



PROSECUTORIAL WORKLOAD

The Hidden Crisis in Criminal Justice

BY ELAINE BORAKOVE, KRISTINE HAMANN, AND ANTONIA MERZON

The growing volume of work in prosecutor offices is a pressing issue that demands attention. Across the nation, prosecutor offices are grappling with high caseloads, limited resources, and increasing demands from stakeholders and the community.

The New Roles of the Modern Prosecutor

In addition to traditional responsibilities, modern prosecutors are embracing new roles and initiatives to address the evolving needs of their communities. These roles include problem solver, innovator, community partner, crime prevention strategist, service and treatment facilitator, and conviction and sentence reviewer. See PCE's Nat'l Best Prac. Comm., *The New Roles of the Modern Prosecutor* (May 2023), <https://tinyurl.com/>. By expanding their focus beyond traditional functions, prosecutors are playing a more proactive role in addressing systemic issues, promoting equity, and enhancing public safety.

The new approaches result in more work for the

prosecutor's office. Rather than merely being reactive to police arrests, a modern prosecutor is a problem-solver who looks not only to prove that a crime occurred but also to craft solutions to the root causes of crime. Both proving crime and seeking broader solutions that can reduce crime have become more complex and labor-intensive over time.

ELAINE BORAKOVE is the president of the Justice Management Institute, which works collaboratively with prosecutors, courts, and defense to shape practitioner-oriented solutions that are fair, responsive, and equitable. She can be reached at elaineb@jmijustice.org.

KRISTINE HAMANN is the Executive Director of Prosecutors' Center for Excellence, a national non-profit that works with prosecutors to improve the criminal justice system. She can be reached at khamann@pceinc.org.

ANTONIA MERZON is a senior attorney with the Prosecutors' Center for Excellence, a national non-profit that works with prosecutors to improve the criminal justice system. Ms. Merzon is an author, editor, and researcher. She can be reached at amerzon@pceinc.org.

The Expanding Workload of Prosecutors

Prosecutor workloads are also negatively impacted by the swiftly increasing complexity and depth of the typical criminal investigation. Every significant criminal investigation includes some combination of cell phone records, body-worn camera footage, social media searches, jail calls, computer analysis, surveillance videos, license plate readers, and forensic evidence (e.g., ballistics, DNA, and fingerprints). Much of this evidence did not exist two decades ago, and in the last decade, the volume of this evidence has grown dramatically. There is also an important realization of the trauma suffered by victims and witnesses that must be addressed.

Modern prosecutors have many duties not directly tied to a case and thus not part of any caseload or workload analysis. See PCE's Nat'l Best Prac. Comm., *Prosecutorial Work Not Included in Caseload Counts* (Nov. 2023) [hereinafter *Prosecutorial Work Not Included*], <https://tinyurl.com/m2s28b3n>. The office's resources are stretched further by their participation in the worthy goal of preventing crime through community partnerships, treatment and diversion programs, and education initiatives. Funding for these evolving and critical components of a modern prosecutor's responsibilities is inadequate and sometimes nonexistent.

Increasing legislative and judicial mandates have escalated the procedural demands on a prosecutor. Some statutory initiatives and court decisions have created unfunded mandates that put additional pressure on a prosecutor's office.

As a result, many offices find themselves understaffed and overburdened, compromising the quality of justice delivered and the well-being of staff members.

The Importance of Studying Prosecutor Workload

As the American Bar Association (ABA) has recognized, prosecutor overwork can negatively impact the entire criminal justice system. The ABA's Criminal Justice Standards state:

The prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations.

Crim. Just. Standards for Prosecution Function Standard 3-1.8(a) (Am. Bar Ass'n, 4th ed. 2017).

When prosecutors have excessive workloads, they have insufficient time to devote to each case they are assigned. This problem can lead to breakdowns in the justice process, such as the failure to convict guilty defendants, the failure to investigate claims of innocence, inadequate attention paid to victims, incomplete assessments of criminal activity, plea-bargained cases with inappropriate dispositions, and weak cases that are not dismissed promptly. Constitutional obligations, such as the disclosure of *Brady* material, also may be hampered. In short, excessive prosecutor workloads harm victims, defendants, and the public at large. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U. L. Rev. 261 (2011).

