

September 2023

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Recommended Citation

Phelps, Zane R. (2023) "Indigent Defense in Louisville: Conditions for Unionization," *The Cardinal Edge*: Vol. 1: Iss. 3, Article 11.

Available at: <https://ir.library.louisville.edu/tce/vol1/iss3/11>

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Cover Page Footnote

I would like to extend my sincere gratitude to both Dr. Imbroscio of the Department of Political Science and Councilman Arthur of the Louisville Metro Council for their guidance and time, which I know is limited and immensely valuable. This paper—the culmination of my internship with the Metro Council—could not have been produced without them.

Indigent Defense in Louisville: Conditions for Unionization

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ABSTRACT

This paper begins by examining the unionization efforts of the Louisville Metro Public Defender Corporation and seeks to link those conditions with national trends to cultivate a rich understanding of why the attorneys are unionizing and what policy solutions they hope to achieve. After surveying the sources of funding and oversight for indigent defense across varying state systems, it synthesizes a policy recommendation wherein federal intervention (National Labor Relations Board), state and local government budgetary oversight and appropriations powers (Kentucky General Assembly, Louisville Metro Council), and the collective bargaining and unionization process (concerted activity), protected by law, are utilized in conjunction to bring the remedies the attorneys desire after.

KEYWORDS: public defenders, union, labor, indigent defense, law, legal, unionization, Louisville, labor law, legal profession, employment law

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I. INTRODUCTION

Staff attorneys for the Louisville Metro Public Defender Corporation voted to unionize in January by a vote of 32 to 5. Their organizing effort is just one sliver of a national trend of public defender unionization. Why are these attorneys unionizing? What material conditions do public defenders experience that warrant unionization? To best comprehend their struggle for dignity, higher salaries, modest case-loads, and structural reform, it is also pertinent to cultivate a deeper understanding of the forces that operate beneath the public defense system in the United States. How are these systems organized from state to state? Where does their funding

come from primarily, and how is it administered? In first exploring the tangible circumstances of public defenders, and second the organizational underpinnings, dispute resolution for the Louisville Metro Public Defenders' Union and the Louisville Metro Public Defender Corporation should be catalyzed via a multi-method approach: 1) coordinated union organization pursuant to the National Labor Relations Act; 2) support from the National Labor Relations Board (NLRB), should administrative hearings warrant it, mandating that the Louisville Public Defender Corporation sit down and negotiate with the union in good faith; 4) legislative action from the Louisville Metro Council or the Kentucky General Assembly, or both, as both governme-

ntal arms possess appropriations authority over the Louisville Public Defender Corporation.

II. OVERVIEW

The value of public defenders to the fabric of society cannot be understated. They are situated within, and often identify with, the public interest profession: a community of legal specialists that seek to apply their work to the betterment of the disadvantaged. They assist impoverished peoples, permeating countless demographics. Public defenders have represented millions. Public defenders represent not just the accused—in some localities, public defense systems (including “appointed counsel” systems, where outside attorneys

not employed by the court are commissioned to provide representation) exist to represent the indigent in a wide range of civil matters: family-related litigation, such as divorce or child custody proceedings; torts; administrative law hearings, such as claims before administrative law judges for Social Security; and several other areas (Standing Committee to Legal Aid and Indigent Defense, 2022).

Not only are public defenders some of the lowest-paid lawyers in the United States, they are also plagued by high turnover stemming from their working conditions: crippling caseloads, titanic work weeks, and relentless social stigma for advocating on behalf of the accused (McCausland, 2017). These issues permeate into the very identity of the public defender—if one is constantly tasked with defending one’s integrity as an attorney, battling low compensation and piles of cases, and depending on a skeleton crew of specialists (investigators, social workers, etc.), the expectation of quality, comprehensive representation will not be reached. For those accused persons that are plausibly at the lowest point in their lives, it is an unfortunate reality that though the right to counsel is a constitutional guarantee and a moral decree commonly appealed to (the phrase *Gideon’s promise*) in the American justice system, accused persons are ill-supplied when the force of the state comes down and they are expected to navigate the complexities of the system.

