- 114** *Id.* at 32, 54.
- 115** *Id.* at 23, 33.
- 116** *Id.* at 50.
- 117** *Id.* at 56.
- 118** *Id.* at 49.
- 119** *Id.* at 52.
- 120** *Id.* at 31.
- 121** *Id.* at 48.
- 122** *Id.* at 31.
- 123** *Id.* at 42; Pennsylvania is the only remaining state in which all public defender funding is provided by the County government alone. A preferred organizational model by many public defender focused organizations, a reform which would require the involvement of forces outside of Allegheny County, is one in which funding is provide state wide by the state itself. Another model which would be useful for Allegheny County to consider is that of Philadelphia, where the County is the main, but not only funding source.
- 124** *Id.* at 44.
- 125** *Id.* at 45.
- 126** *Id.*
- 127** *Id.* at 56.
- 128** *Id.* at 57.

# Appendix 1

Institute for Law and Policy Planning, Allegheny County Office of the Public Defender Assessment, Final Report, presented to Michael Wojcik, Allegheny County Solicitor (Oct 20, 2008), referred to throughout as “Kalmanoff” or the “Kalmanoff Report.”

A copy of the report can be downloaded at [www.aclupa.org/OPD](http://www.aclupa.org/OPD).