



SECURING REASONABLE CASELOADS

ETHICS AND LAW IN PUBLIC DEFENSE

NORMAN LEFSTEIN



AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS



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His professional activities include serving as Chair of the American Bar Association Section of Criminal Justice; as a member of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID); as chair of SCLAID's Indigent Defense Advisory Group; and as Chief Consultant to a Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States. For seventeen years, Professor Lefstein chaired the Indiana Public Defender Commission to which he was appointed by Indiana Governors. He also has frequently been an expert witness in proceedings concerned with professional ethics and/or defense representation.

Professor Lefstein was a member and co-reporter for the National Right to Counsel Committee, organized by The Constitution Project and the National Legal and Defender Association. In this capacity, he played a major role in writing *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, published in 2009. He also was the reporter for the ABA *Eight Guidelines of Public Defense Related to Excessive Defender Workloads*, approved by the American Bar Association in 2009.

During the 1970's, Professor Lefstein served as Reporter for the Second Edition of *ABA Criminal Justice Standards Relating to The Prosecution Function, The Defense Function, Providing Defense Services, and Pleas of Guilty*. In 1982, Professor Lefstein wrote *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, sponsored by ABA SCLAID; and in 2004, he co-authored *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, also an ABA SCLAID publication. His law review articles concerned with indigent defense include an extensive study comparing public defense in the United States with criminal legal aid in the United Kingdom.

In 2005, Professor Lefstein was honored as recipient of the Champion of Indigent Defense Award, presented by the National Association of Criminal Lawyers.

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2011

This book is sponsored by the
American Bar Association Standing Committee on Legal Aid and Indigent Defendants.

The Standing Committee gratefully acknowledges the generous assistance of
Atlantic Philanthropies, which has supported the book's preparation and publication.

The book can be accessed on the Internet at www.indigentdefense.org.

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Library of Congress Control Number: 2011-939531

ISBN: 0-615-54376-6

13-Digit ISBN: 978-0-615-54376-5

Printed in the United States of America.

In recognition of the thousands of dedicated public defense lawyers
prevented from fully discharging their professional duties
because of too many cases and inadequate support.

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Foreword

For all those committed to justice, which I hope includes all Americans, this is a vital book by the nation's leading scholar on indigent defense systems. For more than 40 years, Dean Norman Lefstein has studied public defense in the U.S. After serving as a public defender at one of the best defender organizations in the nation in Washington, D.C., he became a scholar and writer, a consultant to the American Bar Association and The Constitution Project, among other organizations, and an expert witness in cases pertaining to indigent defense. His book is truly the first of its kind in a sorely understudied field.

Our nation's public defense systems in state courts, with few exceptions, should be a source of great embarrassment for all of us: judges, bar associations, lawyers, public officials, and all other citizens. For nearly half a century, almost every state has persistently underfunded public defenders and private lawyers who represent the indigent in criminal and juvenile cases. Such widespread resistance to the clear mandate of the Constitution, as articulated in the U.S. Supreme Court's seminal 1963 right-to-counsel *Gideon* decision and its progeny has, in effect, created one of our legal system's most shameful deficiencies, greatly exacerbated by the Court's unrealistic and damaging 1984 decision in *Strickland v. Washington*, which failed to impose meaningful and enforceable standards to ensure the effective assistance of counsel.

This undisputed and sad state of affairs undermines, indeed vitiates, respect for the rule of law both here at home and abroad and makes a statement to the world about who we are as a people and a society, a statement that we must no longer tolerate.

In this book, Dean Lefstein shows us a viable way forward, examining not only the problem of underfunding but also the structural problems in our public defense systems, including the lack of independence and control over intake and the absence of the private bar's role as an essential "safety valve" to avoid overwhelming caseloads.

This book serves as an insistent wake-up call for all of us, particularly for lawyers and judges who have taken an oath that we will never reject or ignore the causes of the oppressed or defenseless. For too long, we have tolerated, through ignorance or design, systems of indigent defense that violate the Constitution, our own Rules of Professional Conduct, and common standards of human decency.

Dean Lefstein's portrait of our nation's indigent defense systems is not totally negative. He provides examples of excellent programs that have succeeded in overcoming excessive caseloads and other impediments to justice. He thus prescribes for us a clear vision of a more promising future. The challenges are immense and the cause is unpopular.

The primary responsibility for achieving meaningful improvements unquestionably rests upon the shoulders of a profession that claims, but in this context has too often ignored, its honorable professional calling and noble history.

William S. Sessions

Partner, Holland & Knight LLP; Director, Federal Bureau of Investigation, 1987–1993; Judge, United States District Court for the Western District of Texas, 1974–1987, Chief Judge, 1980–1987; United States Attorney, Western District of Texas, 1971–1974

Preface

For the criminal justice system to work, adequate resources must be available for police, prosecutors and public defense. This timely, incisive, and important book by Professor Norman Lefstein looks carefully at one leg of the justice system's "three-legged stool"—public defense—and the chronic overload of cases faced by public defenders and other lawyers who represent the indigent. Fortunately, the publication does far more than bemoan the current lack of adequate funding, staffing, and other difficulties faced by public defense systems in the U.S. and offers concrete suggestions for dealing with these serious issues.

Professor Lefstein's book is sponsored by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) with generous support from the Atlantic Philanthropies. SCLAID is the ABA's longest-running standing committee. Throughout our 90-year history we have worked to improve legal services for the poor in both the civil and criminal defense areas. In the field of public defense, we have helped to start defender programs, and we continue to provide technical assistance to bar associations and public defender offices through our Bar Information Program (BIP).

During the past decade, several of SCLAID's significant initiatives have become ABA policy. These include the "Ten Principles of a Public Defense Delivery System" (2002), which constitute the fundamental criteria necessary to deliver effective, high quality, ethical, conflict-free representation to indigent accused persons. In addition, we sponsored the "Eight Guidelines of Public Defense Related to Excessive Workloads" (2009), which provide guidance to public defense programs and lawyers when confronted with too many persons to represent and are thus prevented from fully discharging their duties under professional conduct rules. SCLAID also played a major role in encouraging the ABA's Standing Committee on Ethics and Professional Responsibility to issue Formal Opinion 06-441, outlining the ethical duties of lawyers and public defense programs when dealing with excessive caseloads.

Professor Lefstein's book draws upon these major policy developments in the field of public defense, but it also goes beyond them as he discusses a wide variety of related subjects that are not covered by ABA policies. Given SCLAID's commitment to advancing the right to counsel for the indigent, it is fitting that we should be involved in Professor Lefstein's extensive treatment of the excessive caseload problem. During his professional career, he has studied defense services in the U.S. and abroad, worked closely with the ABA in the development of ABA standards and guidelines on defense representation, and published widely on the subject.

Obviously, Professor Lefstein's recommendations that are not covered by approved ABA policies are his and do not necessarily reflect the views of either the Association or SCLAID. But given his background in the area of indigent defense, as well as his roadmap for addressing excessive caseloads and other structural problems in providing defense services, we urge that his ideas be carefully considered.

Robert E. Stein

Chair, ABA Standing Committee on Legal Aid and Indigent Defendants, 2009–2012

Acknowledgements

I am grateful to those organizations and persons whose names appear below, as well as many others too numerous to mention.

First, I thank Atlantic Philanthropies, which provided financial support for this book and for my efforts in developing, in cooperation with others, the American Bar Association *Eight Guidelines of Public Defense Related to Excessive Workloads* (2009), which are discussed in Chapter 2. In addition, I want to acknowledge the contribution of John Terzano, who served as President of the former Justice Project of Washington, D.C., and Joyce McGee, formerly Executive Director of the Justice Project. Mr. Terzano arranged a grant from Atlantic Philanthropies that was awarded to the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID), which in turn asked me to write this book.

Because of their encouragement and assistance, I am indebted to the members of ABA SCLAID; its chair, Robert Stein; and to the committee's outstanding staff, including Terry Brooks, Chief Counsel; Tamaara Piquion, Program, Events and Data Manager; and Lavernis Hall, Administrative Assistant. I am especially indebted to Georgia Vagenas, Assistant Counsel to the Committee, with whom I worked closely throughout the several years that I devoted to this project.

Just before this book's completion, in cooperation with staff of ABA SCLAID, we decided that I should prepare an additional publication containing an Executive Summary and Recommendations of this book's contents. This separate publication is expected to be completed by the end of 2011 and will be posted on an Internet website along with the book itself.

I also appreciate the help of Kyle Galster, my assistant at the Indiana University School of Law–Indianapolis, for her usual excellent service. In addition, I want to recognize the assistance provided to me by Richard Humphrey, Reference Librarian, and Miriam Murphy, Associate Director, of the law school's Ruth Lilly Law Library.

Several graduates of the Indiana University School of Law–Indianapolis performed important background research for me during the book's preparation. I thank Kathleen Casey and Jillian Genaw for their efforts and particularly Ryan Farner, who labored diligently for a number of months researching a wide variety of subjects discussed in this book.

Any mistakes in this book are mine and in no way attributable to my research assistants or to those who offered advice to me about its content. Similarly, the recommendations in this book, which are not existing ABA policy, are mine and do not

necessarily reflect the views of ABA SCLAID members or the members of “IDAG”—the Indigent Defense Advisory Group of ABA SCLAID.

While writing this book, I met with IDAG members on several occasions to discuss its content. Periodically, I also sent drafts of my manuscript to IDAG members and sometimes received from them valuable suggestions to improve the publication. The members of IDAG consisted of its chair, Jean Faria, State Public Defender of Louisiana; Adele Bernhard, Associate Professor, Pace University School of Law; James Bethke, Director, Texas Task Force on Indigent Defense; Robert Boruchowitz, Professor from Practice, Seattle University School of Law; Edwin Burnette, Vice President, Defender Legal Services, National Legal Aid & Defender Association; Hon. James Duggan, Associate Justice, New Hampshire Supreme Court; Dennis Murphy, Director of Training for the Criminal Practice, New York Legal Aid Society; James Neuhard, former State Appellate Defender of Michigan; and Robert Weeks, former public defender in Santa Clara County, California. Moreover, two other experts in matters of public defense, Robert Spangenberg and David Newhouse, received drafts of the book and offered comments.

In Chapter 8, I summarize three impressive public defense programs that I visited in preparation for writing this book. The heads of the programs, their staffs, and other persons familiar with their operations were generous with their time and extremely helpful to me. I particularly thank Avis Buchanan, Director of the District of Columbia Public Defender Service; William Leahy, former Chief Counsel, Massachusetts Committee for Public Counsel Services; and John Digiacinto, Chief Defender, San Mateo County (California), Private Defender Program.

Further, I express my appreciation to William Sessions, partner in Holland & Knight, Washington, D.C., and former United States District Court Chief Judge and former Director of the Federal Bureau of Investigation, who has written a Foreword for this book. In addition, I want to thank Stephen Hanlon, partner in Holland & Knight, Washington, D.C., with whom I had a number of helpful discussions about this publication and its content.

I also especially want to recognize my faculty colleague, Joel Schumm, Clinical Professor of Law, Indiana University School of Law–Indianapolis, who served as my editor for this book and contributed important substantive and stylistic suggestions.