Some groups have expressed concern that developing workload standards for prosecutors will lead to greater levels of incarceration. However, research has shown that improving prosecutor workloads can help the entire criminal justice system, depending on the office's policies. While there might be stronger prosecution of certain defendants, a manageable workload also allows prosecutors to better identify cases that should be dismissed and defendants eligible for diversion programs or treatment. See J.W. Bourgeois et al., *An Examination of Prosecutorial Staff, Budgets, Caseloads and the Need for Change*, Ctr. for Just. Rsch., Tex. S. Univ. (2019); Howard Henderson, *Clarification to "An Examination of Prosecutorial Staff, Budgets, Caseloads and the Need for Change: In Search for a Standard"*, Ctr. for Just. Rsch., Tex. S. Univ. (2019).

Prosecutor and Public Defender Caseloads

For years, prosecutors and public defenders have faced excessive caseloads that have only become more challenging since the COVID-19 pandemic. Case filings around the country continue to rise, and many courts face significant backlogs, resulting in case processing delays. Coupled with recruitment and retention challenges, an increase in time-consuming advances in digital and scientific evidence, and budgetary constraints, there is a growing demand for caseload standards.

The recent release of public defense caseload standards has reignited a desire for similar standards for prosecutors. See Nicholas M. Pace et al., *National Public Defense Workload Study* (RAND 2023), <https://tinyurl.com/nhbkyhmm>. Unlike the new public defense standards, prior efforts to develop national

prosecutor caseload standards found several critical variables that deem such standards to be unreliable and invalid. Specifically, these variables include the following:

- **Variation nationally in charge classifications**—for example, what may be a Class 3 felony in one state may be a misdemeanor in another—making attempts to create charge categories unreliable;
- **Law enforcement policies** that change regularly and can vary widely from department to department, within a jurisdiction, and across jurisdictions;
- **Significant resource differences** across prosecutors' offices in terms of availability of support staff such as investigators, victim/witness advocates, and other nonattorney staff who provide substantial support to attorneys for case processing;
- **Different organizational models** and policies among prosecutors' offices; and
- **Differences in the number of courts served.**

See Elaine Nugent et al., Am. Prosecutors Rsch. Inst., *How Many Cases Should a Prosecutor Handle?* (2002). Yet, as states begin adopting the public defense standards, it is necessary to similarly study standards for prosecutors to ensure that they have the resources to properly evaluate and prosecute cases, while also fulfilling their expanded roles in crime prevention and community outreach.

What Is Measured Matters: Studying Prosecutor Caseloads and Workloads

Although national-level guidance for prosecutors is difficult to achieve, states, localities, and individual prosecutor offices can develop their own workload standards. Establishing these standards involves assessing how much work prosecutors are required to handle, and then analyzing whether this caseload and the workload are excessive given their procedural, legal, and ethical duties.

Prosecutorial work is often described in terms of *caseload*—meaning the volume of cases a prosecutor's office files or disposes of annually. However, the work of a prosecutor's office includes numerous responsibilities beyond casework. Administrative and supervisory duties, coordination with law enforcement,

The most accurate and comprehensive caseload and workload calculations are accomplished using a combined time study and sufficiency study.

multidisciplinary task forces, community outreach, and legal training are just a few of these other tasks. See *Prosecutorial Work Not Included, supra*.

This broader scope of activities can be described as the office's *workload*—the volume of cases *plus* any non-case-related tasks. Both metrics are important.

Methods of Study

Several methods can be used to determine prosecutor caseloads and workloads. The most *basic calculation* is to simply divide the number of cases in an office by the number of attorneys or the number of available attorney hours. A *weighted calculation* adds more information to this process by also looking at the level of attorney effort and processing time for different types of cases. These calculations can be helpful, but they are based on limited details and only describe an office's status quo, with no insight into future workload or the time that should ideally be devoted to a case.