Alongside commonplace symptoms of a coercive and deteriorating workplace (sexism, sexual harassment, mental health strains, stigmas against unionization, retaliation for discussing unionization), these material conditions formulate into a desire to motivate policy change and improve the public’s perception of indigent defenders. On the surface, it is a rather tough sell to the public to increase compen-

sation and hiring of public defenders when their job consists of defending accused persons (regardless of the presumption of innocence perpetuated to be intrinsic to the American justice system). In spite of this, the conditions themselves proved to be ripe for mobilization: and the country has witnessed a unionization spree among public defenders (Brink, 2020).

It is prudent to address the potential difficulties stemming from unionization, putting aside conflicts with management and the potential for retaliation. The efforts one may contribute to a union have the potential to interfere with obligations that attorneys owe to their clients. In offices that are fully unionized and protected, supervising attorneys may experience obstacles in, for example, transferring deputy public defenders and staff attorneys to different offices. Such processes require consultation, review, and scrutiny in accordance with union standards. The transfer or reevaluation of an attorney already negatively affects clientele interests—clients cycle through multiple attorneys throughout the course of their litigation, adversely affecting the office’s obligation to provide quality representation—post-unionization, there now exist additional roadblocks as a result of meticulous negotiation and collective bargaining.

Though there are downsides, the benefits of unionization and collective bargaining might be understood to offset these costs. Thinking at the macro-national level, the kinds of symptoms explored in the next section may be ameliorated, or at the very least tended to, should unionization efforts produce nationwide reform in the manner envisioned by the union attorneys. In the next section, the relevant literature will illuminate funding controversies among states and their respective public defense systems, as well as the plague of excessive caseloads and low compensation. It will also be explored

how public defense coverage (for example, some states guarantee by statute a right to counsel at bail hearings) reflects the variance of state systems (with some states being county-administered, some being state-administered exclusively, or a hybrid of both), with certain states excelling relative to their peers.

III. GENERAL ANALYSIS

3 CS: CONDITIONS, CASE LOADS, AND COMPENSATION

Overall funding nationwide for public defender programs has been described as woefully inadequate (Ogletree, 1995: 1). Even the Supreme Court of the United States has lent its voice into the conundrum, noting that indigent defenders are obligated to provide quality representation to their clients in lieu of limited resources and subpar training (*Polk County v. Dodson*, 454 U.S. 312, 1981).

Public defenders require infrastructure to mount a quality defense for their client. They require investigative personnel, social workers, paralegals, and other specialists who can augment their service. In California, it was found that for every dollar spent on prosecution, only fifty-three cents was spent on average for indigent defense in 2008; additionally, at least 85% of the felony docket statewide (95% in some of the largest counties) was comprised of defendants who had to rely on indigent defense services (Benner, 2009: 268).

High demand subsequently leads to high caseloads. These caseloads often exceed nationally accepted and recommended standards endorsed by the American Bar Association (ABA) (Standing Committee on Legal Aid and Indigent Defendants, 2002: 1). ABA’s Formal Ethics Opinion 06-441 requires that attorneys control their workload in order to provide

competent and comprehensive representation. Studies by the Department of Justice's Bureau of Justice Statistics revealed that close to three out of every four county-funded and county-administered public defender offices have caseloads that exceed the maximum caseload standards. Systems organized at the state level are hardly better off: fifteen of twenty-two state-level PD systems had attorney caseloads that exceeded national standards. State defender systems experienced a 20% increase in caseload but only a 4% increase in staffing and hires (Benner, 2011: 25).

A report in October posited that though the national average is \$66,193, the starting salary for Louisville public defenders is approximately \$45,000, among the lowest in the country (Bennett, 2022). Relative to other legal careers requiring admission to the bar, possession of a J.D., and comparable qualifications expected from all attorneys, public defenders remain at the bottom of the totem pole despite high demand, high workloads, high stress, et cetera.