Finally, I thank my wife, Diane Lanman, who put up with me during the months that I researched and wrote this book. She is now rejoicing at its completion.

Norman Lefstein

November 2011

INTRODUCTION

During 2008, I exchanged a series of e-mails with an assistant public defender in a state far from Indianapolis, where I live. His first e-mail arrived in late February, and we communicated with each other frequently until mid-June 2008, usually via e-mail but occasionally on the phone. The lawyer was a stranger to me when I received his initial e-mail, and we still have never met.

The defender, whom I will call “Pat,” not his actual name, was employed in a large public defender agency in a northeastern metropolitan city. In one of his first e-mails, Pat told me that he was a recent law graduate, who at the age of thirty-seven was older than most new assistant public defenders. Pat wrote to me because he had read an article that I coauthored about dealing with excessive caseloads in public defense,¹ and Pat was certain that he had a truly excessive number of cases, consisting primarily of misdemeanor cases but also including a few felonies. Here is an excerpt from his first e-mail to me:

I started this job in August of 2007. The first time I counted my open cases, I stopped at 315. A few months later, it was up to roughly 330–340. The most painful and infuriating aspect of this is the impact on the defendants. Where do I even begin? People are going to jail because of my inability to devote enough time to their case. I appear in three courts before six judges. I am going to file motions to withdraw with each judge ...²

The e-mail ended with a request for a sample motion to withdraw. I advised Pat that before filing withdrawal motions he needed to discuss the matter with his supervisor and, if necessary, the head of the defender office.³ He dutifully followed my advice, but discussions with the leaders of his defender agency did not go well. Here is what Pat later wrote to me:

I spoke to the new supervisor who is set to take over in roughly two weeks. I mentioned the motion to withdraw. She immediately told me a story about a felony attorney who apparently filed the same and was promptly fired. Also, she discussed the potential for office-wide repercussions in the form of losing money, other people losing their jobs, that sort of thing. She had a stack of resumes on her desk and, as I left her office, said “I’ll continue looking for your replacement.”⁴

¹ Norman Lefstein and Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, 30 THE CHAMPION 10 (Nat’l Assoc. Crim. Defense Lawyers, December 2006) [hereinafter, Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*], available at www.indigentdefense.org.

² E-mail from Pat (Feb. 28, 2008, 8:28 a.m., EST) (on file with author).

³ This advice was consistent with rules of professional conduct and an ethics opinion of the American Bar Association. See *infra* notes 2–9 and 36–54 and accompanying text, Chapter 2.

⁴ E-mail from Pat (March 19, 2008, 2:27 p.m., EST) (on file with author). The additional e-mails from

In subsequent e-mails and in phone conversations with Pat, it became increasingly evident that Pat was under enormous pressure not to challenge those in charge of the agency and to refrain from filing motions to withdraw. Here are sample excerpts from Pat's e-mails:

March 20, 1:59 p.m. Just finished getting admonished and belittled by the head of the office, the guy who is second in charge, and the incoming and outgoing supervisors. They totally lowered the hammer on me. Their reaction [was that] I [was] using "the nuclear option," "could destroy the office" ... The operative word was "disastrous." Over and over and over.

March 20, 4:31 p.m. This is the letter that I got from the incoming supervisor. "As a follow-up to [our earlier meetings], I am informing you explicitly that you do not have the authority to file a motion [to withdraw]."

March 28, 10:48 a.m. I spoke to my incoming supervisor. I described not being able to return phone calls, file motions, prepare for trial, that sort of thing. She literally looked at me as if I were describing unearthly phenomena. As I left her office, she said, "I'll just keep going through these resumes so I can find your replacement."

My current supervisor came into my office later in the day. Basically, he told me that he wishes he could back me up, that there will be an intense battle if I file, and that my bosses are scared and embarrassed of me and by me because I present a direct challenge to their authority. They've been here a long time and have towed the line, never challenged the status quo and have patted themselves on the back for doing so.

June 11, 8:19 a.m. I'm done. My last day will be June 27th. Between June 13 and June 20, I have 18 bench trials and 6 hearings scheduled, in addition to the regular dockets. Since giving notice, a gradual sense of relief has washed over me.

Pat never did file motions to withdraw seeking to reduce his caseload. However, in his last e-mail quoted above, Pat said that before departing the office, he planned to file a single "symbolic" motion to withdraw before one of the judges before whom he regularly appeared,⁵ but he never confirmed that even this was done. In the end, Pat left the defender agency, disheartened by his caseload, his inability to represent his clients the way he knew they should be represented, and wholly unsupported by his supervisors, including the head of the defender agency. Just to underscore the last point, in one of his emails to me, Pat described a conversation with the head of the agency, who told

"Pat," quoted below and for which there are not citations, have been retained in my files.

⁵ E-mail from Pat (June 11, 2008, 8:19 a.m., EDT) (on file with author).

him that “the courts I work in are ‘triage’ courts and that nothing can be done or will change.”⁶

I have reflected often about Pat and what happened to him during his relatively brief employment as an assistant public defender. His story, unfortunately, says a lot about public defense in many state courts across the country, and it raises a host of questions that I determined to address in this book. Notice that I said “state courts.” This is not accidental, because the problem of out-of-control caseloads is in *state* courts not in the federal courts, where the funding has long been greater than among the states.

I never doubted that Pat had too many clients to defend and that his caseload was preventing him from providing the kind of competent representation that rules of the legal profession require.⁷ Many years ago, I represented clients in criminal and juvenile cases, and I also directed a public defender agency that successfully controlled the caseloads of its attorneys. I simply could not imagine simultaneously trying to represent more than 300 clients charged with criminal conduct. I knew that my reaction to the situation would have been exactly the same as Pat’s. Based upon my personal experience and my research of public defense, I had enormous empathy for the situation in which Pat found himself.

As reported in a wide variety of studies, some of which are cited in Chapter 1, public defenders frequently have caseloads similar to Pat’s or even worse.⁸ Because the

⁶ E-mail from Pat (March 9, 2008, 5:32 p.m., EST) (on file with author). The director of Pat’s office verbalized what many chief defenders and assistant defenders are probably reluctant to admit. Consider the similarity of Pat’s situation with statements contained in a government report published several years earlier:

Many defenders who face excessive caseloads make decisions analogous to those made by physicians in a M.A.S.H. unit. They perform triage. Defendants facing serious felony charges receive primary attention, whereas defendants facing misdemeanor, juvenile delinquency, or lower-level felony charges receive much less. Too often in these cases, early investigation and regular client communication fall by the wayside.

KEEPING DEFENDER WORKLOADS MANAGEABLE, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE 4 (2001) [hereinafter KEEPING DEFENDER WORKLOADS MANAGEABLE], *available at* <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>. Others who have written about excessive caseloads in public defense have made similar points. For discussion of a failure to communicate sufficiently with the client and lack of adequate investigations as a result of excessive caseloads, *see, e.g.*, Edward C. Monahan & James C. Clark, *Coping with Excessive Workload*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 318, 322, 324 (Rodney J. Uphoff, ed., 1995) [hereinafter Monahan, *Coping with Excessive Workload*].

⁷ *See infra* notes 3–5 and accompanying text, Chapter 2.

⁸ Sometimes private practice lawyers who furnish defense representation on contracts or in return for hourly fees also have excessive caseloads. For example, a former Michigan prosecutor and state bar president has pointed out that low fee schedules encourage private lawyers to “take too many cases to earn enough money to support themselves, and are not able to effectively represent all of their clients.” Nancy J. Diehl, *What If you Couldn’t Afford Perry Mason*, MICH. B. J., Nov. 2004, at 13. However, the problem of excessive caseloads is far more pervasive among public defenders

problem has been well documented, this book is less about the existence of excessive caseloads in public defense than what can be done about them. For example, in hindsight, I have wondered whether Pat could have handled his situation differently than he did. Suppose he had just gone ahead and filed motions to withdraw and been fired. Could he have sued for damages, claiming wrongful termination under employment law principles? I also have wondered whether he should have reported his supervisors and the head of the agency to the state's disciplinary body, suggesting that their conduct was inconsistent with their duties under professional conduct rules. Finally, Pat's plight fueled my speculation about why so few defenders complain when they find themselves with caseloads like Pat's, and if anything can be done about this state of affairs.⁹

But it is not just the individual lawyer with whom we should be concerned. We should be equally concerned with the options available to the heads of defender programs who are confronted with too many cases and too few staff. What should the heads of defense programs do when this occurs? How aggressively should they seek to control the caseloads of their lawyers? Surely they should do more than Pat's boss, who denied the problem's existence; but should they routinely file motions to withdraw and seek to curtail the assignment of new cases? If judges continue to pile on cases despite motions to withdraw, should public defenders force judges to pursue contempt proceedings? Is broad, systemic litigation, the answer? And if litigation is the appropriate course, what steps can be taken to ensure its success? Also, are there alternatives to litigation that are likely to be successful? Can case-weighting studies and the use of time records

than among private lawyers, and remedying the problem is much more difficult for public defenders. Lawyers who accept cases for hourly fees normally can avoid excessive caseloads by informing those making assignments that they are not available for additional appointments. Contract lawyers can negotiate contracts that do not place unreasonable caseload burdens on them. The American Bar Association has recommended that all contracts for defense services should include provisions containing "allowable workload limits for individual attorneys, and measures to address excessive workloads . . ." ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-3.3 (b)(v) (3d ed., 1992) [hereinafter ABA PROVIDING DEFENSE SERVICES]. For further discussion of private lawyers and excessive caseloads, *see infra* notes 21–24 and accompanying text, Chapter 1.

- ⁹ In his last e-mail to me, Pat discussed the reactions of his fellow assistant public defenders:

As word has spread [of my decision to leave the defender agency] and people have come into my office to talk, I've told more of them about the motion to withdraw [idea] and the reaction of the higher-ups. Most have expressed something akin to agreement about the caseload and the motion to withdraw, shock about the reaction of the higher-ups, but no real solidarity.

E-mail from Pat (June 11, 2008, 8:19 a.m., EDT) (on file with author). But even if there are not a lot of defenders like Pat who complain, I also am convinced that Pat's situation is not unique. Over the years, I have heard of other defenders just like Pat who have been threatened with termination if they filed motions to withdraw from any of their cases or were fired for doing so. In fact, as noted earlier, Pat's supervisor told him of a defender who was fired for filing a motion to withdraw. For this reason, I have included Chapter 5, "Remedies for Defenders Terminated Due to Caseload Challenges."

maintained by lawyers enable a defender program to make the case for additional resources? What are the risks to defense programs if they do nothing despite genuinely excessive caseloads?

In the pages that follow, I address these kinds of questions, as well as others. I also discuss several defense programs that have had success in controlling their caseloads and the reasons for their success.¹⁰ In the book's final chapter, I offer suggestions for dealing with structural problems in the delivery of defense services that contribute to excessive caseloads and ways to challenge such caseloads through litigation.

