

# Paying for the Right to Counsel

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National Survey Findings on the Practice of  
Charging Public Defense Fees to Clients

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# Introduction

Recognizing the “obvious truth”<sup>1</sup> that defendants cannot be assured a fair trial without representation, the Supreme Court has held that the right to counsel guaranteed by the Sixth Amendment requires states to provide a lawyer if a defendant cannot afford one.<sup>2</sup> However, in 42 states and the District of Columbia, individuals experiencing poverty are charged a fee for invoking their Sixth Amendment right to counsel (hereafter referred to as “defender fees”).<sup>3</sup> While defender fees are a marginal contributor to legal system fines and fees imposed on individuals, these fees are unique amongst the larger universe of fines and fees insofar as they essentially impose a fee for a Constitutional guarantee.<sup>4</sup>

Although there is a growing body of research on the use and impact of legal system fines and fees broadly defined, specific attention to defender fees remains underexplored within this literature. Policymakers and practitioners can help to ensure quality representation through an evidence-based approach to the problems and potential solutions associated with defender fees. To fill this research gap and start building the necessary evidence base, the Center for Justice Innovation (Center) partnered with the National Legal Aid & Defender Association (NLADA) to conduct two national surveys to document the uses and perceptions of defender fees among (1) public defense attorneys and (2) public defense and court leadership. What follows is a summary of those findings and a discussion of potential policy and practice considerations.

Findings suggest that public defense attorneys are receptive to exploring policy and practice solutions to mitigate the impact of defender fees.

- Most public defense attorneys surveyed for this study opposed the use of defender fees, the most common reason being the collateral consequences experienced by clients. Public defense leaders who responded to our survey<sup>5</sup> were more supportive, seeing the benefit of fees in offsetting the costs of the public defense system.
- Contrary to prior research, few attorneys in our study reported defender fees negatively impacting the attorney-client relationship. Still, some had witnessed clients waive their right to counsel because they could not pay an upfront defender fee.
- We also asked attorneys to describe how statutes on defender fees apply in practice, and there was considerable variability, suggesting the need for greater standardization in terms of equipping attorneys with the skills to advocate against the fees and for judges to consistently apply procedural safeguards like ability to pay determinations.
- Finally, a secondary survey of public defense and court leaders illustrated jurisdictions’ difficulties tracking data, specifically estimating outstanding debt or the revenue associated with defender fees.

These findings underscore the need for additional research to help public defense systems confront how defender fees potentially create misaligned incentives and harm clients. Solving these issues is a complex matter, however. On one hand, eliminating defender fees via legislative action or court rule reform stands as the only pathway to permanently solving the core problems of misaligned incentives and harm to clients. On the other hand, fee elimination could create *new* problems in jurisdictions that use defender fees to fund aspects of the public defense delivery system. To best identify how to navigate this tension, system actors should identify alternative funding sources to offset potential budget shortfalls associated with defender fee elimination to avoid compromising core defense

functions. In situations where defender fee elimination is not viable, this report offers a series of ground-up practices that public defense leaders and attorneys can consider to mitigate the harms of defender fees. It should be noted, however, that public defense cannot solve the problems associated with defender fees alone; these steps require cross-system collaboration to shift court culture to fully realize the end goal of mitigating harm. We hope our findings serve as a starting point for all system actors to consider whether the revenue generated by defender fees outweighs the harms experienced by individuals relative to other potential funding sources.

# Background

## Generalized Use of Fines and Fees

Due to growing budget constraints, the use of fines and fees has expanded across virtually every stage of the criminal legal system.<sup>6</sup> Estimates based on a review of U.S. Census Bureau data between 2005 and 2019 reveal that fines, fees, and forfeitures are a small but consistent source of revenue for state and local governments.<sup>7</sup> Whereas fines are a means of deterrence and punishment, fees are a means of charging individuals for their “use” of the criminal legal system.<sup>8</sup> Policymakers and researchers have acknowledged that using fines and fees to fund the criminal legal system creates conflicts of interest and misaligned incentives for system actors.<sup>9</sup> Although much of the academic and policy discussion has focused on law enforcement and judges prioritizing enforcement of fines and fees for revenue generation relative to other goals, public defense faces a similar quandary as twenty-four states use defender fees to fund a portion of local public defense systems.<sup>10</sup>

The promise of revenue from fines and fees is enticing for state and local governments, but it is rarely fully realized, and system actors must weigh the potential harms against it. As of 2020, roughly 6% of adults in the U.S. report debt stemming from legal expenses, fines, or court costs. This number expands to approximately 20% of people with an immediate family member who is incarcerated.<sup>11</sup> Researchers estimate unpaid fines and fees in

twenty-five states to be at least \$27.6 billion, but the lack of data collection and transparency make it impossible to estimate the scale of outstanding debt in the United States.<sup>12</sup> Looking beyond financial implications, their capacity to exacerbate racial disparities, and the collateral consequences associated with failure to pay—including rearrest, incarceration, revocation of driver’s license, loss of personal rights, employment challenges, and adverse spillover effects to families—have been well documented.<sup>13</sup> Collectively, fines and fees can create an unsustainable “high pain, low gain” funding stream.<sup>14</sup>

## The Black Box of Defender Fees

Although there is a growing body of research on fines and fees generally, there is a significant gap in understanding the use and impact of defender fees in particular.<sup>15</sup> Policy scans and descriptive studies of select jurisdictions indicate that defender fees typically take one of two forms: 1) a flat administrative fee assessed at the start of the case (upfront fee) or 2) a variable amount assessed at the end of the case for the defense services provided (recoupment fee).<sup>16</sup> How the assessment, waiver, and collection of defender fees are applied in practice, however, remains largely unknown, as most states do not publicly disclose the amount assessed and collected. Among those that do, the revenue collected falls significantly short of the original assessments.<sup>17</sup> For example, a report in Iowa revealed that judges varied significantly in imposing recoupment

fees, and only \$46 million of nearly \$200 million in outstanding debt was collected.<sup>18</sup> Moreover, rural communities included in the study had disproportionately higher fees due to their reliance on court-appointed attorneys relative to more populous counties with public defender offices. This example offers a clear illustration of how defender fees can undermine uniformity in the administration of justice when different communities incur different amounts as a function of their local defense system.

While defender fees represent only a portion of total fines and fees, they have a unique impact. A report issued by the American Civil Liberties Union of Southern California exemplifies this point.<sup>19</sup>

First, public defenders expressed concern that the upfront fee undermined public defenders' ability to build trust with their clients. Some attorneys noted that the fee discussion introduced "a chilling effect," whereas others felt it tainted the first meeting with clients. Second, some counties either reduced or stopped collecting the upfront fee over fears that it would encourage individuals to waive their right to counsel, an issue complicated by inconsistent communication from attorneys and judges regarding the possibility that the upfront fee may be returned or waived. These examples highlight how defender fees may undermine attorney-client relationships and access to counsel.



