

Checklists for Defense: A Training Strategy for Public Defenders

San Francisco Public Defender's Office

FY 13 BJA Solicitation: Encouraging Innovation: Field-Initiated Programs

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Project Narrative

Statement of the Problem

Over the last two decades, national spending on legal assistance has decreased by one third,¹ while public defender caseloads have increased by 20%. About three-fourths (73%) of county-based public defender offices exceed the maximum recommended caseload per attorney.² For many public defender offices, this reality has translated into an unwelcomed mandate to do more with less. While there is enthusiastic support for providing resources to the state to carry out its responsibilities in the criminal justice system, there is very little corresponding support for increasing the resources available to public defenders. Studies document the inadequacy of the resources available to those who are charged with the responsibility of defending the accused. A Minnesota study found that only a little more than half of public defenders agreed that they were well prepared for their cases in the past year.³

For public defender offices, supervisors are strained to provide adequate training and oversight, particularly for new lawyers. A Nevada report highlights new attorneys “being thrown into practice with no training or support... having to figure it out for [themselves].”⁴ The Comprehensive Review of Indigent Defense in Virginia reached similar conclusions: “inadequate resources and an absence of an oversight structure... form the basis of an indigent

¹ Rhode, Deborah. (2012) “Equal Justice Under Law: Connecting Principle to Practice.” *Journal of Law & Policy*.

² Farole & Langton, U.S. Department of Justice, Bureau of Justice Statistics, *Census of Public Defender Offices: County-based and Local Public Defender Offices*, 2007, NCJ 231175 (September 2010).

³ Junod, Deborah Parker and Starr, KJ. (2010) “Evaluation Report: Public Defender System.” Office of the Minnesota Legislative Audit Commission. Available at <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf>.

⁴ National Legal Aid and Defender Association (2003) ‘Evaluation of the Public Defender Office: Clark County.’ Clark County, Nevada Final Report. Available at http://www.nlada.net/sites/default/files/nv_evalofpdofficeclarkcountyjseri03-2003_report.pdf

defense system that fails to provide lawyers with the tools, time and incentive to provide adequate representation to indigent defendants.”⁵

The damaging effects of this “assembly-line justice” translate into significant miscarriages of justice. As summarized in a paper published by the National Association of Criminal Defense Lawyers, lacking resources lead to “guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.”⁶ In particular, a study conducted by the National Center for State Courts found that nearly half of state Habeas Corpus claims involved allegations of ineffective assistance of counsel, including failure to object to admissibility of evidence and failure to raise an affirmative defense.⁷ Beyond individual cases, inadequate representation has a profound impact on the efficacy of the criminal justice system as a whole: at the most fundamental level, “the lack of competent, vigorous legal representation for indigent defendants calls into question the legitimacy of criminal convictions.”⁸

Divining a more nuanced approach to the complex systemic challenges of this nation’s public defender practice is daunting, but providing additional training resources for defense counsel is within reach. The San Francisco Public Defender’s office has recently begun to launch an initiative to develop practitioner checklists to better guide its attorneys through key moments in a case that are both substantive and user-friendly. The initiative is founded in

⁵ Spangenberg, Robert L. et al. (2004) “A Comprehensive Review of Indigent Defense in Virginia.” American Bar Association, Standing Committee on Legal Aid and Indigent Defendants. Available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/va_report2004.authcheckdam.pdf.

⁶ Baruchowitz, Robert C. et al (2009) “Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts.” National Association of Criminal Defense Lawyers. Available at <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>.

⁷ Victor E. Flango, *Habeas Corpus in State and Federal Courts* (1994).

⁸ “Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations.”. at ix (Feb. 1999), www.sado.org/fees/icjs.pdf

literature – Atul Gawande’s *The Checklist Manifesto* – that documents the value of checklists for complex and overworked systems, such as the legal system:

Know-how and sophistication have increased remarkably across almost all our realms of endeavor, and as a result so has our struggle to deliver on them ... You see it in the 36 percent increase between 2004 and 2006 in lawsuits against attorneys for legal mistakes—the most common being simply administrative errors, like missed calendar dates and clerical screw ups, as well as errors in applying the law ... You see mistakes in any endeavor requiring mastery of complexity and large amounts of knowledge ... Yet our failures remain frequent. They persist despite remarkable individual ability.