Pat's story is not the only impetus for this book. My interest in the subject was heightened by my involvement in 2005, along with others, in urging the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility to issue a formal ethics opinion dealing with the responsibility of public defenders and other lawyers confronted with excessive caseloads. The resulting ethics opinion, released in 2006 and discussed later,¹¹ has not gone unnoticed either by the public defender community or by the courts. The opinion makes clear that all lawyers, including those representing the indigent, must take action to try and reduce their caseloads if they have too many cases and must, if appropriate, seek to withdraw from cases and avoid additional assignments to cases. A few defender offices have sought to invoke the opinion's admonitions, although it has not had nearly as much impact as I had hoped. The full history of the opinion's impact on public defense across the country is still being written, however.

Quite aside from what the opinion says about the rules of professional responsibility and the duties of defenders, the opinion is really about the quality of justice in America's criminal and juvenile courts. Defenders who have excessive caseloads all too frequently are providing a kind of representation that is neither competent nor diligent and certainly not of the quality expected by a client of financial means who hires a well-trained, private lawyer with adequate resources and sufficient time to devote to the client's case. In contrast, when excessive caseloads are the norm, there are insufficient client interviews, motions are not filed for pretrial release and other purposes, investigation of the client's case is either inadequate or nonexistent, and preparation for hearings, trials, and sentencing, to mention just a few of the defense lawyer's basic

¹⁰ The primary focus throughout this book is on caseloads of defense lawyers who handle felonies, misdemeanors, and juvenile cases in trial courts. It does not deal specifically with caseloads of lawyers who provide representation in capital cases at trial and on appeal. Death penalty representation requires vastly more time and effort than the defense of noncapital criminal cases and juvenile delinquency charges. Accordingly, lawyers who provide defense services in capital cases must have substantially reduced caseloads in order to provide effective representation. *See, e.g.,* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 6.1 Workload (rev. ed. 2003).

¹¹ *See infra* notes 36–54 and accompanying text, Chapter 2.

tasks, are given short shrift.¹² The result is that the accused is not treated fairly, which is the essence of due process of law, and frequently the justice system incurs both damage to its reputation and unnecessary expense.¹³

In addition, as we have painfully learned as a result of the advent of DNA evidence, innocent people are sometimes convicted while those who should be punished remain free and able to offend again; and excessive caseloads in public defense undoubtedly contribute to the problem. An extensive report on indigent defense in the United States summed up the current state of affairs:

[W]e are convinced that defendants who are innocent—and there are an unknown number who are—stand virtually no chance of avoiding conviction absent dedicated representation by attorneys who can . . . find witnesses, cross-examine skillfully, and otherwise offer an effective defense to counter the state’s false evidence. The causes of wrongful conviction, such as mistaken eyewitness identifications, faulty scientific evidence, and police perjury, are all matters that competent defense lawyers can address.¹⁴

Excessive caseloads are a constant, unpleasant reminder of just how far we are from rendering obsolete the warning of Justice Hugo Black in a case decided by the United States Supreme Court even before the constitutional right to counsel in criminal and

¹² Examples of deficient representation due in whole or in part to excessive caseloads are found in several places in this book. See, e.g., *infra* notes 31–48 and accompanying text, Chapter 1, and *infra* notes 9–55 and accompanying text, Chapter 7.

¹³ One of the most compelling illustrations of unnecessary costs due to inadequate defense representation is contained in a statement of Dawn Van Hoek, Chief Deputy Director, State Appellate Defender Office of Michigan, submitted to the U.S. House of Representatives Committee on the Judiciary, House Subcommittee on Crime, Terrorism and Homeland Security, dated March 26, 2009, *available at* <http://mynlada.org/files/Van%20Hoek%20Testimony.pdf>. The statement explains that trial counsel for indigent defendants in Michigan failed to ascertain numerous sentencing errors of judges under Michigan law, which resulted in millions of dollars of additional prison costs as defendants spent more time incarcerated than they should have. The errors were not corrected until the cases were reviewed by appellate lawyers and the accuracy of the sentences litigated on appeal. As explained in the statement at page 3, “[i]n a typical Michigan criminal case, court-assigned attorneys obtain the [presentence] report just before sentencing, leaving virtually no time to check the accuracy of the important contents . . . Defendants are frequently sentenced on the basis of inaccurate information and, inaccurately scored guidelines.” In addition, the statement documents that, since 1996, approximately fifty claims of ineffective assistance of trial counsel in Michigan resulted in reversals as a result of successful habeas corpus actions. The statement also notes that large caseloads of Michigan lawyers who furnish defense representation contribute to these problems. Similarly, the failure of overburdened defense lawyers to advocate effectively for pretrial release of clients frequently contributes to unnecessary jail costs.

¹⁴ JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 47 (The Constitution Project 2009). For additional information about this report and the composition of the committee responsible for it, see *infra* note 16 and accompanying text, Chapter 1.

juvenile cases was recognized: “[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”¹⁵

The audience for this book is not just assistant public defenders, supervisors, heads of defender programs, and members of their governing boards. While I expect that such persons will find the pages that follow interesting and, hopefully, beneficial, I also hope that it will be consulted by others who are committed to the quality of justice in our nation’s criminal and juvenile courts.

Ideally, judges, state legislators, and county officials, as well as bar leaders at the local, state, and national levels, will heed the overriding message of this book: it is just plain wrong to force lawyers to ration their services to clients in drastic ways just so it can be said that a warm body possessing a law license “represented” the accused. This persistent triumph of form over substance is a shameful mockery of the constitutional right to counsel. Lawyers like Pat, whether assistant public defenders or private lawyers defending the indigent, need to be able to do their jobs properly in compliance with rules of professional conduct. Fairness to the accused and justice demand it.

¹⁵ Griffin v. Illinois, 353 U.S. 12, 19 (1956). I do not mean to suggest, however, that excessive caseloads are the only problems in indigent defense. There are many others, including the failure of judges to advise persons adequately of the right to counsel, judicial acceptance of imperfect waivers of counsel, fees imposed on defendants that discourage the exercise of the right to counsel, especially in misdemeanor and juvenile cases, and over criminalization of minor conduct. The possibility of reclassifying offenses as infractions, thereby leading to cost savings and reduced caseloads, is discussed later. See *infra* note 79, Chapter 2, and note 161 and accompanying text, Chapter 9.

CHAPTER 1

The Failure to Implement the Right to
Counsel Due to Excessive Caseloads

A. The Constitutional Right to Counsel: Brief Overview

The right of persons to legal representation at government expense when they are unable to afford a lawyer in state criminal cases and juvenile delinquency proceedings is of relatively recent origin. The text of the Sixth Amendment to the Constitution does not guarantee the right to an attorney at government expense.¹ Beginning in 1963, however, with its decision in *Gideon v. Wainwright*,² the United States Supreme Court interpreted the Sixth Amendment to the Constitution in a way that it previously had rejected.³ *Gideon* held that a person charged with a felony offense under state law, punishable by five years imprisonment, was entitled at state expense to legal representation. Five years later, the landmark *Gideon* decision was followed by another, *In re Gault*,⁴ in which the Court extended the right to counsel to delinquency proceedings in juvenile courts. Then, in *Argersinger v. Hamlin*,⁵ decided in 1973, the Court held that the right to counsel applied in misdemeanor cases that result in a defendant's loss of liberty.

More recently, the decision in *Argersinger* was extended to misdemeanor cases in which a suspended sentence, subject to revocation, is imposed.⁶ The Supreme Court has also recognized a right to legal representation on a defendant's first appeal of a conviction⁷ and when a guilty plea is appealed.⁸ In 2008, the Court held that the right to counsel "attaches" at the initial court appearance during which the defendant learns of the charges filed by the state.⁹ While a defendant is never required to have a lawyer,¹⁰

¹ The Bill of Rights to the United States Constitution, which includes the Sixth Amendment right to counsel, was adopted in 1791. DAVID G. SAVAGE, *THE SUPREME COURT AND INDIVIDUAL RIGHTS* 23 (5th ed. 2009). The Sixth Amendment states, in part, that "in all criminal prosecutions the accused shall enjoy the right to ... have the assistance of counsel for his defense." Its purpose was to reverse the English practice of preventing persons charged with a felony from being represented by a lawyer. See GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 702–710 (5th ed. 2010).

² 372 U.S. 335 (1963). *Gideon* and the Supreme Court's other right to counsel decisions are discussed at greater length in JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 18–31 (The Constitution Project 2009) [hereinafter JUSTICE DENIED], available at http://2009transition.org/justicedenied/index.php?option=com_content&view=article&id=53&Itemid=84.

³ See *Betts v. Brady*, 316 U.S. 455 (1942).

⁴ 387 U.S. 1 (1967).

⁵ 407 U.S. 25 (1972).

⁶ *Alabama v. Shelton*, 535 U.S. 25 (2002). Since revocation results in imprisonment based upon the underlying offense on which the defendant was convicted, the Court reasoned that the right to counsel must be extended to defendants who receive such sentences.

⁷ *Douglas v. California*, 372 U.S. 353 (1963).

⁸ *Halbert v. Michigan*, 545 U.S. 605 (2005).

⁹ "Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

¹⁰ *Faretta v. California*, 422 U.S. 806 (1975) (defendant has a constitutional right to proceed without

defendants charged with offenses for which counsel must be afforded are not permitted to proceed without a lawyer, unless the person enters on the record a knowing and intelligent waiver of the right to legal representation.¹¹

As a result of these Supreme Court decisions, there are now thousands of lawyers and support personnel engaged in the business of providing defense representation for the indigent in criminal and juvenile cases across the country. The representation is provided through public defender agencies, as well as “assigned counsel” and “contract programs.”¹²

The public defender model employs salaried full-time or part-time lawyers. Typically, they are employed by public or quasi-private agencies and, ideally, there are orientation and training programs, close supervision and mentoring, especially of those lawyers who are inexperienced. An assigned counsel program is one in which defense representation is provided by private lawyers in return for an hourly or other fee. Also, some defense services are provided pursuant to contracts in which lawyers agree with courts, defender agencies, or other entities to provide representation. Pursuant to contractual terms, the lawyers sometimes agree to represent a certain number or type of cases for a fixed fee. Even in jurisdictions with large public defender programs, at least one other model for providing representation is used to ensure that other lawyers are available to represent the accused when the public defender has a conflict of interest.¹³

Programs that provide defense services for the indigent must also provide counsel in a variety of other cases in which the Sixth Amendment does not apply (because imprisonment is not an option), such as termination of parental rights, dependency cases, civil commitments, and traffic infractions. These additional types of cases, combined

counsel but trial court must advise defendant of the “dangers” and “disadvantages” in proceeding without legal representation).

¹¹ See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 723–724 (1947); *Iowa v. Tovar*, 304 U.S. 77, 87–91 (2004).

¹² The total number of lawyers engaged in indigent defense litigation nationwide has been estimated as of 2007 as more than 15,000. See Lynn Langston and Donald J. Farole, Jr., *State Public Defender Programs, 2007*, Table 1, at 3, Bureau of Justice Statistics, U.S. Dept. of Justice (2009) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdoo7st.pdf>. The funding and organization of public defense in the United States is reviewed in *JUSTICE DENIED*, *supra* note 2, at 52–64 and 148–157.