# Current Study

In 2022, NLADA issued an updated report on the national policy landscape, supplemented by in-depth case studies that tried to “follow the money.” We built upon these prior efforts with two surveys: 1) a national survey of public defense attorneys and 2) a survey of public defense and court leadership. We sought to explore several research domains:

1. **Perceived Impact of Defender Fees:** What collateral consequences have attorneys seen their clients experience due to defender fees? Do defender fees impact the attorney-client relationship?
2. **Attorney Attitudes:** What is the overall level of support or opposition to defender fees? What drives these attitudes, and how do they vary across attorneys in different roles?
3. **Defender Fees in Practice:** How are upfront and recoupment fees implemented? How is information about the fees communicated to clients? How often have attorneys witnessed a client waive the right to counsel due to notification of an upfront fee?
4. **Responding to Defender Fees:** What practices have jurisdictions implemented to offset the potential harm of defender fees? How often are they practiced? What is the extent of education and training related to defender fees?

## Methodology

The project team worked with subject matter experts at NLADA to design a 56-item web-based survey to be administered to attorneys who provide adult criminal court representation in state or local public defense delivery systems.<sup>20</sup> The survey consisted of closed- and open-ended questions about 1) attorneys’ perceptions of defender fees; 2) training, education, and resources related to advocacy against the imposition of defender fees; 3) experience with upfront fees; and 4) experience with recoupment fees.<sup>21</sup> The research team worked with NLADA and members of their professional network to recruit public defense attorneys via listservs, social media, webinars, conferences, and direct engagement with professional networks. We fielded the survey between December 2022 and January 2024.<sup>22</sup>

Overall, 330 attorneys from 34 states and Washington, D.C. completed the survey.<sup>23</sup> Over three-quarters of attorneys in the study (77%) practiced in public defender offices. Respondents were most commonly staff attorneys (49%), with representation from private attorneys (18%), supervising attorneys (15%), and chief public defenders or managing attorneys (15%).<sup>24</sup> Due to the optional subsections and missing data considerations, the sample size of 330 fluctuates depending on where an item was in the survey, a point noted in the findings below.<sup>25</sup>

# Findings

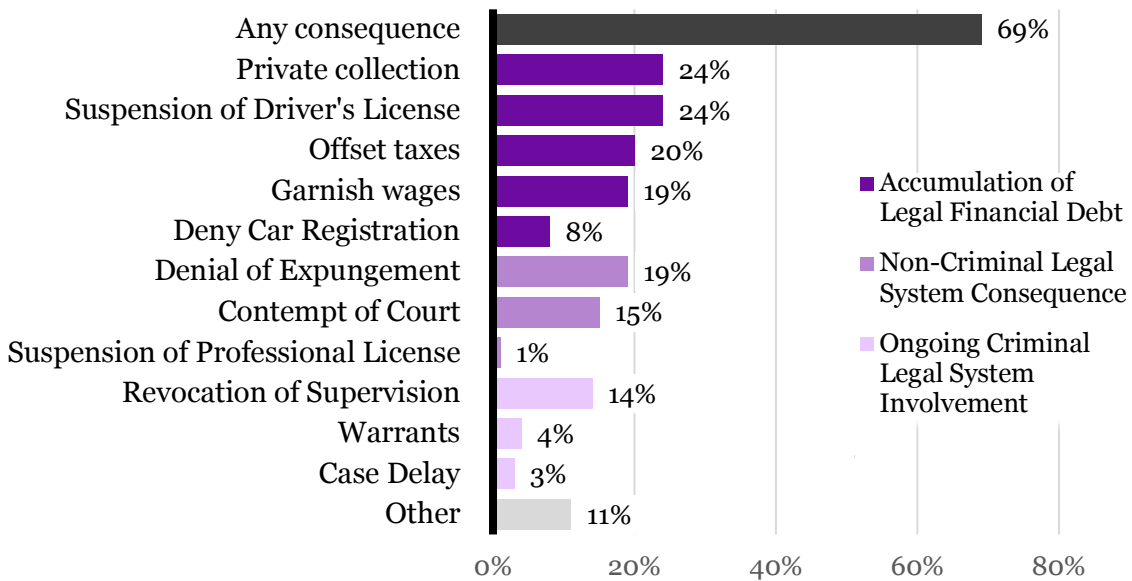
## Attorney Perceptions on the Impact of Defender Fees

Attorneys who continued with the survey (n = 298) were presented with a list of potential consequences and asked to select all those their clients had experienced due to non-payment of defender fees. As depicted in Figure 1, more than two-thirds reported their clients had experienced at least one consequence, which we categorized across three broad areas: accumulation of legal debt, ongoing criminal legal system involvement, and non-criminal legal system consequences that impact

ability to pay. Those who selected the “other” category had the option to write in additional consequences; these included civil judgments, negative changes to case outcomes, jail, technical violations (including court diversion or alternative programs and probation), and feelings of embarrassment.

We also presented attorneys with several potential criticisms of defender fees and asked them to rate their level of agreement with each argument. Attorneys most frequently agreed that defender fees negatively impact their clients (73%), perpetuate clients’ ongoing system involvement (64%), and contribute to racial and ethnic

**Figure 1. Public Defense Attorneys Have Observed Their Clients Experience Numerous Consequences for Unpaid Defender Fees**



*Note:* Respondents (n = 298) can select all consequences that apply or input an unlisted consequence. As a result, the total percentage will not add up to 100%.