Nonetheless, that know-how is often unmanageable.... And the reason is increasingly evident: the volume and complexity of what we know has exceeded our individual ability to deliver its benefits correctly, safely, or reliably ... That means we need a different strategy for overcoming failure, one that builds on experience and takes advantage of the knowledge people have but somehow also makes up for our inevitable human inadequacies. And there is such a strategy – though it will seem almost ridiculous in its simplicity, maybe even crazy to those of us who have spent years carefully developing even more advanced skills and technologies. It is a checklist.

The San Francisco Public Defender, for example, has a successful attorney training program, as well as a cooperative training partnership with private attorneys who provide indigent defense in San Francisco. Every year, the office hosts over fifty high quality training sessions. The training program is staffed by a director who, while maintaining a modest caseload, develops and implements the curriculum. The complete program does much more than convey basic legal knowledge. It is a comprehensive series of requirements for effective practice including basic training for new attorneys, continuing education for experienced attorneys, weekly case conferences, individual coaching and feedback, weekly ‘brainstorming’ sessions, ‘brown bag’ conversations, mentorship opportunities, trial practice groups, monthly and annual new laws seminars, immigration seminars and bi annual forensic and trial colleges. In an effort to enhance training curricula, the office recently assembled an ad hoc group of attorneys to identify and

create checklists. In order to fully reap the benefits of such an innovative endeavor, however, substantial time and resources are required.

Project Design and Implementation

The San Francisco Public Defender, in partnership with the Center for Court Innovation, proposes to create the first-ever local and nationally-applicable checklist system for public defenders and indigent defense attorneys. The checklist system will build existing training curricula, including topics such as *Trial Objections, Jury Selection, Investigating an Arson Case, Preparing a DNA case, Preparing a DUI case, Immigration Consequences of Taking a Plea, Preparing Your Client to Testify, and The First 30 Days of a Homicide Case*. The goal of the checklists will be to efficiently and substantively improve the effectiveness of indigent defense providers and thereby enhance the delivery of justice to low-income clients.

The proposed project is an innovative approach consistent with the Bureau of Justice Assistance's strategic plan of using building capacity of justice system partners to promote a safe and fair criminal justice system and help prevent unnecessary confinement. The use of checklists on a large scale has not been implemented within the indigent defense system. This efficient and user-friendly training approach has the potential to revolutionize how public defenders – and potentially other agencies throughout the justice system – facilitate staff development and retention and agency-wide capacity building. Furthermore, the innovative implementation and evaluation design of this project will allow the idea to be pilot-tested in two distinct settings in a relatively short period of time, providing added evidence to the field for how the approach is best utilized.

The proposed project will unfold in three phases, building upon an extensive planning process that is already underway, currently funded in-kind by the San Francisco Public Defender's Office. The Project Team will be composed of an attorney and legal assistant within the Office of the San Francisco Public Defender, and researchers at the Center for Court Innovation, in consultation with BJA wherever appropriate. The proposed start date of the three-year grant is October 1, 2013. Project staff will also begin to identify existing resources – locally and nationally – that can be drawn upon for substantive and procedural content.

Phase 1: Research and Development (October 1, 2013- September 30, 2014): During Phase 1, project staff from the San Francisco Public Defender's office will convene a checklist committee spearheaded by a qualified lead attorney as the Project Coordinator and a legal assistant. The committee will include experienced deputy public defenders within the office who will work under the regular supervision of a managing attorney. The checklist committee will initiate the planning process by selecting six to eight topic areas for which checklists and training tools will be developed during the grant period. The committee will analyze internal trial data and trial outcomes to identify relevant subject areas. Additionally, the committee will observe preliminary hearings, motion to suppress hearings, evidentiary hearings, and trials in order to obtain a more precise idea of the type and quality of checklists that can be useful and practical during such proceedings. Lastly, the committee will convene a focus group which would include practicing attorneys both in and out of the office, federal public defenders, attorneys from the Habeas Corpus Resource Center, appellate lawyers with whom our office regularly consults, and attorneys with specific expertise, such as immigration law, to identify areas in which to concentrate our efforts. The committee will conduct legal research, develop checklists

and corresponding training materials, and develop and finalize an implementation and evaluation plan in collaboration with the Center for Court Innovation.

The checklists themselves will be designed to combine precision and comprehensiveness, with ease and efficiency of use. Therefore, although each checklist may contain from 20-40 discrete items, the items will take the form of extremely straightforward checkboxes (i.e., each recommended action either was taken or was not taken), which can be quickly digested, reviewed, and re-reviewed in each case where they apply. Two illustrative examples follow.