¹³ For a discussion of public defense models, see *JUSTICE DENIED*, *supra* note 2, at 53. The ABA has long urged that the same lawyer, private law firm, or defense organization should not represent codefendants except in very “unusual situations.” See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARDS, Std. 4-3.5 (c) (3d ed. 1993) [hereinafter ABA DEFENSE FUNCTION STANDARDS]. See also *JUSTICE DENIED*, *supra* note 2, at 98–99. In addition, for many years, the ABA has recommended that systems for providing defense services should always include lawyers from the private bar. ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-1.2 (b). For further discussion of private bar involvement in furnishing indigent defense services, see *infra* note 62 (this chapter) and accompanying text and *infra* notes 9–45 and accompanying text, Chapter 9.

with those to which the right to counsel applies, contribute to the staggering caseloads that confront so many of the nation's indigent defense programs.¹⁴

B. Excessive Workloads: A Pervasive National Problem

There is abundant evidence that those who furnish public defense services across the country have far too many cases, and this reality impacts the quality of their representation, often severely eroding the Sixth Amendment's guarantee of the right to counsel. The problem, moreover, has existed for decades as states and counties have struggled to implement the Supreme Court's right to counsel decisions.¹⁵

In 2009, two national reports about indigent defense in the United States were released. The first of these—*Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*—was from the National Right to Counsel Committee and published by the Constitution Project.¹⁶ The second report—*Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*—was published by the National Association of Criminal Defense Lawyers and focused on representation in misdemeanor cases and other lesser offenses.¹⁷ Both reports devoted considerable attention to the issue of excessive caseloads.

This is how *Justice Denied* summed up the problem:

Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly

¹⁴ “[S]tate courts have interpreted their state constitutions and statutes in ways that have expanded the right to counsel beyond what the Supreme Court has required. This is important because oftentimes, indigent defense programs are called upon to provide the necessary legal representation, which requires the time of defense lawyers and support staffs, as well as additional cost.” JUSTICE DENIED, *supra* note 2, at 24–25.

¹⁵ See, e.g., JUSTICE DENIED, *supra* note 2, at 50–64. This reference is to a section in Chapter 2 of JUSTICE DENIED titled, “The Need for Reform Is Decades Old.”

¹⁶ JUSTICE DENIED, *supra* note 2. The preface to the report explained the composition of the national committee:

The National Right to Counsel Committee includes an extraordinary group of individuals, with a diversity of viewpoints shaped by their service at the highest levels of every part of federal and state justice systems. Committee members have experience as judges, prosecutors, defense lawyers, and as law enforcement officials; members also include nationally-known law school academics, bar leaders, a victim advocate, and a court researcher.

Id. at xiii. The National Legal Aid & Defender Association also served as a sponsor of the National Right to Counsel Committee and its report.

¹⁷ MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (National Association of Criminal Defense Lawyers (2009) [hereinafter MINOR CRIMES], *available at* www.nacdl.org/misdemeanor.

through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.¹⁸

The report of the National Association of Criminal Defense Lawyers explained the caseload problem in misdemeanor courts this way:

Almost 40 years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision. Legal representation for indigent defendants is absent in many cases. Even when an attorney is provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties. Frequently, judges and prosecutors are complicit in these breaches, pushing defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client.¹⁹

These two reports are part of a long line of national, state, and local studies, as well as other publications, that have complained about the enormous caseloads of those who furnish defense services and the adverse impact of excessive caseloads on the quality of representation.²⁰ Discussion of *all* of these prior publications would serve little useful purpose, especially because of their similarity, but a few common details might be helpful, especially for persons unfamiliar with indigent defense and the dimension of the caseload problem.

¹⁸ JUSTICE DENIED, *supra* note 2, at 7.

¹⁹ MINOR CRIMES, *supra* note 17, at 14.

²⁰ The second of the two reports contained extremely troubling data about the caseloads of defenders handling misdemeanor cases. For example, in three major cities—Atlanta, Chicago, and Miami—defenders handled more than 2000 cases per year, and in a number of other jurisdictions the caseloads per year were exceedingly high. See MINOR CRIMES, *supra* note 17, at 21. These caseloads conflict with the recommendation of the National Advisory Commission of Criminal Justice Standards and Goals, which recommends that misdemeanor caseloads not exceed 400 cases per year. See *infra* note 91 and accompanying text, Chapter 2.

The reports quoted above imply that excessive caseloads are confined to public defender programs. While the most frequent and worst examples of out-of-control caseloads are among public defenders, private lawyers who provide indigent defense services sometimes take on way too much work as well.²¹ When adequate oversight of assigned counsel programs is lacking, the lawyers, in an effort to maximize their incomes, sometimes accept too many cases, because they are poorly compensated on a per case basis for their services.²² Similarly, when representation is provided pursuant to contracts, the lawyers sometimes are awarded contracts to provide defense services because they have furnished the lowest bid as a result of their willingness to accept an excessive number of cases.²³ This assessment was confirmed by a government commissioned report that summed up the difficulty of caseloads among private defense lawyers: “The problem is not limited to public defenders. Individual attorneys who contract to accept an unlimited number of cases in a given period often become overwhelmed as well. Excessive workloads even affect court-appointed attorneys.”²⁴

A conflict of interest arises when part-time defenders, assigned counsel, or contract lawyers have retained clients as well. While rules of professional conduct require that all clients be “competently” and “diligently” represented²⁵ and that neither the source nor amount of a lawyer’s payment should make any difference in the quality of

²¹ See, e.g., *supra* notes 8 and 13, Introduction.

²² Occasionally private assigned lawyers refuse to provide representation when the hourly rate of compensation is too low. During 2011, for example, when the State of North Carolina threatened to reduce by \$25 per hour its payments of \$75 per hour to assigned counsel, a number of the state’s court-appointed lawyers declared that they were no longer willing to represent indigent defendants. See, e.g., Michael Hewlett, *Defense Lawyers Walk Away*, WINSTON-SALEM JOURNAL, May 6, 2011. See also *infra* note 67 and accompanying text, Chapter 8, pertaining to the refusal of assigned counsel in Washington D.C. to accept court appointments because of a budget deficit leading the lawyers to believe that they would never be paid for their services. In contrast, the ABA has recommended that [a]ssigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned should be compensated for all hours necessary to provide quality representation. Compensation should be approved by administrators of assigned-counsel programs.

ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-2.4. The reality is that “compensation for assigned counsel is often far from adequate.” JUSTICE DENIED, *supra* note 2, at 64. For compensation paid to assigned counsel, see RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (The Spangenberg Group 2007), available at Reports and Studies: www.indigentdefense.org.

²³ The ABA has long opposed awarding contracts for indigent defense based primarily on cost. See ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-3.1. In addition, the ABA has recommended that contracts for defense services contain “allowable workloads for individual attorneys, and measures to address excessive workloads” *Id.* at Std. 5-3.3 (b)(v).

²⁴ KEEPING DEFENDER WORKLOADS MANAGEABLE, *supra* note 6, Introduction. See also *supra* note 8, Introduction.

²⁵ For the duty to provide “competent” and “diligent” representation, see *infra* notes 3–6 and accompanying text, Chapter 2.

representation provided,²⁶ a conflict of interest is created when a third party (i.e., the government) is paying a relatively meager sum to represent indigent persons, whereas the lawyer is simultaneously being far better compensated to represent retained clients. The conflict of interest is exacerbated if the lawyer has a heavy caseload, because lawyers are tempted to devote even less time to their appointed cases.

I witnessed this kind of conflict of interest when I first began representing indigent defendants in Washington, D.C. in the 1960s. A court-appointed lawyer, who also did a substantial amount of retained criminal defense work, seemed always to arrange early guilty pleas for his clients in court-appointed cases. When I asked the lawyer about his efforts on behalf of court-appointed clients compared to his retained clients, he was brutally candid, admitting that he often urged clients in his assigned cases to enter early guilty pleas so that he could devote more of his time to cases where clients were paying him. I noted the same phenomena of lawyers favoring retained clients over clients in appointed cases in a 1982 report that I prepared on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants.²⁷

In 1988, a special committee of the ABA Criminal Justice Section issued a report dealing with a variety of criminal justice issues, including the delivery of defense services for the indigent.²⁸ Over the course of a year, the committee held hearings in three urban communities in different parts of the country, in which police officers, prosecutors, defense attorneys, and judges talked to the committee about a wide variety of problems. The work of the committee was supplemented with data gathered from a structured random sample national telephone survey of more than 800 participants engaged in various capacities in the criminal justice system.²⁹ Among the committee's

²⁶ "A lawyer may be paid from a source other than the client ... if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* Rule 1.8 (f)." ABA MODEL RULES OF PROF'L CONDUCT, R. 1.7, cmt. 13 (2009) [hereinafter ABA MODEL RULES]. Pursuant to this comment and ABA Model Rules 1.7 (a), (b), and 1.8 (f), arguably, accused persons for whom the government pays for the cost of representation should be required to give their "informed consent," perhaps even in writing, to the lawyer provided by the state or local jurisdiction.

²⁷ "As one circuit judge explained, 'I hate to say it, but I think the compensation affects the representation. The lawyer just doesn't get out and 'scratch' for the evidence. It's not like a retained case.' A private attorney used similar language: 'With a retained case you sometimes go out and hunt down the witnesses, whereas with an assigned case you tell the defendant to bring his witnesses in to see you.'" NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 41 (ABA 1982).

²⁸ *See* ABA SPECIAL COMMITTEE ON CRIMINAL JUSTICE, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE (1988). I am familiar with the committee's work because I appointed the committee's members while serving as chair of the Criminal Justice Section, and I also served as a committee member.

²⁹ *Id.* at 2, 73–77.

conclusions was the following: “In the case of the indigent defendant, the problem is ... that the defense representation is ... too often inadequate because of underfunded and overburdened public defender offices.”³⁰ The committee’s data included the testimony of a chief defender who claimed that his lawyers were overwhelmed with cases:

I can give you a profile of what the average lawyer would handle in one year in our office. That lawyer would handle two Murder 1st Degree cases, one other homicide, a hundred and thirty-three other felonies, one hundred and forty-four misdemeanors, five post-conviction relief cases, eighteen probation revocations, six extraditions, one miscellaneous writ, and one petition for a release from a mental institution.³¹

Few would question that an annual caseload of 311 felonies, misdemeanors, and other cases is extremely high and would prevent the kind of competent representation that lawyers are required to furnish their clients. This is an easy assessment for those with experience in providing defense representation in criminal and juvenile cases. But in the absence of such experience, the “average lawyer” caseload described by the chief defender can be assessed by considering the number of work days and work hours during a year and determining how much time a lawyer would have available, on average, to devote to each of his or her 311 cases.

Typically, there are between 255–258 workdays per year, after deducting for holidays that fall on weekdays. If the higher of the two numbers is used and 10 days are subtracted for vacations and another 5 days for sick leave, the average number of weekdays available for work is 243. If multiplied by 7 hours, which excludes an hour for lunch, the available work hours for client representation are 1701 hours per year. Although this does not include time for other work-related functions, such as continuing legal education, staff meetings, and bar activities, 1701 hours for direct representation of clients is a justifiable number. Nevertheless, for the sake of argument, assume that the defenders work nights, weekends, and holidays and that they push themselves hard, much like many lawyers in the private practice of law and, for that matter, much like most defenders. So assume that the defenders work on their clients’ cases at least 1850 hours per year.³²

³⁰ *Id.* at 9.