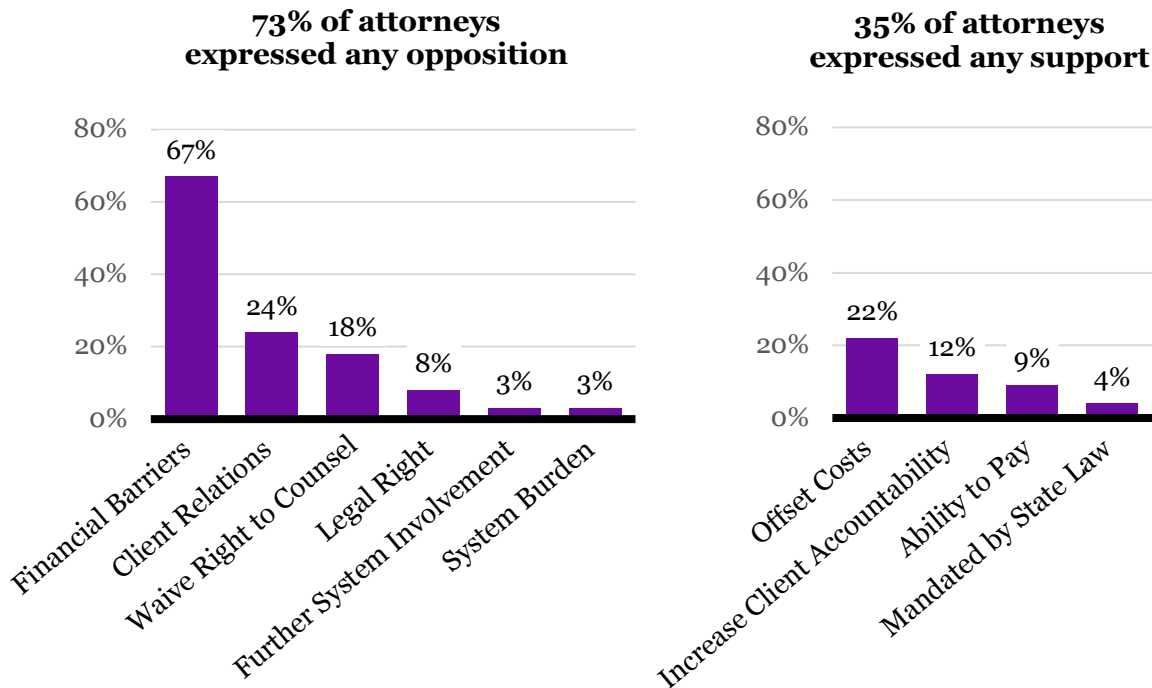
disparities in the criminal legal system (59%).<sup>26</sup> Fewer attorneys agreed that defender fees undermine the attorney-client relationship (31%) or negatively impact their ability to advocate for their client (22%).

Specific to aspects of the attorney-client relationship that are strained by defender fees, attorneys rated barriers such as establishing legitimacy as an advocate (26%), establishing trust (25%), and building relationships (21%) with similar frequency. Fewer attorneys reported that the fees created barriers in communication (14%) or actively engaging clients in their defense (14%).

## Attorney Attitudes about Defender Fees

When asked whether they supported the use of defender fees in their jurisdiction, 65% of the 330 responding attorneys said no, 26% said yes, and 9% were unsure. Those who reported clear opposition or support were presented with a follow-up list of reasons and asked to select all that resonated with them. Those who indicated they were unsure could report reasons for support and opposition (Figure 2).

**Figure 2. Public Defense Attorneys Strongly Oppose Defender Fees for Several Reasons that Negatively Impact Their Clients**



Note: Respondents (n = 330) can select multiple responses. As a result, the total percent will not add up to 100%. There were 6% of respondents who selected 'other opposition' and 1% of respondents selected 'other support'.

Nearly three-quarters of attorneys in our study endorsed at least one reason for their opposition, with the majority citing that the fees create financial barriers for their clients. To a lesser extent, attorneys reported their opposition was also associated with the belief that defender fees undermine the attorney-client relationship and increase clients' likelihood of waiving the right to counsel. There was variation in the degree of opposition by attorney role. Both staff (82%) and supervising (74%) attorneys most frequently reported that they did not support the use of defender fees compared to public defense leaders (62%).

In contrast, little more than a third of all attorneys endorsed at least one reason for supporting the use of defender fees in their jurisdiction. The most common reason for support was using defender fees to offset the costs associated with funding local public defense systems. We also examined how overall support varied by attorney role. Of the little more than a third of attorneys who supported defender fees, nearly half (46%) of these attorneys were public defense leaders relative to staff or private attorneys (33%) or supervising attorneys (24%).

Overall, our findings indicate that attorneys were highly aware of the toll defender fees take on their clients, and their primary concern is how these fees contribute to a revolving door within the criminal legal system (e.g., issuance of warrants, license suspension, revocation of community supervision). Attorneys were less focused on the barriers these fees create in their client relationships. Despite the overall high levels of opposition to defender fees, our findings highlight there are nuances. The attorneys with more day-to-day interactions with

clients shared a stronger opposition as they witnessed the impact of defender fees on their clients. In contrast, public defense leaders were more sensitive to the role of defender fees in funding local public defense systems.

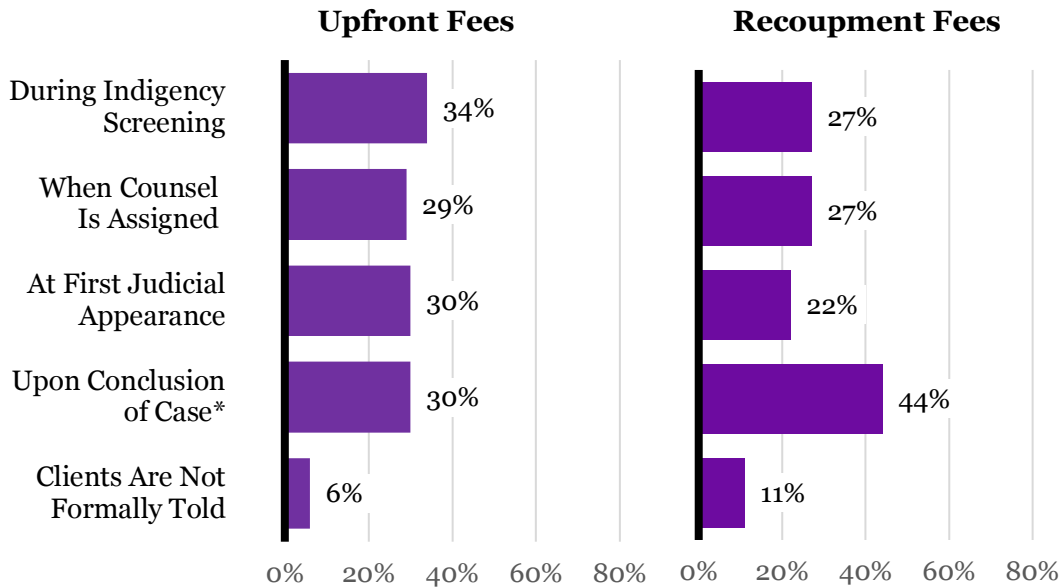
## Defender Fees in Practice

To better understand opportunities for procedural safeguards to offset the potential harms noted above, we asked attorneys questions to understand how those operating in jurisdictions with upfront fees (n = 213) or recoupment fees (n = 222) experience local practice. As shown in Figure 3 (see page 13), attorneys reported that typically clients are made aware of defender fees at multiple points, with upfront fees most frequently disclosed during indigency screening and recoupment upon the case's conclusion when other court fees are applied.

Court representatives (e.g., clerk, judge) are reportedly the system actors most commonly responsible for informing individuals about either upfront (51%) or recoupment (52%) fees—the involvement of public defense representatives varied by type of fee. Defense attorneys were more frequently involved in notifying their clients about recoupment (25%) relative to upfront fees (17%), with an administrator associated with the local defense system playing a slightly more involved role in the notification of upfront fees (12%) relative to recoupment (8%).