EXAMPLE 1: DNA Cases

- Send Discovery Letter to DA
 - Cold hit
 - Standard DNA Case
- Create flow chart or spread sheet of the evidence in the case; include the following categories:
 - Date/time collection
 - Who collected
 - Date packaged
 - By whom
 - Where was evidence stored during transport from scene
 - Was evidence stored in CSI prior to booking
 - When/by whom was evidence booked
 - When/by whom was evidence retrieved from property room
 - Where was the evidence taken
 - If medical examiner collected evidence

- Who did collection

- When

...

EXAMPLE 2: Driving Under the Influence (DUI) cases

Review File

- Complaint, looking for enhancements (e.g. excessive speed, under 21 years of age, refusal of chemical test) and alleged prior DUIs.
- RAP sheet, looking for uncharged prior DUIs.
- Police report and officer/witness statements, paying particular attention to:

- Driving characteristics

- Statements to officers

- Performance on FSTs

- ‘Objective signs of intoxication’ – e.g. unsteady gait, odor of alcohol, and bloodshot eyes

- Chemical test results – e.g. PAS, Intox, or blood

Gather Information

- Informal discovery request asking for:

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Training materials will accompany the checklists, including practice tips, references to penal, health and safety, vehicle, et al. code sections, substantive federal and state law with full citations, case summaries, references to the evidence code, as needed, and other applicable legal sources.

Phase 2: Pilot Testing (October 1, 2014- September 30, 2015): The focus of Phase 2 will be piloting six to eight checklists and corresponding training materials within two public defender offices: San Francisco and Alameda Counties. Piloting the project in two jurisdictions will allow researchers to test the applicability of the project beyond their point of origin and produce rigorous, generalizable, and credible information for the national field. As designed, the checklists themselves will reflect the practices and preferences of the San Francisco Public Defender's Office. By also testing the checklists in a second agency, the project will be better equipped to evaluate how the practices transfer to different jurisdictions and organizational structures and cultures. This model will help answer: do the checklists constitute an evidence-based strategy for broader statewide and national dissemination?

Alameda County was selected as the second site for multiple reasons – the foremost being that senior officials from the public defender's office have agreed to participate in the pilot. Second, it is similar in size to San Francisco County, with 100 attorneys in each office. Also, Alameda is geographically proximate to San Francisco, helping to ease the implementation process, including facilitating the training itself, follow-up training and assistance, and overseeing the evaluation process. Lastly, there will be significant value for research purposes in testing the initiative in a public defender's office that does not currently have a checklist training initiative. Alameda will not be involved in checklist development and will not have prior knowledge of the checklist project, nor any institutional investment in it, until the project is actually “rolled-out.” This will allow researchers to employ a pre-post research design (described below).

Phase 2 will be launched with a training event for attorneys at both offices. Management at both offices will conduct a checklist training highlighting the use of this innovative new tool for

attorneys, paralegals and investigators. Atul Gawande's *How Do We Heal Medicine*, a 20 minute video about the use of checklists which was presented at a TED conference in April 2012 will be shown at the training. Additionally, attorneys who have used checklists will share their experience using checklists in their practice and answer audience questions. Finally, the Project Team will unveil the checklists and accompanying materials and invite comments and questions.

The pilot checklists will be widely disseminated and easily accessible on each of the office's intranet. Attorneys will be invited to utilize the checklists and those identified to participate in the study will be required to keep a log provided to them of when a particular checklist is utilized. All use logs will be collected on a monthly basis for evaluation. Project staff will provide ongoing training as needed.

To measure the impact of the pilot and identify opportunities for improvement, Center for Court Innovation researchers will conduct a quasi-experimental study of the impact of the checklists on public defender perceptions and performance in Alameda County. The quasi-experimental study will proceed as follows. While the checklists are in the final stages of development in San Francisco during Phase 1—but after their content is largely known—researchers will initiate research activities in Alameda County. These activities will involve a confidential survey of Alameda public defenders regarding their self-reported training needs as well as their knowledge, attitudes, and behaviors (KAB) in specific areas—and in relation to specific tasks—that (known only to the researchers) the forthcoming checklists will cover.