³¹ *Id.* at 42.

³² There are various ways in which to compute the number of hours during a year that a lawyer has available to work. Consider the following:

Because a law firm at its core is a business attempting to make a profit, attorneys employed by a firm are measured according to the billable hours that they accrue during the course of a year. In fact, a firm may require an associate attorney to bill a minimum number of hours. Typical minimums range from 1750–2001 hours per year. 2001 hours per year equals 40 billable hours per week for 50 weeks, allowing 2 weeks for vacation. Note that some firms don’t

Using 1850 hours, the “average lawyer” would have had available approximately 6 hours to devote to each of his or her 311 cases. Recall, however, that 136 of the cases are felonies (3 of them homicides) and another 144 of the cases are misdemeanors. If only a small percentage of these cases proceeded to a jury trial, which often takes substantially more than a week of a lawyer’s time for trial preparation and the trial itself, it is easy to understand why defenders with caseloads of the kind described by the chief defender would have serious difficulty handling the volume of work. Moreover, studies of public defenders demonstrate that the amount of time required for handling a variety of different kinds of cases, including misdemeanors, can require considerably more time than 6 hours.³³

The most recent ABA report dealing with indigent defense was issued by the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) at the end of 2004.³⁴ During 2003, commemorating the fortieth anniversary of the Supreme Court’s *Gideon* decision, SCLAID held public hearings at four different locations around the country and invited 32 expert witnesses familiar with their respective jurisdictions to offer their perspectives on the extent to which the right to counsel was being effectively implemented. Like the hearings held 15 years earlier by the ABA Criminal Justice Section, a host of problems in indigent defense were revealed, including excessive caseloads. Specifically, witnesses from Maryland, Nebraska, Pennsylvania, and Rhode Island spoke of the caseload problems present in their respective jurisdictions.³⁵

For example, a witness from Pennsylvania told of a county that had had 4172 cases in 1980 but that the number of cases had grown to 8000 in 2000 without any growth in the staff size of the public defender’s office.³⁶ Especially interesting was the testimony of the Public Defender for the State of Rhode Island, who detailed the caseload problems of his agency. As I was writing this chapter in 2009, I read a newspaper article about this same state Public Defender, who asked the presiding justice of the superior court that his office be excused from appointments to post-conviction cases due to

have minimums, but rather have ‘expectations’ for a certain number of billable hours.

Richard Caira and Jeffrey Powers, *Law Firm Basics: Partners, Associates and Billable Hours*, available at <http://www.lawschoolcompanion.com/law-firm-basics.html>. See also Monahan, *Coping with Excessive Workload*, *supra* note 6, Introduction, at 330, in which the authors suggest that billable hours in private law firms range from 1750 to 1900 hours per year. For discussion of private law practice billing and annual billable hours, in which the firm’s associates are expected to account for 1,850 billable hours per year, see *infra* note 51 and accompanying text, Chapter 6.

³³ See, e.g., *infra* notes 7–33 and accompanying text, Chapter 6.

³⁴ ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* (2004) [hereinafter ABA GIDEON’S BROKEN PROMISE].

³⁵ *Id.* at 18.

³⁶ *Id.*

his office's high caseloads.³⁷ Each lawyer was handling, on average, 1517 misdemeanor cases and 239 felonies, or a total of 1756 cases each year. The dimension of the caseload problem is staggering when compared with the testimony of the chief defender from another jurisdiction discussed earlier, in which each lawyer had an average annual caseload of 311 felonies, misdemeanors, and other matters.³⁸ If the same analysis of 1850 available hours in a year is applied to public defenders in Rhode Island, each attorney would have, on average, one hour and five minutes to devote to each of his or her cases—to meet with clients, interview witnesses, prepare bail and pretrial motions, appear in court, and so on. Often, therefore, there is only time to “meet and plead” clients guilty.³⁹

Equally startling is a 2005 report by the Kentucky Department of Public Advocacy (DPA).⁴⁰ This state agency is responsible for providing defense services throughout Kentucky, except for the Louisville area,⁴¹ and it has long had too many cases.⁴² To shine a spotlight on its caseloads, the Public Advocacy Commission held a series of public hearings throughout the state with testimony from “Supreme Court Justices, Court of Appeals judges, public defenders, concerned members of the private bar, judges, prosecutors, and others. The consistent theme was that of an overwhelmed and jeopardized criminal justice system.”⁴³

The report showed how the caseloads of the agency's lawyers had increased in recent years and how they exceed so-called national guidelines on caseloads.⁴⁴ Evidence also was presented of tasks not performed because of excessive caseloads, such as the failure of lawyers to seek pretrial release of clients, prepare motions and legal briefs, and answer client phone calls. The report concluded with a series of recommendations, including the need for additional lawyers and support staff, as well as the importance of adequately compensating private lawyers who worked with the DPA and accepted cases when the agency's lawyers had a conflict of interest.⁴⁵

But most surprising to me about the report was its forthright acknowledgement that “[d]efender caseloads in some offices are so high as to be unethical.”⁴⁶ The report

³⁷ Talia Buford, *R.I. Public Defender Looks to Lighten Load*, PROVIDENCE JOURNAL, April 20, 2009.

³⁸ See *supra* notes 31–33 and accompanying text.

³⁹ MINOR CRIMES, *supra* note 17, at 31.

⁴⁰ JUSTICE JEOPARDIZED: A REPORT OF THE PUBLIC ADVOCACY COMMISSION ON KENTUCKY PUBLIC DEFENDER CASELOADS (2005) [hereinafter JUSTICE JEOPARDIZED].

⁴¹ See discussion of the history of the Louisville-Jefferson County Public Defender Corporation, *available at* <http://www.louisvillemetropublicdefender.com/history.html>.

⁴² See JUSTICE JEOPARDIZED, *supra* note 40, at 5.

⁴³ *Id.* at 1.

⁴⁴ See *infra* notes 91–116 and accompanying text, Chapter 2.

⁴⁵ See JUSTICE JEOPARDIZED, *supra* note 40, at 17–20.

⁴⁶ *Id.* at 10.

further stated that “[u]nder ... the Rules of the Supreme Court [of Kentucky], a well-founded argument can be made that the Public Advocate and his Leadership Team as well as the Public Advocacy Commission are responsible for the ethical breaches of public defenders caused by the excessive caseloads.”⁴⁷ Yet, despite these rather remarkable admissions of ethical misconduct, no one connected with the DPA was ever subjected to disciplinary sanction.⁴⁸

In fact, because caseload problems persisted after publication of the DPA report, during 2008 the agency announced that it would refuse to accept certain court-assigned cases, and it also filed a declaratory judgment action in an effort to clarify its legal and ethical duty to accept cases assigned by Kentucky courts.⁴⁹ Regrettably, neither of these steps proved to be entirely successful. A trial court dismissed the declaratory judgment action and ordered the agency to continue to accept cases assigned to it, although the litigation led to the DPA obtaining some additional state funding.⁵⁰

C. Why the Caseload Problem Is So Extremely Difficult to Solve

The major reasons for excessive caseloads in public defense are easily identified. The most significant are discussed below.

⁴⁷ *Id.* at 11.

⁴⁸ I do not mention this because I am disappointed that the head of the DPA and others in the agency were not disciplined, but simply to point out that in the field of indigent defense even a public confession of ethical violations due to excessive caseloads does not lead either to public outcry or discipline, let alone to reform of the system.

⁴⁹ See *infra* notes 68–84 and accompanying text, Chapter 7.

⁵⁰ *Id.* The forthright way in which the DPA acknowledged its caseload problems has occurred in other states as well. For example, the annual report of Missouri’s Public Defender Commission in 2009 contained a section titled “Caseload Crisis: A System Operating in Triage” followed by this:

Up until Fiscal Year 2010, MSPD had no addition to its staff in six years, while its caseload rose by as much as 12,000 cases during that same time period. Even before the staffing levels completely flat-lined in 2000 caseload continued to climb. MSPD had been struggling under an ever-widening gap between the pace of the increase in its caseload and the much slower, smaller increase in the numbers of attorneys and support staff to handle that caseload. When all staffing increases ground to a halt, the struggle turned into a full-blown caseload crisis with lawyers forced to triage their services.

STATE OF MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2009 ANNUAL REPORT (2009), available at <http://www.publicdefender.mo.gov/about/FY2009AnnualReport.pdf>. For a discussion of litigation related to caseloads in Missouri, see *infra* notes 85–103 and accompanying text, Chapter 7.

Inadequate Funding

The lack of sufficient funding is the leading cause of the problem. As stated by the National Right to Counsel Committee in 2009, “[u]ndoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads.”⁵¹ Not surprisingly, the committee’s first recommendation is that “[l]egislators should appropriate adequate funds so that quality indigent defense services can be provided.”⁵² Similarly, while discussing massive caseloads in misdemeanor courts, the National Association of Criminal Defense Lawyers has urged that “[d]efender offices, contract defender offices, and assigned counsel lists ... have sufficient attorneys to permit the maintenance of ethical standards,”⁵³ as well as the necessary support services to furnish effective defense representation.⁵⁴ Five years earlier, an ABA report called the funding for indigent defense “shamefully inadequate”⁵⁵ and urged that state governments provide increased funding “at a level that ensures the provision of uniform, quality legal representation.”⁵⁶

Structural Problems

Appointment Process

The organization of public defense in the United States contributes to the difficulty of finding viable solutions to the problem of excessive caseloads. The majority of courts in the United States still appoint lawyers to represent indigent persons in criminal and juvenile cases.⁵⁷ While the ethical duty to avoid excessive caseloads is clear,⁵⁸ defense lawyers and heads of defender programs often are reluctant to seek to avoid court appointments or to withdraw from cases to which they have been appointed.⁵⁹ The

⁵¹ JUSTICE DENIED, *supra* note 2, at 7.

⁵² *Id.* at 183.

⁵³ MINOR CRIMES, *supra* note 17, at 9.

⁵⁴ *Id.*

⁵⁵ ABA GIDEON’S BROKEN PROMISE, *supra* note 34, at 38.

⁵⁶ *Id.* at 41.

⁵⁷ The ABA has long urged that the appointment of lawyers to represent indigent defendants should not be a judicial function: “The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged by the administrators of the defender, assigned-counsel and contract-for-service programs.” ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-1.3 (a). See also THE ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002) [hereinafter ABA TEN PRINCIPLES].

⁵⁸ See *infra* notes 3–15 and accompanying text, Chapter 2.