Even though our findings highlight that the courts are primarily responsible for notifying individuals about defender fees, defense attorneys should discuss the fees with their clients to help them understand potential collateral consequences. Yet a

**Figure 3. Clients Are Made Aware of Defender Fees At Multiple Points**

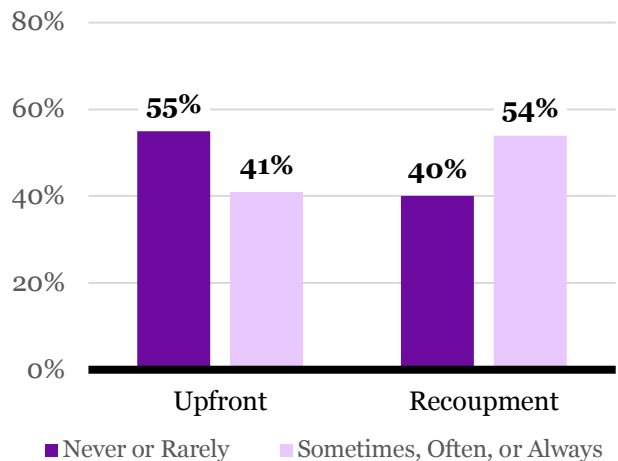


*Note:* Respondents (n = 213 for upfront fees and n = 222 for recoupment fees) can select multiple responses. As a result, the total percentage will not add up to 100%. For upfront fees, 18% selected “other” and 3% selected “don’t know”. For recoupment fees, 13% selected “other” and 5% selected “don’t know.”  
 \*Upon conclusion of case when other court fees are applied.

sizable proportion of attorneys in our study reported that they never or rarely discuss the fees with clients (Figure 4), a finding more pronounced for upfront fees versus recoupment.

Communication about upfront fees has received specific attention in past literature.<sup>27</sup> More specifically, if a client is unaware that the fee may be waived or deferred, they may waive their right to counsel which increases their likelihood of a poorer case outcome. In our study, some attorneys (12%) reported witnessing an individual waive the right to counsel because they could not pay an upfront fee. Judges may also be more inclined to grant relief for upfront fees because they perceive them to be nominal and do not want an individual to proceed without an attorney.<sup>28</sup> The attorneys in our study reported

**Figure 4. Public Defense Attorneys Are More Likely to Discuss Recoupment Fees With Clients**



*Note:* Respondents for upfront (n=213) and recoupment (n=222) fees also could select “Don’t Know” and “Not Applicable,” which comprised 3% of respondents for upfront fees and 7% for recoupment fees.

that there were options for mitigating the impact of upfront fees, including waiver or deferral (37%), with some jurisdictions offering only waiver (31%) or only deferral (3%). However, only 40% of attorneys estimated that they often or always informed their clients that the upfront fee could be waived or deferred.<sup>29</sup> When attorneys considered the occasions they discussed defender fees with their clients, they recalled that clients expressed greater concern over their ability to pay recoupment (42%) versus an upfront fee (30%).

## Procedural Safeguards to Respond to Defender Fees

Jurisdictions could exert the greatest impact through fee elimination, but that may not be feasible. In this section, we describe the frequency of ground-up approaches that public defense leaders and attorneys can pursue to advocate against the imposition of defender fees. We also explore perceptions of judicial behavior and courtroom culture among public defense attorneys.

### Frequency of Ability to Pay Determinations

Overall, attorneys reported that the ability to pay is considered more often for recoupment (57%) than for upfront fees (42%). Given the larger amount of debt associated with recoupment, we asked attorneys to select all the ways that ability to pay is determined. Approximately one-third (32%) of respondents reported that the judge imposes recoupment at sentencing, and attorneys can cite client's inability to pay. In comparison, roughly another third (29%) indicated that the judge

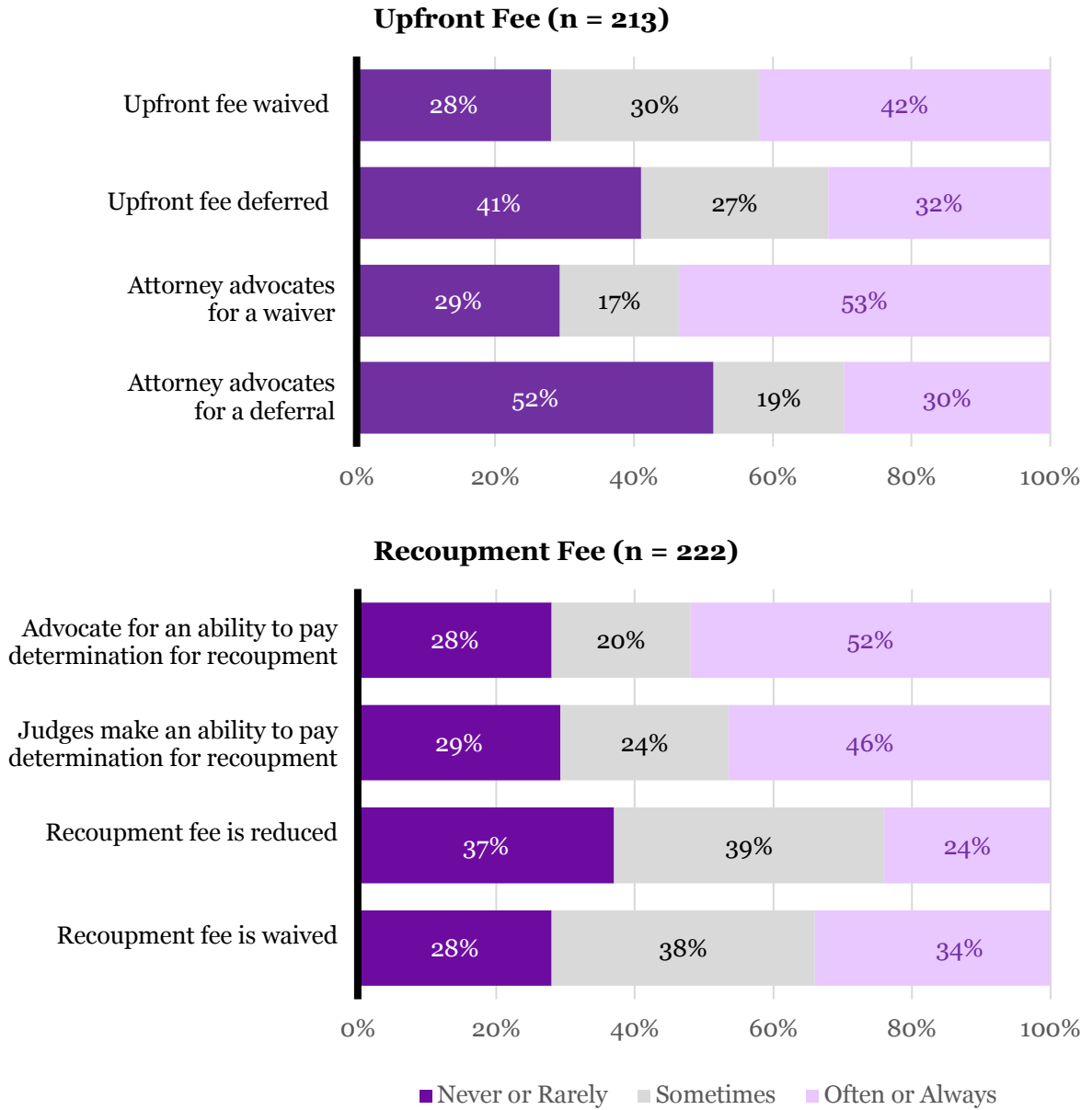
informally probes ability to pay before imposing recoupment. Less common were judges conducting formal ability to pay hearings before imposing recoupment (18%) or judges imposing recoupment at sentencing and requiring the client to file new financial statements to request that ability to pay be considered (13%).