The most accurate and comprehensive caseload and workload calculations are accomplished using a combined *time study* and *sufficiency study*. This approach is the method of analysis preferred by researchers in the field today, as it better identifies current resource gaps and future needs.

Time Study

A time study tracks the time that attorneys and support staff spend on the different types of activity that constitute the work of a prosecutor's office. Activity categories are created, such as case preparation, filing of cases, pretrial motion practice, victim and witness outreach, subpoena issuance, court appearances, and trial. For a period of time, but ideally at least a month, employees—or a representative portion of them—record the time they spend each day on these activities.

Time studies also track the complexity factors of cases. For example, a simple theft case may be very straightforward and take relatively little of the office's

time. On the other hand, a case with multiple defendants, multiple victims, significant violence, statutory complexity, competency issues, or insanity defenses may require far more time to shepherd to disposition. Also, within the same category of cases, some can be completed quickly, while others are complex.

At the conclusion of the time study, the collected data can be analyzed to provide an array of insights into the prosecutors' workload, including:

- **Disposition Time:** The average amount of time spent to bring a case from intake to disposition.
- **Step-by-Step Analysis:** The time spent and the number of dispositions achieved during each step of the prosecutorial process.
- **Variations by Case:** How these time and disposition measurements vary for different types of cases.
- **Complexity Factors:** How different complexity factors affect the amount of time spent on a case, and at what point cases with those factors reach disposition.
- **Non-Case Work:** The time spent on non-case responsibilities.
- **Time Spent by Staff on Tasks:** How prosecutors and support staff are spending their time in a given day, week, month, or year in terms of case-work and non-case-related tasks.
- **Hours Worked:** Numbers of hours worked, calculated by staff member, job title, unit, and the office as a whole.
- This information can be used to better understand the average caseload and workload within the office or locality, and how those metrics translate into the attention and effort available for the range of cases being handled. From there, offices can evaluate whether this time, attention, and effort are sufficient to provide quality representation.

Sufficiency Study

Once a time study is completed, then a sufficiency study can be undertaken. A sufficiency study is a survey that asks attorneys and staff members if the amount of time they spend on different activities is sufficient to do them competently. Do they have enough time to adequately conduct each step of their cases, as well as their other responsibilities? Too little? What would be a sufficient amount of time for each type of work they must do?

The survey also asks why the current time available

is appropriate or insufficient. For example, is it simply the number of cases or other tasks being assigned that is impacting sufficiency? Or are there other factors, such as technology challenges or attorneys doing nonlegal work, costing time?

The survey results about sufficient time are then compared to the time study's results about the average time actually spent per task, and the variance between them can be calculated. This analysis provides crucial data about:

- **Slowing Factors:** Factors that are negatively affecting the time to disposition for different case types.
- **Case Weight:** How much effort is needed versus the actual time expended for various kinds of cases.
- **Ratios of Complex Cases:** Ratios of complex to noncomplex cases in the office and in a typical prosecutor caseload.
- **Workload Measure:** The level of individual and staff effort on case-related and non-case-related activity.
- **Reasonable Volume of Work:** How many cases and non-case tasks an attorney or support staff member can reasonably handle.
- **Ratio of Lawyers to Support:** How the ratio of lawyers to support staff impacts time spent on case and non-case work.
- **Resource Projections:** Resource projections for meeting the office's overall workload so that individual employees do not carry excessive workloads.

Conclusion

The pressing issue of excessive workloads in prosecutor offices cannot be overstated. As the criminal justice system evolves, so too do the responsibilities and demands placed upon prosecutors. The growing complexity of cases, increased use of technology, and expanding roles in crime prevention and community engagement highlight the need for adequate resources and thoughtful workload management. Creating standards for prosecutor caseloads and workloads to ensure justice is served efficiently and equitably is sorely needed. Ultimately, tackling this hidden crisis requires collaboration among policymakers, researchers, and the community to align resources with responsibilities, ensuring prosecutors can fulfill their vital role in safeguarding public safety and upholding justice.