⁵⁹ Chapter 4 discusses reasons that assistant public defenders do not often seek to avoid court appointments or file motions to withdraw from cases even when their caseloads are much too high. Moreover, as the foregoing discussion of Kentucky illustrates and, as further explained in Chapter 7 dealing with litigation, lawsuits aimed at controlling caseloads do not always succeed.

story told in the Introduction to this book reflects this reluctance, because, in the end, neither Pat nor the head of Pat's office took any action, despite Pat's crushing caseload. Normally defense lawyers and public defense programs must convince judges that reduced caseloads are needed in order to deliver legal services consistent with their professional obligations.⁶⁰

In addition, many of the statutes governing public defender programs anticipate that the agency's lawyers will provide virtually all of the representation that may be required.⁶¹ Partly as a result of such statutes, in many jurisdictions the private bar plays less of a role in public defense than it once did, resulting in fewer private lawyers available to take cases when the primary office of public defense is unavailable. This development is in sharp contrast to what the ABA has long recommended: "Every system [for legal representation] should include the active and substantial participation of the private bar."⁶²

Public defense lawyers faced with excessive caseloads are in a very different situation than civil legal aid programs when confronted with inadequate financial support and too many clients seeking their services. In civil legal aid, organizations and their staffs can control their caseloads simply by refusing to accept the cases of new clients. On several occasions, the ABA Standing Committee on Ethics and Professional Responsibility discussed the duty of civil legal aid programs to refuse new cases on ethical grounds if funding is reduced, noting that a lawyer's first obligation is to existing clients for whom services are being performed.⁶³

Public defense representation also differs from the private practice of law in which clients with sufficient funds retain counsel of their choice.⁶⁴ Just as in legal aid programs, private lawyers and law firms decide whether they have the necessary resources to

⁶⁰ See *infra* notes 7–12 and accompanying text, Chapter 2.

⁶¹ See, e.g., MINN. STAT. ANN. § 611.18 (2009) ("If it appears to a court that a person requesting the appointment of counsel satisfies the requirements of this chapter, the court shall order the appropriate public defender to represent the person at all further stages of the proceeding through appeal, if any."); R.I. GEN. LAWS ANN. § 12-15-3 (West 2006) ("It shall be the duty of the public defender to represent and act as attorney for indigent defendants in those criminal cases referred to him or her by the supreme court, by the superior courts, by the district courts . . .").

⁶² ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-1.2 (b).

⁶³ The American Bar Association Standing Committee on Ethics and Professional Responsibility has twice addressed the duty of civil legal aid programs when faced with insufficient funding. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 381 (1981); and ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96–399 (1996). "A lawyer's obligations to provide competent and diligent representation under Model Rules 1.1 and 1.3 imposes a duty to monitor workload, a duty that requires declining new clients if taking them on would create a 'concomitant greater overload of work.'" *Id.* at 14.

⁶⁴ In the book's final chapter, I discuss the possibility of reforming indigent defense so that it more closely resembles the private practice of law by permitting clients to select their own lawyers. See *infra* notes 53–84 and accompanying text, Chapter 9.

provide representation. If required to handle the demands of client representation, law firms hire new attorneys. Conversely, if a recession reduces the need for their services, fewer attorneys are hired, or there are layoffs of lawyers. Beginning in 2008, the nation's economic downturn adversely impacted the private practice of law much as it did other parts of the labor market. Thousands of attorneys lost their jobs, and hiring of new graduates was severely restricted.⁶⁵

Lack of Independence

A primary reason that the heads of defense programs fail to mount sufficiently aggressive challenges to their caseloads is often due to a lack of independence. The head of Pat's defender agency (about whom I write in the Introduction) was appointed by county commissioners, and the chief defender owed his job to persons who were very likely antagonistic to providing increased funding for public defense. The report of the National Right to Counsel Committee contains illustrations of what happens when defense programs are not independent of political and judicial interference, such as pressures on the office not to fight too aggressively on behalf of their clients and chief defenders being told to fire a particular lawyer because judges are displeased with the lawyer's representation.⁶⁶

Some years ago I had a conversation with the head of a statewide defense program. I had known this chief defender for some years, and he sought my advice about the excessive caseloads of the public defender lawyers for whom he was responsible throughout the state. When I suggested to him that he should take the lead on behalf of his office, ask that new appointments be curtailed, and request that his lawyers be permitted to withdraw from cases to ensure that competent representation was provided, he dismissed my suggestion as impractical. Why? As he explained, "the governor appoints the members of my statewide board, and he will see to it that I am fired."⁶⁷

⁶⁵ As reported in an American Bar Association newsletter:

The layoff numbers have hit a depressing mark: In the last 15 months, more than 10,000 lawyers and legal staffers have lost their jobs at major law firms. LawShucks has the tally. March was the worst month so far, with 3,677 losing their legal jobs, according to the blog. There were 2,708 job losses in February and 1,540 in January. Counting April job losses, 4,218 lawyers and 6,259 staffers have been laid off since January 2008, LawShucks says.

Debra Cassens Weiss, *Law Firm Layoffs Hit 10K Mark; Thursdays Most Often Bring Bad News*, April 13, 2009, available at http://www.abajournal.com/news/law_firm_layoffs_hit_10k_mark_thursdays_most_often_bring_bad_news/.

⁶⁶ JUSTICE DENIED, *supra* note 2, at 80–82.

⁶⁷ As of 2009, twenty-seven states had statewide programs for providing indigent defense services throughout the jurisdiction. A minority of the agencies do not have governing boards at all. Apparently, even when there is a statewide commission or a board of directors, the head of the program might still not feel entirely secure in his or her position. See generally JUSTICE DENIED, *supra* note 2, at 148–162. Because of the type of problem related by this chief defender, Justice Denied recommends that:

The foregoing story obviously demonstrates the need for complete independence of the defense function. Precisely because of the kind of problem told to me by the head of this statewide defense program, the ABA recommends that “[t]he legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.”⁶⁸

No Control Over Intake

Still another reason caseloads in public defense are such a difficult problem is that those who provide defense services have no control over the number of cases in which police make arrests and in which prosecutors decide to file charges requiring the appointment of counsel. Defense programs are simply expected to respond with sufficient numbers of lawyers and resources to provide adequate defense services, even though police and prosecutors are effectively in charge of determining the number of cases in which defense counsel must appear.

In deciding whether to prosecute, a wide variety of factors are considered by prosecutors—and this is entirely proper, but the availability of defense lawyers to represent the accused is not among them.⁶⁹ And, while “adequate defense lawyer availability” should not be a factor used by prosecutors in deciding whether to proceed with a case, would it not make sense for legislative bodies to consider on a regular basis whether increases in arrests and prosecutions require a concomitant increase in funding for defense services? However, state legislatures and local officials usually make only a modest connection, if any at all, between the need for additional defense service funds in the wake of increased prosecutions. And no state has ever enacted a statute that requires automatic increases in the size of defender programs when prosecutions increase.

The caseload problem also has been exacerbated by differences in state and local funding allocated to defense services compared to law enforcement and corrections. In a 2009 decision dealing with the overwhelming caseloads of the Missouri State Public

[t]he members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments.

Id. at 185, Recommendation 2.

⁶⁸ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-1.3 (a).

⁶⁹ See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, Std. 3-3.9 (3d ed. 1993) [hereinafter ABA PROSECUTION FUNCTION]. This standard deals with a variety of factors that prosecutors should consider in exercising discretion whether to charge a person with a criminal offense. The availability of defense counsel is not one of the factors.

Defender program, the Missouri Supreme Court rendered what is probably the first decision in the country to emphasize this important funding disparity:

The public defender represents about 80 percent of those charged with crimes that carry the potential for incarceration. Since 1985, the number of offenders convicted of drug offenses (possession, distribution and trafficking) has increased by nearly 650 percent, while non-drug sentencing has increased by nearly 230 percent.

When the state established the public defender system in the early 1980s, one in 97 Missourians was under correctional control—either in jail or prison or on probation or parole. In 2007, by contrast, one in 36 was under correctional control, and 32 percent of those were incarcerated in prison or jail.

During the decade of the 1990s, the population of Missouri grew by 9.3 percent, while the prison population grew by 184 percent. Recent data show more than 56,000 individuals on probation; nearly 20,000 on parole (supervision that follows a prison term); more than 10,000 in Missouri jails (many of whom are awaiting trial) and about 30,000 in state prisons.

*The state's vast increases in criminal prosecutions have not included commensurately increasing resources for the public defender.*⁷⁰

Similarly, the federal government provides substantially greater funding for state law enforcement purposes than it does for indigent defense. As explained in a 2010 memorandum of the Constitution Project, “[b]y virtue of its massive funding of state and local law enforcement the federal government unintentionally exacerbates the abrogation of the constitutional right to a lawyer.”⁷¹ The memorandum notes that the government proposes for fiscal year 2011 to increase federal assistance for law enforcement to \$3.4 billion, while allocating “less than 0.1% of federal funding for ... indigent defense services.”⁷²

Although lack of resources drives much of the problem of excessive caseloads, resource increases are often difficult to achieve. Therefore, in addition to discussing ways to demonstrate the need for financial support, this book focuses on other possible responses and solutions.

⁷⁰ State *ex rel.* Missouri Public Defender Commission v. Pratte, 298 S.W.₃d 870, 877 (Mo. 2009) (footnotes omitted) (emphasis added). For further discussion of this case, see *infra* notes 85–103 and accompanying text, Chapter 7.

⁷¹ *Federal Action to Ensure the Right to Counsel in the United States 2* (Constitution Project, March 2010) (on file with author).

⁷² *Id.*

CHAPTER 2

The Duty of Defense Programs and Lawyers to Avoid Excessive Caseloads

In evaluating whether a lawyer's caseload is reasonable, relevant factors include the complexity of the cases, the availability of support services (e.g., investigators, social workers, and paralegals), and the speed at which cases proceed through the court system. Further, the range of a lawyer's other professional activities, such as attendance at training programs, staff meetings, and participation in bar activities, must be assessed. These activities do not constitute a lawyer's "caseload," but they obviously bear on a lawyer's overall "workload." As explained in ABA standards, "[c]aseload is the number of cases assigned to an attorney at a given time. Workload is the sum of all work performed by the individual at any given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which that attorney is responsible."¹ Whether the focus is caseloads or workloads, professional conduct rules, performance standards, and numerous other recommendations should be fully considered.

A. Rules of Professional Conduct

The report of the National Right to Counsel Committee summarized the adoption of the ABA Model Rules of Professional Conduct among the states and the consequences of violating provisions of the rules:

[E]very attorney who practices law in the United States, including all who represent indigent clients, are subject to their respective states' rules of professional conduct. In each state, these rules were approved by the state's highest court and, virtually everywhere, the states' rules are substantially similar in both form and substance to the ABA Model Rules In all states, moreover, failure to comply with the state's rules of professional conduct can lead to disciplinary sanctions, such as reprimand, suspension, or even disbarment.²

¹ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at 68. A similar point is made in ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at Principle 1. A lawyer's workload also was elaborated upon in a publication that dealt specifically with public defenders having too many cases:

A defender's work includes more than her cases. She must consult with others about her cases, engage in review processes to assure quality in her cases, and handle other work, for example, brainstorming, case or peer review, mock presentations, post-case critiques, and performance evaluations. An ethical defender maintains and advances her knowledge by reading newly decided cases and newly enacted laws and rules, and by attending training sessions. She must support others in her office by doing case consultation for colleagues. Defenders must perform administrative and office duties. She must supervise support staff to ensure that their work is at the requisite standard.