### Frequency of Advocacy and Legal Relief

Attorneys have several options for seeking relief from defender fees. We asked respondents to consider their past courtroom advocacy related to defender fees and the frequency with which they perceived judges responding to their arguments (Figure 5).

- **Deferral or Waiver of Upfront Fees:** Attorneys reported that they do not advocate for deferrals frequently relative to waivers, which suggests that they are more focused on pursuing a remedy that eliminates a fee instead of postponing it. Based on their courtroom experience, attorneys reported that judges are also less inclined to waive an upfront fee rather than defer it.
- **Reduction or Waiver of Recoupment Fees:** Nearly half of attorneys reported that they infrequently advocated for an ability to pay determination. Slightly more than half of attorneys reported that judges infrequently made such a determination. However, attorneys report considerable variability in judges' willingness to waive or reduce recoupment, with most attorneys indicating either form of relief was sometimes granted.

**Figure 5. Public Defense Attorneys Report Considerable Variability in Their Advocacy and in Judicial Decisions**



*Note:* To simplify the figure, we omit responses of “Don’t Know” and “Not Applicable” from the denominator and report what is known as valid percentages. Missing values ranged from 29% to 48% for upfront fees and 17% to 22% for recoupment fees.

To better understand the cultural and procedural challenges attorneys face when advocating for their clients' ability to pay defender fees, most attorneys (41%) reported that their top barrier was judges not making reasonable decisions regarding ability to pay given clients' experiences with poverty. The second most common barrier was the need for adequate guidance on how a court should determine ability to pay (15%). We observed that attorneys were relatively split on the third barrier consisting of procedural hurdles (7%), time constraints to gather documents and evidence (8%), and not knowing the full balance of what clients owe at the time ability to pay is determined (10%).

### **Attorney Awareness of Defender Fees**

One potential reason attorneys may not discuss defender fees with clients or consider them part of advocacy is that they lack awareness of the fees. At the start of our survey, all attorneys (n = 330) reported the state in which they practiced. This response triggered questions informed by text from that state's statute relating to upfront or recoupment fees as identified in NLADA's 2022 report. Overall, attorneys were generally aware of their states' statute on defender fees, with greater awareness reported for recoupment (80%) versus upfront fees (63%). Little over half of attorneys (52% for either fee) noted that their jurisdiction's practices aligned moderately or extremely with statute.

### **Frequency of Attorney Training**

Despite high levels of awareness regarding the state statute, less than a third of all attorneys (30%) reported that they had ever received training on how to advocate for a waiver or reduction of defender fees. Of the 99 attorneys who received training, the majority (70%) received information via public defense training curricula, followed by continuing legal education (22%), informal networks (e.g., colleagues; 11%), or were self-taught (11%).<sup>30</sup> Despite the infrequency of training, of the individuals who did receive training, most (67%) felt it was helpful for their advocacy in waiving or reducing defender fees.



# The Potential for Misaligned Incentives

As detailed above, the attorneys we surveyed reported high levels of opposition to defender fees and were acutely aware of how their clients were impacted by corresponding legal debt. Nevertheless, public defense *leaders* were relatively more supportive of the fees because they offset the cost of the local public defense system. One possible explanation for this relatively greater support is that those in leadership positions may have a wider view of the funding realities and challenges of public defense systems. This begs several questions that can shed light on the misaligned incentives created by defender fees: What types of data do local systems collect concerning defender fees? Do jurisdictions document whether defender fees generate revenue? Which agencies have the power to make decisions about the revenue associated with defender fees?

Concurrent with the data collection period for the attorney survey, we fielded a separate survey of high-level system actors who were presumed to know more about the assessment and collection of defender fees given their role (e.g., chief defenders, court clerks).<sup>31</sup> We hoped to capitalize on the administrative insights of this population to gain insight into the potential for misaligned incentives. Accordingly, this second survey included a section asking respondents to report how jurisdictions collect and track defender fees in their jurisdiction to understand how data collection on the assessments, collections, and outstanding balances

associated with defender fees may potentially increase transparency and open the door to conversations about alternative funding streams for public defense. Although our sample is limited, the findings from 81 individuals in various administrative positions (73% chief/deputy public defenders, 15% leadership from other public defense systems, 9% court administration, and 4% state/local government positions related to public defense) across 28 states mirrors NLADA's findings that how governments apply defender fees to public defense budgets is a black box.<sup>32</sup>

- **Fee Collection:** Respondents reported that courts were the primary gatekeepers for upfront (35%) and recoupment fees (58%). There were small variations across fee type and responsible party. Public defender offices played a slightly more involved role in collecting upfront fees (16%) relative to recoupment fees (9%).
- **Data Tracking:** Less than a quarter (21%) of respondents reported that their jurisdiction was not required to track data on defender fees. Although 40% of respondents reported data tracking was required, slightly over a third (35%) were uncertain about data tracking requirements. When asked to expand on the data collected, a similar proportion of respondents reported their jurisdiction tracked both upfront (25%) and recoupment fees (26%). Data on fee collection was more common for recoupment (37%) compared

to upfront fees (27%) with data regarding fee waiver being less common (10% and 11% respectfully).

- **Estimating Revenue:** Slightly over half (52%) of respondents reported that their jurisdiction could estimate how much revenue was generated by defender fees, and less than a quarter (21%) reported that their jurisdiction could estimate the total amount of unpaid defender fees in a year. Notably, given their role, many individuals who should know about these topics did not know how much revenue was generated (40%) or outstanding debt (53%).
- **Applying Revenue:** Only 28% of respondents reported that defense

systems could decide how to use revenue generated by defender fees. Conversely, 54% indicated that the legislature, state, or county decided how to use revenue generated by defender fees.

These findings suggest two challenges, with misaligned incentives. First, when external actors control revenue, these external actors do not psychologically internalize the costs imposed on individuals and have fewer incentives to reduce the size of defender fees. Second, defense systems heavily dependent on defender fees can only reduce defender fees if they make budget cuts elsewhere, which could also adversely affect clients, or they secure additional funding.