Subsequently, towards the end of the Phase 2 implementation period, a largely similar confidential survey will be re-administered. First, to estimate the effect of the checklist rollout on public defender knowledge, attitudes, and behaviors, the “post-implementation survey” will repeat the exact same series of questions in each of these domains that appeared on the “pre”

survey. Second, in place of the questions from the “pre” survey that concerned training needs, the latter part of the “post” survey will include an explicit set of questions regarding the perceived utility and value of the training that actually took place. Third, the “post” survey will include specific questions documenting the frequency of use of different ones of the checklists that were rolled-out and documenting the specific perceived utility of each checklist. (Besides this follow-up/post-implementation survey, a standard evaluation form also will be distributed to all Alameda and San Francisco attorneys immediately after the planned training event, with basic questions on the quality of speakers, information, and handouts for each session.)

The pre-post survey methodology will be supplemented by a pre-post analysis of actual case data from criminal cases handled by the Alameda County public defenders in an effort to detect the project’s impact. Possible performance measures include discernible changes in pretrial outcomes (e.g., bail decisions); motion practice; case processing measures; case dispositions; and sentences.

Finally, to obtain more qualitative information regarding the experience of the checklists in both the Alameda and San Francisco sites, focus groups will be held with public defenders at both sites regarding their perceptions of the checklists, strengths, weaknesses, extra time demands (if any) involved in adhering to the checklists, and final suggestions for improvement.

Phase 3: National Dissemination and Replication (October 1, 2015-September 30, 2016):

Phase 3 will involve the adaptation of training materials created for implementation of the checklist approach by Alameda County for a national audience. Substantive and procedural issues that are state-specific will be noted so that practitioners can adapt as needed. Project staff will develop a toolkit for implementing the checklists and using them to improve training, practice and supervision of indigent defense counsel. The toolkit will also include a final training

curriculum, revised based on feedback gained after the pilot San Francisco/Alameda training sessions. Moreover, project staff will use feedback solicited from attorneys trained during the pilot period to improve the format and content of the checklist training materials, as well as the checklist tools themselves. Tools will include sample checklists, a practitioner guide for replicating the model, a brief training curriculum/recommended agenda; and a summary of lessons learned. Project researchers will also publish a summary report that documents the content of the San Francisco checklists; the rationale for different elements in the checklist materials; and the findings from the aforementioned research activities. The finalized checklists will be made nationally available, at no cost to recipients. The technical assistance network and internet support system within the Office of the Public Defender will be established and assistance will be provided as needed.

Capabilities and Competencies

Management Structure and Staffing

The day-to-day Project Team will be composed of an attorney (to be named) and a legal assistant (to be named). The attorney (to be named) will be the Project Coordinator, while [REDACTED] [REDACTED], will be available, as needed, to support the Project Team and provide oversight of the project. The Project Team will be primarily responsible for practical development and expansion of the checklists, and the attorney will provide training to jurisdictions nationwide, and acting as the technical assistance point of contact.

The Office of the San Francisco Public Defender is led by [REDACTED] As the Public Defender for the City and County of San Francisco, [REDACTED] is California's only publically elected public defender. He served as a deputy public defender for 15 years, and has been the

Public Defender since March 2002. He has tried over 100 criminal cases and represented more than 3,000 indigent defendants. He served on the American Bar Association's Standing Committee on Legal Aid and Indigent Defense and is a past board member of California Attorneys for Criminal Justice. In 2006, Mr. Adachi received the California Public Defender Association's Program of the Year Award, and the American Bar Association's national award for excellence in public defense. In 2007, he was the recipient of the prestigious California Lawyer Attorney of the Year award (CLAY) for his work in the field of prisoner reentry.

[REDACTED] has a J.D. from University of California, Davis; he is a Deputy Public Defender and Felony Managing Attorney at the San Francisco Public Defender's Office. [REDACTED] is a seasoned trial attorney with extensive criminal experience. He has handled a full range of criminal cases, including serious and violent felonies, gang cases, homicide, and sex offenses. [REDACTED] has extensive experience and training in special areas affecting criminal defense practice, including exonerations and false convictions, DNA, police misconduct, eyewitness testimony, and gangs. He has been instrumental in improving the quality of training at the Public Defender's office.