Monahan, *Coping with Excessive Workload*, *supra* note 6, Introduction, at 319.

² JUSTICE DENIED, *supra* note 2, Chapter 1, at 35.

Excessive caseloads among lawyers representing indigent criminal and juvenile clients implicate a number of state rules of professional conduct. The most important of these are the requirements to be “competent” pursuant to Rule 1.1 (“provide ... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”)³ and “diligent” pursuant to Rule 1.3 (“act with reasonable diligence and promptness in representing a client”).⁴ The comment to Rule 1.3 contains an explicit admonition: “A lawyer’s work load must be controlled so that each matter can be handled competently.”⁵ In addition, when a lawyer has too many clients to represent simultaneously, a “concurrent conflict of interest exists” because “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client”⁶ If a lawyer’s acceptance of a client’s representation will lead to a violation of the rules of professional conduct, or if a lawyer’s continued representation of a client will lead to a violation of rules of professional conduct, Rule 1.16 (a) requires that the lawyer either decline the representation or seek to withdraw from the representation.⁷ However, a comment to Rule 1.16 acknowledges, that when “a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority.”⁸ Moreover, Rule 1.16 (c) recognizes an exception to 1.16 (a): “When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”⁹

If the defense lawyer believes the court has erred and should have permitted withdrawal, the lawyer might want to seek a stay and try to appeal the court’s ruling.¹⁰ Refusal to represent the client, even if the defense lawyer believes competent representation is impossible, can result in court sanctions.¹¹ The Supreme Court declared some years

³ ABA MODEL RULES R. 1.1.

⁴ *Id.* at R. 1.3.

⁵ *Id.* at cmt. 2. Comment 1 to Rule 1.3 states that “[a] lawyer must ... act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf.” This is similar to the ABA’s former ethics code: “A lawyer should represent a client zealously within the bounds of the law.” MODEL CODE OF PROF’L CONDUCT Canon 7 (1980). Not all state rules of professional conduct include the comments to the rules recommended by the ABA Model Rules. As of March 2011, the following eight states had not adopted comments to their states’ rules of professional conduct: California, Illinois, Louisiana, Montana, Nevada, New Jersey, New York, and Oregon.

⁶ *Id.* at R. 1.7 (a)(1).

⁷ ABA MODEL RULES R. 1.16 (a)(1).

⁸ *Id.* at cmt. 3.

⁹ *Id.* at R. 1.16 (c).

¹⁰ However, the court’s decision will not likely be subject to appeal as a matter of right. *See* Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 1, Introduction, at notes 27–30 and accompanying text.

¹¹ *See, e.g.,* *People v. McKenzie*, 668 P.2d 769 (Cal. 1983) (court may hold public defender in contempt when defender refuses to proceed due to belief that trial court’s rulings rendered effective representation impossible); *In re Galloway*, 389 A.2d 55 (Pa. 1978) (finding of contempt proper when defense lawyer’s request to withdraw was denied and defense lawyer refused to proceed).

ago that “all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that the order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.”¹² Nevertheless, as explained in this book’s final chapter, I suggest that defense programs consider refusing to provide services when they clearly have excessive caseloads and trial courts insist that representation be provided anyway.¹³

A corollary to Rule 1.16 is Rule 6.2, which provides that “[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct”¹⁴ A comment to this rule refers the reader back to the duty to deliver “competent” representation: “Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1”¹⁵

The relationship between subordinate and supervisory lawyers is also addressed in the Model Rules, which define the responsibilities of each when there is an issue respecting excessive caseloads. As for the subordinate lawyer, Rule 5.2 states that the “lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”¹⁶ This is a bedrock principle of the legal profession, the importance of which is not always well understood and that is repeatedly overlooked in the area of public defense. What it means is that, except in the situation discussed below, *every lawyer is responsible individually for providing competent and diligent legal representation*. Here is how one writer has explained the duty of each member of the profession:

All attorneys, including subordinate attorneys, are responsible for their own misconduct even if it occurred at the direction of a supervisor, and even if the attorney acquiesced from a fear of loss of employment. This rule unequivocally disposes of any “Nuremburg” defense in which a subordinate attempts to deny responsibility because he or she was merely acting in accordance with the orders of a superior. In a larger sense, however, this rule of independent responsibility simply states an obvious and paramount duty of professional conduct: each lawyer is ultimately responsible for his or her own actions.¹⁷

¹² *Maness v. Meyers*, 419 U.S. 449, 458 (1975).

¹³ See *infra* notes 110–128 and accompanying text, Chapter 9.

¹⁴ *Id.* at R. 6.2 (a).

¹⁵ *Id.* at cmt. 2.

¹⁶ *Id.* at R. 5.2 (a).

¹⁷ Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70

But Rule 5.2 also contains an exception: “A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”¹⁸ In other words, if there is “an arguable question” of whether the subordinate lawyer has an excessive caseload, and the subordinate lawyer continues to provide representation at the direction of the supervisor notwithstanding concerns about whether “competent” and “diligent” representation can be provided, no violation of professional conduct rules has occurred. Conversely, if the situation is not really arguable, for example, because the size of the caseload clearly interferes with providing competent and diligent representation, the subordinate lawyer is guilty of professional misconduct, unless a good faith effort is made to avoid additional assignments and the lawyer seeks to withdraw from one or more existing cases.¹⁹ What the rules do not—and cannot decide—is when a matter of disagreement about caseload is “an arguable question.” This is a matter of judgment among professionals and, at least theoretically, there could be reasonable disagreements on the subject among the supervisor and subordinate lawyer.²⁰

What about the applicability of professional conduct rules to the heads of public defense programs and to supervisors when subordinate lawyers with excessive caseloads are permitted to represent clients? The answer is contained in Rule 5.1, which spells out the duties of those with “managerial” and “supervisory authority.”²¹ Although the rule uses the term “law firm,” the terminology section of the Model Rules makes clear that the term is intended to include public defense programs.²² According to Rule 5.1,

NOTRE DAME L. REV. 259, 295–297 (1994). *See also* Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449, 463 (2003). *See generally* Robert F. Keating, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Law Firm*, 39 SO. TEX. L. REV. 279 (1998).

¹⁸ ABA MODEL RULES R. 5.2 (b).

¹⁹ Consider again ABA MODEL RULE 1.16 (a) and the discussion at *supra* notes 7–13 and accompanying text.

²⁰ “If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly.” ABA MODEL RULES R. 5.2 (b), cmt. 2. In the field of public defense, there appear to be few reported cases of subordinate lawyers who have formally challenged supervisors about their caseloads. However, in the 1980s in New York City, a lawyer employed by the New York Legal Aid Society was terminated; the Society claimed he had not been sufficiently attentive to several of his clients. In response, the lawyer claimed that he had an excessive caseload. Under the terms of a collective bargaining agreement, the dispute was adjudicated in arbitration. The lawyer’s caseload challenge was unsuccessful and his termination was sustained. For further discussion of the case, *see infra* note 8, Chapter 5.

²¹ ABA MODEL RULES R. 5.1 (a), (b).

²² “Firm’ or ‘law firm’ denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” *Id.* at R. 1.0 (e).

persons with “managerial authority” are required “to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”²³ And those with “direct supervisory authority over another lawyer” have a duty to “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”²⁴

In addition, Rule 5.1 spells out several situations in which one lawyer “shall be responsible for another lawyer’s violation of the Rules of Professional Conduct.”²⁵ The first is where a lawyer “orders or, with knowledge of the specific conduct, ratifies the conduct involved”²⁶ The second is where a lawyer with “managerial authority” or “direct supervisory authority . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”²⁷ These rules are not especially difficult to apply to situations where lawyers furnishing public defense services have excessive caseloads. In all likelihood, there are many such programs throughout the country where managers and supervisors are subject to charges of professional misconduct because they are well aware of the excessive caseloads of their lawyers and fail to take appropriate actions to prevent them.

Pat’s story, told in the Introduction to this book, is worth recalling here. “Pat,” a subordinate lawyer, had more than 300 pending cases and complained of what I think any reasonable person would conclude was an excessive caseload. His caseload was not an “arguable question” of professional judgment, and neither Pat’s supervisors nor the head of the agency ever sought to persuade Pat that his caseload was reasonable. In fact, the head of the program essentially conceded that Pat’s caseload was excessive, noting that “triage” is the kind of representation provided by the agency. Pat’s supervisors and the head of the public defender program, therefore, violated the commands of Rule 5.1 because they made no effort whatsoever to “take remedial action” that might have enabled Pat to avoid violating the professional conduct rules. In fact, they did much worse. They threatened Pat with employment termination when he was merely calling to their attention their own professional misconduct, of which they were seemingly oblivious.

Ironically, the misconduct of the supervisor and head of the defender program meant that Pat most likely also violated the professional conduct rules. Rule 8.3 (a) requires that lawyers report violations of professional conduct rules to “the appropriate professional authority” if the violation “raises a substantial question as to that lawyer’s

²³ *Id.* at R. 5.1 (a).

²⁴ *Id.* at R. 5.1 (b).

²⁵ *Id.* at R. 5.1 (c).

²⁶ *Id.* at R. 5.1 (c)(1).

²⁷ *Id.* at R. 5.1 (c)(2).

honesty, trustworthiness or fitness as a lawyer or in other respects”²⁸ While subordinate lawyers like Pat are undoubtedly extremely reluctant to report their bosses for violating their ethical duties and rarely, if ever, do so, the rule seems quite clear. In fact, I think Pat’s bosses flagrantly breached their ethical duties and, by their actions, did an enormous disservice not only to Pat but also to his clients. The report of the National Right to Counsel Committee makes these exact same points:

[W]hen defenders represent excessive numbers of clients with the knowledge of supervisors and directors of defender programs, these supervisors and agency heads commit professional misconduct It has been forcefully argued . . . that if a public defender is ordered by a supervisor or agency head to undertake representation in an excessive number of cases, thereby preventing the lawyer from competently representing his or her clients, the defender should report these persons to the appropriate disciplinary authority.²⁹

B. Performance Standards for Defense Representation

Professional conduct rules apply to lawyers generally and do not specifically address duties of defense lawyers in representing their clients in criminal and juvenile cases. However, the responsibilities of defense lawyers are addressed in “performance standards” adopted by national organizations, such as those approved by the National Legal Aid & Defender Association (NLADA),³⁰ and standards approved in various states.³¹ Because these standards are recommendations, violations of them do not lead to disciplinary or other sanctions. Performance standards, moreover, do not normally

²⁸ *Id.* at R. 8.3 (a). The duty to report professional misconduct applies only if the lawyer’s knowledge of the misconduct is not confidential. Arguably, in the situation under discussion, confidentiality is not implicated when a defense lawyer explains to a disciplinary body what he or she was prevented from doing on a client’s behalf because of an excessive caseload. While the lawyer’s information relates to the representation of the client (*see* ABA Model Rules R. 1.6 (a)), the purpose of the confidentiality duty, aimed at encouraging full client disclosures to counsel, is not violated. *See also* R. 8.3 (c).

²⁹ JUSTICE DENIED, *supra* note 2, Chapter I, at 206, citing Monroe Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 921 (2005).