# Discussion

The time is ripe for cross-system conversations about defining the potential problems associated with defender fees and exploring possible solutions. California eliminated defender fees as part of a statewide abolition on all court fees, whereas Delaware and New Jersey passed legislation specifically to eliminate defender fees.<sup>33</sup> From a practice perspective, the American Bar Association updated its principles for public defense delivery systems in 2023, making explicit its position that jurisdictions should not charge individuals eligible for a public defense attorney any defender fees.<sup>34</sup> Policymakers and practitioners ready to tackle the issue can find guidance in local data and research to objectively document both the existing harms associated with defender fees and predict the potential impacts that any intervention—including fee elimination via legislative action or reform to court rules—might have on public defense systems.<sup>35</sup> Even if defender fees generate relatively small revenue,<sup>36</sup> a data-driven approach to documenting *how* public defense systems use that money is needed to ensure jurisdictions are not jeopardizing resources needed to provide effective representation. Such considerations could then be weighed against other potential funding streams to offset any potential shortfall.

Our findings illustrate strong opposition to defender fees from the public defense field. Still, system actors must consider additional nuances to ensure they do not create further harm or unintended consequences through fee elimination. Courts

are primarily responsible for collecting the fees while legislatures and public defense systems typically have the authority to determine how fees are used. Without a clear understanding of *how* defender fees are used and *who* has decision-making power, local system actors are ill-equipped to develop solutions to reduce the misaligned incentives associated with defender fees. When our findings are considered in tandem with those documented in NLADA’s 2022 report, there are several policy and practice considerations jurisdictions may find helpful in addressing defender fees.

## Considerations Related to Fee Elimination

Public defense leaders must balance the impact on clients against the incentives created by the fees to fund defense systems.<sup>37</sup> Indeed, public defense leaders who responded to our survey supported defender fees on account of budgetary reasons. Additionally, when non-defense actors control the revenue, they have interests other than the quality of public defense and they may not consider the costs imposed upon clients. This results in little incentive to enact changes.<sup>38</sup> Our findings from the survey of high-level system actors illustrated the prominent role non-public defense actors play in defender fees. Moreover, both our findings and the case studies conducted by NLADA illustrate the challenges in mapping revenue streams associated with defender fees.

Without a clear understanding of *how* defender fees are used and *who* has decision-making power, local system actors are ill-equipped to develop solutions to reduce the misaligned incentives associated with defender fees. Nevertheless, establishing a common understanding of *why* it is in the best interest of all system actors and accused individuals to have a strong public defense system can be a gateway to deeper conversations about the many ways defender fees may undermine that ideal. An appropriately funded, robust defense system with more experienced attorneys, more manageable case-loads, and specialized programs can pay dividends by improving pretrial outcomes and case dispositions.<sup>39</sup> Jurisdictions should consider sustainable alternative funding source to defender fees.

## Addressing Defender Fees via Courtroom Practices

There are also several ground-up practices that jurisdictions may consider implementing, should they not be positioned to eliminate defender fees entirely. Public defense (including leadership and staff), judges, court staff, and other system professionals must all be fully involved in these practice-oriented steps to maximize their full potential.

- **Communication with Clients About Defender Fees:** Given the variability among respondents' reports of when jurisdictions notify clients of defender fees, the high stakes for clients, and the already confusing nature of the criminal court process, the lack of consistency risks irregularities in the administration of justice.

However, the responsibility for notification should rest with all parties (judges, court staff, and defense attorneys), and it should be given early in the case to allow the client to make informed decisions.<sup>40</sup> What constitutes "effective" notification is beyond the scope of this project. At a minimum, system actors should message information responsibly to avoid increasing the potential waiver of counsel and help the individual understand the potential fee amounts and the options associated with each type of fee.

- **Fair Ability to Pay Determinations:** Approximately half of respondents reported ability to pay was considered as part of the decision-making related to upfront fees (42%) or recoupment (57%). Some of the reason for these low numbers may rest in barriers to defense attorneys advocating for them including, per our respondents: 1) judges not making reasonable decisions considering clients' experiences with poverty and 2) insufficient guidance for the court on determining ability to pay. Judges need better guidelines, restrictions, and training to ensure they make proper ability to pay determinations using the necessary criteria. Although a lesser barrier for attorneys who responded to our survey, jurisdictions should also consistently provide defense counsel with the pertinent information required to challenge inconsistent or insufficiently thorough determinations (e.g., financial screening information for clients, the total amount of debt owed).
- **Training and Education:** Our findings revealed that training on advocacy related to defender fees was

minimal. This represents an opportunity for chief defenders, public defense training directors, and organizations that provide continuing legal education courses to shift culture in jurisdictions dependent on the fees. Because public defense providers are not the only system professionals responsible for clients' experiences with defender fees, judges, court staff, pre-trial services, and others who either administer or have a role in the imposition of these fees (e.g., notification of fees) should also receive training on best practices in fee waiver, reduction, and imposition. In all instances, this training should combine skills training (e.g., motions advocacy for attorneys, fee imposition procedures for judges) with education about the potential harms of defender fees (e.g., the negative effect that defender fees can have on accused individuals' acceptance of public defense representation, designation of payment of defender fees as a condition of probation). Training should also include messaging about the financial harms caused by defender fees that center the voices and perspectives of impacted community members. Finally, jurisdictions should train legal actors on reducing collateral consequences or penalties triggered by defender fees where possible (e.g., decoupling license suspensions from unpaid fees, eliminating interest on fees).

## Limitations and Future Directions

Our national survey of public defense attorneys fills a critical gap in the field by

beginning to document how jurisdictions translate defender fee statutes into local practice, as well as the appetite of public defense attorneys for change. Nevertheless, there are some limitations to consider that will set the stage for future research. First, our sample is not representative and may not reflect the full scope of attorneys' experiences with defender fees. Second, our survey relies upon attorneys' self-reports related to courtroom behavior and their clients' experiences. Finally, the depth of information researchers can gather via survey is always limited.

We encourage future research to build upon what we learned through this study, starting with in-depth interviews with attorneys and clients. Such an approach could help clarify where our findings diverge from past scholarship. It also serves as an opportunity to co-create solutions with those most impacted by defender fees to implement and test the efficacy of novel interventions. Further, we encourage jurisdictions dependent on defender fees to pursue research partnerships to document the extent to which defender fees fund local defense systems. In other words, are you generating revenue, given the costs associated with fee collection? Where does the money flow? Who makes decisions about the utilization of the funds? Are there alternative payment structures or funding sources that yield higher returns at a lower pain point? Failure to address these questions will perpetuate the misaligned incentives embedded in defender fees.

# Endnotes

<sup>1</sup> See the majority opinion drafted by Justice Hugo Black in *Gideon v. Wainwright*, 372 U.S. 335, 1963.