The Center for Court Innovation will serve as the project's research partner, as well as provide writing and technical assistance support. The principal investigator of the pilot study will be [REDACTED] (Principal Investigator). Based on close input and review by the Center's research director, [REDACTED] will write all evaluation tools, develop the plan for administering pre- and post-implementation surveys and official records data analyses, and conduct all project analyses. [REDACTED] is an associate director of research at the Center. She is currently the lead researcher on the Center's current collaboration with the Committee for Public Counsel Services in Massachusetts, as well as the project director on two separate

national studies (one a representative survey of law enforcement agencies nationwide and the other a multi-site process and impact study) of pretrial diversion programs. Recently, [REDACTED] [REDACTED] served as principal investigator (PI) on a randomized controlled trial (RCT) of intensive judicial monitoring with domestic violence offenders; and PI on a statewide evaluation of New York's domestic violence courts. [REDACTED] (Co-PI) has been the Center's research director since 2002 and is ultimately responsible for all research at the agency. Current projects include serving as PI on the Center's *Defending Childhood* evaluation; a national study of pretrial diversion programs; and a RCT of an evidence-based risk/needs assessment and treatment matching protocol (using the LSI-R tool). He is also Co-PI on a national evaluation of specialized reentry courts, an evaluation of a "community justice center" in southwest Brooklyn (NY). Primarily during Phase 3 of the project, [REDACTED], deputy director of national technical assistance, and [REDACTED], a senior communications associate, will join the project to assist with the development of toolkit materials developed for the benefit of other jurisdictions.

The Center for Court Innovation is a nonprofit think tank with a 15-year history of justice innovation designed to address the problems of defendants, victims, and communities. The Center achieves its mission through a combination of demonstration projects, technical assistance, and rigorous research to determine what works and what does not. The Center has played a major role in the planning and implementation of over 50 demonstration projects throughout New York State. In addition, the Center currently provides technical assistance to criminal justice systems throughout the country on cutting-edge issues including community prosecution, criminal justice responses to drug-addicted offender, and domestic violence. National awards received by the Center include the Peter F. Drucker Award for Non-Profit

Innovation and the Innovations in American Government Award from Harvard University and the Ford Foundation.

The Center's research department has a reputation for conducting rigorous research on justice reform initiatives nationwide. The Center is currently leading a national, multi-site evaluation of the Attorney General's *Defending Childhood Demonstration Program*; a national study of pretrial diversion programs; a multi-site study of gang involvement among tribal youth; separate quasi-experimental impact evaluations of specialized drug courts and specialized domestic violence courts in New York State; and four separate randomized controlled trials (RCTs) respectively focused on evidence-based assessment; intensive judicial monitoring; an experimental parole reentry model; and a teen dating violence prevention program.

The Center's multiple technical assistance departments now assist jurisdictions throughout the United States and internationally on developing, implementing, and disseminating cutting-edge reform initiatives in both criminal and civil justice systems. Of particular relevance to the current project, the Center is currently providing a blend of best practice, research, and technology related technical assistance to the statewide public defender agency in Massachusetts, which is known as Committee for Public Counsel Services (CPCS).

Plan for Collecting Data and Project Sustainment

A rigorous evaluation has been planned as an inherent part of the proposed field-initiated program. As described previously, the evaluation will involve a quasi-experimental comparison of knowledge, attitudes, and self-reported practices, as well as actual criminal case outcomes, during periods of time immediately preceding and following the implementation of checklists in Alameda County. Research findings will be directly incorporated into toolkit materials (e.g., potentially leading to final revisions of the checklists, training curricula, or instructions given to

attorneys) during the Phase 3 toolkit production and dissemination process. In short, national dissemination and replication efforts will build in rigorous evaluation findings wherever appropriate. In addition, the applicants are familiar with standard BJA reporting requirements and with the importance of GPRA measures and will ensure full compliance by tracking the completion of each project task identified within this proposal as well as date of completion (to determine fidelity to timeline) and other relevant indicators (e.g., numbers of attorneys trained in each jurisdiction, numbers of pre-implementation and post-implementation surveys completed, sample size for final analyses of case outcome data, etc.).

The Public Defender will continue to advance checklists as an evidence-based tool for excellent defense. The Public Defender has a rigorous training program for its attorneys and private defenders and will continue to build on this foundation of stability as it incorporates the use of checklists into its training curriculum. Together with the Center for Court Innovation, the Public Defender will document program development and implementation to assist with future replication efforts and disseminate the final report to public defender offices and indigent defense providers, both statewide and nationally. The findings and checklists will also be shared with statewide organizations including the California Public Defenders Association and other such organizations as well as national organizations such as the National Legal Aid and Defender Organization. Since the checklists themselves are portable and easily shared, the Public Defender will commit to engage in the widespread dissemination of the checklists by publishing them on defense related websites and by attending defense conferences to advocate for the use of checklists as best practice.