FUNDING

As the previous section touched on the conditions experienced by public defenders, it would now be fruitful to touch on actual funding and oversight mechanisms for public defense nationwide. Funding for indigent defense programs can come through a variety of mediums. States can decide to fund them 100%; fund them 50%, leaving counties and municipalities to fund the remainder; or, state governments may play no role at all, and thus county-funded programs are the norm—in 2008, it was noted that Pennsylvania was the only state to organize its public defense system in this manner (Stevens et al, 2010: 5).

STATE OVERSIGHT

As late as 2009, 42 states either had a statewide authority that provided oversight for some or all indigent defense services or a statewide agency that provided representation directly (National Right to Counsel Committee, 2009: 148). From data that same year, eight states had neither a statewide public defender agency nor an oversight body for representation at trial, but had established a state appellate, post-conviction, capital, and/or conflict office that provides representation in those areas as needed (National Right to Counsel Committee, 2009: 149).

It is crucial to note that just because a state has organized their public defense system through the state level does not mean that they provide defense through government-employed staff attorneys organized in county or regional offices. Some of the largest counties in the country opt for a court-appointed counsel system, where private (not formally employed by the state) attorneys are contracted by courts to provide indigent defense on a case-by-case basis (DeFrances and Litras, 2000: 4).

STATE-BY-STATE VARIATION

A consequence of the variation among states means that some states lack quality in key areas where others reach higher performance relative to their peers. For example, data assembled throughout the decade of the 2000s (2002, 2005, and 2009, respectively) found that the greatest deviation among states was found in the following key indicators: 1) whether the state itself provides counsel through a defender system and whether that state system has a commission which provides oversight; 2) whether the state provides a minimum of

75% of the budget for public defense; 3) whether the state guarantees representation at bail hearings or partially guarantees representation at bail hearings; and 4) whether the state provides appellate defense services in a central state office (Worden et al, 2010/2011: 1429).

These indicators are not exhaustive. There are bound to be other points of entry that researchers have included when scrubbing the nationwide public defense system. With that being said, there is surely disagreement on which measures ought to be looked at and considered indicative of any general problems or symptoms. One trivial consensus is that the more organized, well-equipped, and effective a system is at delivering quality, sound, and refined representation through a comprehensive network (i.e., the above metrics are tended to and gaps between states are reformed), the prevalence of failures in the nationwide public defense system may be at least somewhat ameliorated.

IV. LOCAL APPLICATION

Shedding light upon these conditions illuminates their tangibility as ripe for unionization efforts. In a press release, the Louisville Metro Public Defenders' Union posited that unionization came as "the result of what local public defense attorneys feel are untenable working conditions, which negatively impact their clients who already lack vital resources necessary to adequately defend themselves without the services of the Public Defender" (Tobin, 2022).

The press release identifies key conditions—what they denote as "adverse conditions"—that contributed to their decision to organize (Tobin, 2022). They consist of the following:

- An “unmanageable case load that prevents attorneys from giving clients due attention.”
- A “high turnover rate that often churns clients through a revolving door of attorneys before the cases resolved.”
- A “severe lack of transparency in terms of how decisions that have significant and rippling effects on clients’ livelihoods and the attorney’s own safety are made.”

Tethering the experiences of these attorneys in the locality they hail from to the data surveyed in the previous section is not a stretch. It is plausible that the Louisville office and its unionization efforts offer a microcosm of a nationally shared grievance. Public defenders, though their systems, funding, organization, and administration all vary from state to state, feel the ripples of structural and financial inadequacies (the salaries not being high enough, the cases exceeding ABA-endorsed standards, and infrastructure in peril) as the consequences of those discrepancies pore into the broader national justice system.