<sup>2</sup> The Sixth Amendment to the U.S. Constitution states, “In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” Until the 1960s, case law acknowledged the right to counsel in state courts only in capital cases (see *Powell v. Alabama*, 287 U.S. 45, 1932). Case law expanded the right to counsel for indigents to include state felony cases (see *Gideon v. Wainwright*, 372 U.S. 335, 1963), misdemeanors (see *Argersinger v. Hamlin*, 407 U.S. 25, 1972), and juvenile delinquency cases, (see *In re Gault*, 387 U.S. 1, 1967).

<sup>3</sup> Beeman, Marea, Kellianne Elliott, Rosalie Joy, Elizabeth Allen, and Michael Mrozinski. 2022. [At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees](#). Washington, DC: National Legal Aid & Defender Association.

<sup>4</sup> In the sixty years since *Gideon v. Wainwright* enshrined the right to counsel for those unable to afford an attorney, the Supreme Court has decided that the government can charge people who qualify for a public defender for those services. In *Fuller v. Oregon* (417 U.S. 40, 1974), the Court found that it did not violate the constitution to impose the fee but qualified the finding to say that a person can be exempt from repayment if doing so presents a “manifest hardship.” The Court held in *Bearden v. Georgia* (461 U.S. 660, 1983) that punishment for failing to pay cannot occur without determining willful neglect or refusal.

<sup>5</sup> We use the term “public defense leaders” to refer to an individual who holds a leadership position in one of the following public defense systems: public defender office, institutional provider, contract system, managed assigned counsel, or assigned counsel (ad hoc).

<sup>6</sup> Graham, Shannon R. and Michael D. Makowsky. 2021. [Local Government Dependence on Criminal Justice](#)

[Revenue and Emerging Constraints](#). *Annual Review of Criminology* 4(1): 311–330.

<sup>7</sup> Boddupalli, Aravind and Livia Mucciolo. 2022. [Following the Money on Fines and Fees: The Misaligned Fiscal Incentives in Speeding Tickets](#). Washington, DC: The Urban Institute.

<sup>8</sup> Menendez, Matthew and Lauren-Brooke Eisen. 2019. [The Steep Costs of Criminal Justice Fees and Fines](#). New York, NY: Brennan Center for Justice.

<sup>9</sup> For example, the Department of Justice’s investigation into the Ferguson Police Department exemplified the ways that dependence on fines and fees to fund the criminal legal system creates conflicts of interest and misaligned incentives for system actors. Please see U.S. Department of Justice Civil Rights Division. 2015. [Investigation of the Ferguson Police Department](#). Washington, DC: U.S. Department of Justice.

<sup>10</sup> Beeman et al. *supra* note 3.

<sup>11</sup> Federal Reserve Board. 2020. [Report on the Economic Well-Being of U.S. Households in 2019, Featuring Supplemental Data from April 2020, May 2020](#). Washington, DC: Board of Governors of the Deferral Research System.

<sup>12</sup> Hammons, Briana. 2021. [Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?](#) Fines & Fees Justice Center.

<sup>13</sup> See, for example, Fines & Fees Justice Center and the Wilson Center for Science and Justice. 2023. [Debt Sentence: How Fines and Fees Hurt Working Families](#). Fines & Fees Justice Center; Gaebler, Johann D., Phoebe Barghouty, Sarah Vicol, Cheryl Phillips, and Sharad Goel. 2023. [Forgotten But Not Gone: A Multi-State Analysis of Modern-Day Debt Imprisonment](#). *PLOS ONE*, 18(9); Harris, Alexes., Heather Evans and Katherine Beckett. 2010. [Drawing Blood from Stones:](#)

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Legal Debt and Social Inequality in the Contemporary United States. *American Journal of Sociology* 115(6): 1753–1799; Ruback, R. Barry. 2015. The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society. *Minnesota Law Review* 99(5): 1779–1835.

<sup>14</sup> Eichenthal, David. 2020. The Cost of Collection: Rethinking Criminal Justice Fees & Fines as a Revenue Source. Center for Justice & Safety Finance.

<sup>15</sup> Although no studies have evaluated the causal impact of defender fees on public safety or financial outcomes, researchers are starting to build upon prior descriptive and correlational studies of fines and fees. In Oklahoma, researchers conducted a randomized controlled trial where the treatment group had all fines and fees cleared. Although the two groups did not differ in terms of recidivism measures, individuals in the control group made payments that amounted to less than 5% of the outstanding debt and were more likely to be saddled with new warrants and tax refund garnishment (please see Pager, Devah, Rebecca Goldstein, Helen Ho, and Bruce Western. 2022. Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment. *American Sociological Review* 87(3): 529-53). A multi-state quasi-experimental study (consisting of states covering 24% of the U.S. population) found that more fines and fees did not affect recidivism or labor market outcomes. Finlay, Keith, Matthew Gross, Carl Lieberman, Elizabeth Luh, and Michael Mueller-Smith. 2023. The Impact of Criminal Financial Sanctions: A Multi-State Analysis of Survey and Administrative Data. *National Bureau of Economic Research*, Working Paper w31581.

<sup>16</sup> Upfront fees, where they exist, are typically a fixed amount between \$10 and \$400, with most fees being less than \$100. Recoupment fees may be up to the actual cost of representation or capped at hundreds or thousands of dollars. Moreover, states vary in terms of when jurisdictions can impose defender fees. All clients may have to pay an upfront fee, but depending on the state statute, recoupment can apply only to those adjudicated guilty or to those who were acquitted or had their cases dismissed. For a deeper discussion, including the role of defender fees in revocation of probation, see Beeman et al. *supra* note 3.

<sup>17</sup> Beeman et al. *supra* note 3.

<sup>18</sup> Gill, Lauren. 2024. If You Can't Afford an Attorney, One Will Be Appointed. And You May Get a Huge Bill. New York, NY: The Marshall Project.

<sup>19</sup> Porter, Devon. 2017. Paying for Justice: The Human Cost of Public Defender Fees. Los Angeles, CA: American Civil Liberties Union of Southern California. In 2021, legislation took effect that eliminated defender fees as part of the elimination of all court fees in California.

<sup>20</sup> We included several screening questions at the start of the survey to ensure that only criminal defense attorneys practicing in state and local public defense systems participated in the study. If attorneys reported they were federal public defenders, only took federal appointments, had knowledge of only civil case processes in their jurisdiction, or did not accept court-appointed work, they could not proceed with the survey. For those who passed the initial screening, we included a series of critical terms to establish a common language amongst respondents, given the patchwork nature of public defense systems nationwide. We used the term public defense to refer to several systems: 1) a public defender office (government office that employs criminal defense attorneys who get paid a salary to represent clients that cannot afford a lawyer), 2) institutional provider (defined as a not-for-profit that contracts with the government to provide the public defense function and pays attorneys a salary), 3) contract system (defined as a group of lawyers or a law firm that enters into a contract with the government and agrees to represent indigent clients brought before the court in that jurisdiction), 4) managed assigned counsel (defined as a lawyer that works in private practice and gets paid by the government to represent clients that cannot afford a lawyer on a case-by-case basis while being overseen or trained to varying degrees by government or bar associations), or 5) assigned counsel (ad hoc; defined as lawyers whom a judge appoints on a case-by-case basis with little or no oversight and training).