A critical juncture is whether salaries can be increased within budgetary constraints. Indeed, they can: the Kentucky Department of Advocacy, Kentucky’s public defense agency, received a \$7 million boost from the Kentucky General Assembly to fuel staffing shortages and increase salaries, contributing not only to retention but also recruiting efforts at local law schools (York, 2022). Approximately half of the budget for the Louisville Metro Public Defender Corporation (privately administered) comes from the Kentucky General Assembly, and the other half comes from the Louisville Metro Council.

Because the Louisville Metro Public Defender Corporation is administered privately (that is, ran under a corporate structure), the entity itself reserves discretion over the budget

they receive from the General Assembly and the Metro Council, rather than being strictly mandated by either of the two as would a public agency or arm of the government. This translates into immense budgetary flexibility. The Louisville Metro Public Defender Corporation is, at present, not required to commit new and more funding into higher salaries or hiring new staff. In fact, a shortage of attorneys is consistently driving up the office’s case-loads, resulting in the expectation that attorneys work 60 hours a week for approximately \$14.42 an hour; and, though the office has 78 positions, it had only filled 53 as late as May of 2022 (Raymond, 2022).

The Louisville Metro Public Defenders’ Union is determined to see their dispute through to the end with fruitful results precisely because their efforts may amount to not just substantive re-form in the workplace (stronger bene-fits such as family and medical leave, overtime pay, reform of the complaint process), but also structural reform to give the lower echelons more decision-making authority as to the budgetary, organizational, and managerial processes (to conceive of just a few permeating areas, though there are certainly more).

V. CONCLUSION AND POLICY RECOMMENDATIONS

Leo Smith, executive director of the Louisville office, said that attorneys at the office handle an average of 110 cases at a time, though the union alleges more: caseloads range from 200 to 350 (Raymond, 2022). The most conclusive policy recommendation that underpins most of these symptoms is the administration of the newly allotted budget. The budget increase from the Kentucky General Assembly allows breathing room for the Louisville

office to not only hire more at-torneys, thereby softening the average attorney caseload, but also to increase the salaries of its attorneys, both starting and current. Turnover largely stems from these discrepancies. Salary increases would not only benefit retention, but also would increase recruitment and attract attorneys that were previously employed by the office and left in favor of better-paid positions elsewhere. Former employees benefit from a wealth of experience as to the Kentucky specific justice system and may come from private practice, bringing along a regimen of training, tips, and advice for newly minted public defenders maneuvering through the learning curve that undoubtedly exists.

Though the corporation retains control over budget expenses, the Louisville Metro Council and the Kentucky General Assembly have legislative tools at their disposal to require more budgetary transparency. Should the funds not be going toward their intended purposes, the state and local governments could, and should, step in to mandate budgetary transparency via ordinance; if not to support the federally recognized right to collectively bargain and unionize, then to take a step in supporting transparency across the levels of government, the benefits of which have the potential to diffuse across society: these are values plausibly cherished by all members of a polity.

There is also ongoing federal intervention in the dispute. A slew of administrative hearings have been held by the National Labor Relations Board (NLRB). The NLRB is limited in its enforcement authority and can only order employers to perform certain acts, such as reinstate workers fired over protected concerted activity (ex. union organizing) (National to

Labor Relations Board, 2011). The NLRB's critical role, however, can be to de-mand that the Louisville Metro Public Defender Corporation sit down and negotiate with the union and come to an agreement. Their role is facilitatory: to influence the corporation to agree to negotiations lest the union decides strike, rendering the public defense system in Louisville ineffective without its attorneys.

Incorporating all of the methods above would mean progress. As touched on before, the Louisville office is just one case in a nationwide phenomenon of public defender unionization. Alleviating the symptoms that plague the country's public defense system means that, one office at a time, attorneys must realize substantive and structural policy goals through 1) concerted activity, i.e. unionization and collective bargaining; 2) appeals to legislative bodies with control over budgetary appropriations; and 3) appeals to federal support through the National Labor Relations Board. These elements possess the potential to command and facilitate the reform desired, and, when harnessed in tandem, may bring the shortfalls of the Louisville public defense system closer to a solution.

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