<sup>21</sup> In our list of key terms, we also established a common language related to defender fees. First, we defined defender fees as “fees for receiving public defense representation,” to ensure they would not be confused with other fees individuals may incur as part of their defense (e.g., fees for experts or forensic testing). Next, we specified that we would ask about two types of fees: 1) upfront fees (“often referred to as an upfront, appointment, or registration fee that clients must pay to access

representation. In practice, judges may defer these fees to the end of the case”) and 2) recoupment or reimbursement fees (“a client will be asked to pay back some or all of the cost of their representation after the proceedings have concluded”). Finally, we included definitions for 1) waiving a fee (“after a fee is assessed, the defendant or defendant’s counsel may seek to have it waived due to defendant’s inability to pay it”) and 2) ability to pay determination (“inquiry by the court into an individual’s ability to pay assessed fees without undue hardship”).

<sup>22</sup> After an initial fielding period (December 2022 to April 2023), the research team restructured the survey sections to reduce the response burden on attorneys. The restructured survey started broadly asking all attorneys to respond to the first two sections to capture high-level information on both types of fees. Depending on the state in which respondents practiced, the survey would populate sections three and four based on the defender fees NLADA identified in the state statute. The fee-specific sections generally started with items related to respondents’ awareness of each fee, the concerns of clients, and whether judges considered ability to pay. Despite these changes, survey engagement remained low. In October 2023, we made an additional revision to shorten the survey further. We moved several questions to an optional subsection for each fee type, where we asked attorneys if they would be willing to answer these additional questions or proceed to the end of the survey. We fielded this final survey version from October 2023 until January 2024.

<sup>23</sup> In total, 484 respondents completed the survey, but after removing ineligible attorneys (n = 122) and those with high rates of missing data (n = 32), the base sample is 330 respondents. The majority (n = 229) completed the final version of the survey fielded between October 2023 and January 2024, with the rest (n = 101) having participated before the changes described in *supra* note 22.

<sup>24</sup> Private attorneys include individuals who affirmed their current role as panel attorneys or provided an open-ended response indicating they took cases through a contract system, managed assigned counsel system, or assigned counsel system (ad hoc). To verify classification further, open-ended responses were cross-referenced with responses to closed-ended questions about their defense system of practice.

<sup>25</sup> There are three optional sections which we restrict to only those of the 330 respondents in the base sample who opted into the corresponding optional sections to minimize missing data: 1) the impact of fees (n = 298), 2) additional upfront fee questions (n = 213), and 3) additional recoupment fee questions (n = 222).

<sup>26</sup> Percentages represent to combination of respondents who reported they “agreed” or “strongly agreed.”

<sup>27</sup> Porter *supra* note 19.

<sup>28</sup> Wright, Ronald F. and Wayne A. Logan. 2006. The Political Economy of Application Fees for Indigent Criminal Defense. *William. & Mary Law Review* 47: 2045 – 2087.

<sup>29</sup> Response options included never (8%), rarely (11%), sometimes (9%), often (17%), and always (23%), with the remaining 33% comprised of missing data (don’t know or not applicable).

<sup>30</sup> Percentages exceed 100% because respondents could select all that apply. These responses also include ten individuals who indicated they were unsure if they had ever received training on waiver or reduction of defender fees, increasing the denominator from the 99 attorneys who reported “yes” to n = 109.

<sup>31</sup> Given the small sample and parallel findings with the attorney survey, we limit our discussion to the only novel domain (data tracking on defender fees). For more information, please contact the author.

<sup>32</sup> Although Beeman et al. *supra* note 3 (p.12-16) report that 24 states use a portion of defender fees to fund public defense systems, there is significant variability in where revenue from defender fees is directed (e.g., general fund vs. public defense fund). Additionally, there are severe limitations in tracking what is assessed and collected. In states where the authors could find estimates, the collected fees comprised anywhere from 1.6% to 6.7% of agency budgets.

<sup>33</sup> In 2020, the California legislature passed AB 1869, which repealed counties’ authority to charge criminal defendants for any of 23 different court fees, including defender fees. The bill appropriated \$65 million to counties to backfill revenues lost from these fee repeals. AB 1869 went into effect on July 1, 2021. In 2022, the Delaware legislature repealed several criminal fines and



fees, including defender fees, with [HB 244](#). Previously, courts were authorized to charge a \$100 administrative fee for public defense services. The bill went into effect on April 3, 2023. Finally, in 2023, the New Jersey legislature passed [A5587/S3771](#), which eliminated defender fees, along with liens and warrants issued for public defense services statewide, with retroactive effect. Previously, the state charged recoupment with schedule-based criminal court fees ranging from \$150 to \$750, with additional fees possible for trials lasting longer than five days. The bill became effective on June 30, 2023.

<sup>34</sup> American Bar Association. 2023. [Ten Principles of a Public Defense Delivery System](#). Chicago, IL: American Bar Association.

<sup>35</sup> If legislative pathways are blocked, the judiciary can provide another opportunity for top-down elimination of defender fees via amendment of court rules that authorize assessing the fees or the amounts. For example, the Rules of Criminal Procedure sets Alaska’s defender fee cost schedule. Similarly, court rules in Idaho authorize unpaid defender fees as a condition of probation. In these instances, the judiciary can take direct action. The judiciary could also guide courts in administering defender fees through bench cards and advice-of-rights templates. See Beeman et al. *supra* note 3.

<sup>36</sup> For example, in Iowa, the government collected no more than 3.4% of imposed defender fees from 2014 to 2021. In Vermont and Wyoming, collected defender fees comprise 1.6% and 6.7% of statewide public defender budgets, respectively. See Beeman at al., *supra* note 3.

<sup>37</sup> Wright and Logan *supra* note 28.

<sup>38</sup> Wright and Logan *supra* note 28.

<sup>39</sup> See, for example, Anderson, James M., Maya Buenaventura, and Paul Heaton. 2019. [The Effect of Holistic Defense on Criminal Justice Outcomes](#). *Harvard Law Review* 132(3): 821–893; Anwar, Shamena, Shawn D. Bushway, and John Engberg. 2023. [The Impact of Defense Counsel at Bail Hearings](#). *Science Advances* 9(18): 1–1; Heaton, Paul. 2021. [Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities](#). *Indiana Law Journal* 96(3): 701–750; Mahler, Amy. 2023.. [The Impact of Working Conditions on Productivity: Evidence from the U.S. Public Defense System](#).

<sup>40</sup> Porter *supra* note 19.