³⁰ PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION (4th printing) (National Legal Aid & Defender Ass’n 2006) [hereinafter NLADA PERFORMANCE GUIDELINES]. “The object of these *Guidelines* is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” *Id.*, Introduction at xi.

³¹ *See, e.g.*, In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Issued by Nevada Supreme Court, January 4, 2008).

deal with public defense caseloads.³² The NLADA standards call for lawyers to “abide by ethical norms,”³³ and in another standard notes that “counsel has an obligation to make sure that counsel has sufficient time ... to offer quality representation to a defendant in a particular matter.”³⁴ The commentary to this standard cites a standard approved by NLADA in 1976: “No defender office or defender attorney shall accept a workload which, by reason of the excessive size thereof, threatens to deny due process of law or places the office or attorney in imminent danger of violating any ethical canons”³⁵

C. Ethics Opinions

ABA Ethics Opinion

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility (ABA Ethics Committee) issued Formal Opinion 06-441 dealing with excessive caseloads and public defense representation.³⁶ The effort to convince the ABA’s Ethics Committee to issue an opinion on the subject of caseloads was a joint effort undertaken by the ABA Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) and the NLADA.³⁷ Because ABA ethics opinion must be based on ABA Model Rules, there was never any real doubt about what the opinion would say concerning excessive public defense caseloads. As discussed in the preceding section, when caseloads are excessive, the professional conduct rules are clear respecting the duties of those with managerial and supervisory authority, as well as the duty of lawyers providing direct client services.

The most important points in the opinion can be summarized as follows:³⁸

³² Rules and other practices related to caseloads adopted in various states are discussed later. *See infra* note 110, and 119–152 and accompanying text.

³³ NLADA PERFORMANCE GUIDELINES, *supra* note 30, Guideline 1.1, at 1.

³⁴ *Id.* at Guideline 1.3.

³⁵ *Id.* at 31. This language is similar to a blackletter standard approved by the ABA. *See infra* note 66 and accompanying text.

³⁶ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006) [hereinafter ABA Formal Op. 06-441]. Ethics opinions are advisory and typically issued by bar associations. The ABA Ethics Committee is undoubtedly the most important and influential ethics committee in the country, and its opinions often are cited in court decisions.

³⁷ *See* Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 1, Introduction, at 11.

³⁸ The ethics opinion as applied to the private practice of law is discussed in Arthur J. Lachman, *What You Should Know Can Hurt You: Management and Supervisory Responsibilities for the Misconduct of Others Under Model Rules 5.1 and 5.3*, 18 PROF. LAW. 1 (2007).

- The opinion applies not only to public defenders but to all lawyers who represent indigents in criminal cases pursuant either to court appointments or to government contracts.³⁹
- “The Rules [of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.”⁴⁰
- All lawyers who furnish defense representation on behalf of the indigent must provide services that are competent and diligent.
- “A lawyer’s primary ethical duty is owed to existing clients.”⁴¹
- If competent and diligent representation is not possible because of an excessive workload, or if a workload soon will become excessive, the cases of new clients cannot be accepted.⁴²
- If cases are being assigned by courts or through some other form of appointment system, the lawyer should request that new appointments be stopped.⁴³
- If a lawyer cannot provide competent and diligent representation to existing clients and the problem cannot be resolved through a request to the court, the lawyer must move to withdraw from a sufficient number of cases to bring that representation into compliance with the Rules of Professional Conduct.⁴⁴
- If the motion to withdraw is rejected by a court, an appeal should be taken, if possible; but if an appeal is either unavailable or unsuccessful,⁴⁵ the lawyer must continue with the representation and make the best of the situation, “while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.”⁴⁶

³⁹ ABA Formal Op. 06-441, n. 2. The rationale of the opinion applies regardless of the manner in which lawyers become involved in representing indigent defendants.

⁴⁰ ABA Formal Op. 06-441, at 3.

⁴¹ *Id.* at 4.

⁴² *Id.* at 5.

⁴³ Among options listed are the following: “requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer’s existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation.” *Id.* at 5. Thus, before filing a motion in court, the ethics opinion recognizes that a lawyer’s initial approach to the problem should be by making a “request” to the court. The opinion does not address the way this should be communicated, i.e., whether via email, letter, informal personal conversation, etc. This matter is also discussed later. See *infra* notes 102–109 and accompanying text, Chapter 9.

⁴⁴ *Id.*

⁴⁵ “If the court denies the lawyer’s motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation” *Id.* at 1.

⁴⁶ *Id.* at 6.

- Heads of defender programs, lawyer supervisors, and others “with intermediate managerial responsibility, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct.”⁴⁷
- The workloads of subordinate lawyers must be monitored by lawyer supervisors to ensure that workloads do not prevent the delivery of competent and diligent services.⁴⁸
- Caseload standards may be considered in deciding whether the workload of a lawyer is excessive, but standards cannot be the “sole factor;”⁴⁹ whether a workload is excessive “depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational responsibilities.”⁵⁰
- When a lawyer receives cases as a member of a public defender’s staff or law firm, and supervisors are aware that the lawyer’s workload is excessive, the supervisor has a duty to take remedial action, such as transferring nonrepresentational duties to others, not assigning new cases to the lawyer, and possibly transferring cases to others within the public defender’s office or law firm.⁵¹
- If supervisors “know” of a lawyer’s excessive caseload and do not take “reasonable remedial action,” supervisors are themselves responsible for the lawyer’s violation of the Rules of Professional Conduct.⁵²
- If a lawyer and supervisor disagree about whether workload is preventing the lawyer from providing competent and diligent services, the lawyer may rely on the decision of the supervisor if it constitutes a “reasonable resolution of an arguable question of professional duty.”⁵³
- If the lawyer deems the resolution of the supervisor not to be reasonable, the lawyer must continue up the chain of command, perhaps leading to the matter being brought to the head of the defender program and even to the program’s governing board, if there is one.⁵⁴

⁴⁷ *Id.* at 7.

⁴⁸ *Id.*

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ *Id.* at 5.

⁵² *Id.* at 8.

⁵³ *Id.* at 6.

⁵⁴ *Id.* The requirement that a lawyer take his or her complaint to the program’s governing board is based upon ABA Model Rule 1.13 (b) and (c). See Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 1, Introduction, at notes 37–42 and accompanying text.

Opinions of State Bars and the ACCD

Prior to the opinion of the ABA Ethics Committee, the ethics committees of state bars in Arizona, South Carolina, and Wisconsin had addressed the subject of excessive defender workloads.⁵⁵ Although less thorough, these prior opinions reached very similar conclusions to those of the ABA's Ethics Committee. Ethics opinions from New York and Virginia, although dealing with government lawyers (New York) and prosecutors (Virginia), are also similar in their conclusions to the ABA's ethics opinion.⁵⁶ An unpublished ten-page opinion letter issued on behalf of the Ethics Hotline Committee of the Kentucky Bar Association addresses the same issue. Solicited by the former head of the Kentucky Department of Public Advocacy (DPA),⁵⁷ the letter recounts the caseloads of the more than 300 lawyers employed by the DPA. It notes the caseloads were "41% above the NAC standards,"⁵⁸ and it offers the following conclusions:

[I]t is clear that DPA's total caseload has reached a level at which there is a substantial risk that many if not most DPA attorneys will not be able to provide diligent and competent representation. Each DPA attorney with an excessive caseload has an ethical obligation to follow the advice stated in ABA Opinion 06-441 Similarly, you and other DPA supervising attorneys have an ethical obligation to follow the advice stated in ABA Opinion 06-441⁵⁹

⁵⁵ *Id.* at notes 58–63, 65, and accompanying text.

⁵⁶ *Id.* at note 65. The New York opinion addresses the duty of state government lawyers primarily involved in representing the state in child welfare, paternity, and support proceedings. The reasoning of the New York opinion closely tracks that of the ABA's ethics committee, and its forceful language is equally applicable to the countless defenders faced with excessive caseloads:

Accordingly, a government attorney representing a department of social services in judicial or administrative proceedings may not neglect a matter or prepare inadequately. The attorney may not comply with the direction of an agency official to "just show up" or "just do the best you can" without preparation, if the result will be to represent the department incompetently. On the contrary, the staff attorney, as a government official and lawyer for the government, has an independent professional obligation to carry out the department's legal responsibilities in judicial and administrative proceedings in which the staff attorney represents the department, and cannot comply with instructions that would require the lawyer to act antithetically to the law and to the general ethical responsibility to "seek justice." Nor may the staff attorney accept so many matters that the attorney would have no choice but to handle some neglectfully or incompetently. In making the judgment whether handling a matter in a particular way would be incompetent, or whether a case load has become unmanageable, a staff attorney may give weight to a supervising lawyer's reasonable resolution of these questions where they are in doubt, but may not defer where the question is unarguable or the supervising attorney's resolution of it is unreasonable.

N.Y. Ethics Op.751, 2002 WL 1303477, 4 (N.Y. State Bar Ass'n. Comm. Prof'l Ethics 2002).

⁵⁷ Letter from Francis J. Mellen, Jr. to Ernie Lewis (January 11, 2008) (on file with author).

⁵⁸ *Id.* at 9. For discussion of the "NAC standards," see *infra* notes 91–116 and accompanying text.

⁵⁹ *Id.* at 9–10.

In addition, in 2001, the American Council of Chief Defenders (ACCD), a unit of the NLADA, issued an opinion addressing the duties of the heads of defender offices when confronted with excessive caseloads. Although substantially consistent with conclusions later summarized by the ABA's Ethics Committee,⁶⁰ the ACCD ethics opinion appears to be one of the few to suggest that in addition to preventing the delivery of competent and diligent representation, an excessive caseload also presents a conflict of interest. As the opinion explains, lawyers are "prohibited from representing a client 'if the representation of that client may be materially limited by the lawyer's responsibility to another client.'"⁶¹ The Florida Supreme Court also has recognized that an excessive caseload presents a conflict of interest since "the public defender [must] ... choose between the rights of the various indigent criminal defendants he represents"⁶²

Finally, in 2007, the Oregon State Bar, relying upon ABA Formal Opinion 06-441 and Oregon's Rules of Professional Conduct, issued an opinion substantially in accord with the ABA ethics opinion.⁶³ The Oregon opinion, however, addresses an issue not dealt with in the ABA's ethics opinion or in any state bar ethics opinion, i.e., whether negotiating inadequate contracts for providing indigent defense services can ever be the basis for a finding of professional misconduct. The Oregon opinion concludes that it can and provides this warning for those who negotiate contracts for defense services:

Lawyer C, who heads a public defender office, and Lawyer E who negotiates the contract for a consortium [of lawyers], may be responsible for the misconduct of other lawyers if they contract for caseloads knowing that they do not have adequate lawyer and other support staff to provide competent representation to each client. Likewise, managers who knowingly "induce" other lawyers to violate the RPC's by knowingly contracting for excessive caseloads may violate RPC 8.4 (a)(1), which makes it "professional misconduct for a lawyer to ... violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."⁶⁴

⁶⁰ American Council of Chief Defenders, National Legal Aid & Defender Association, Opinion No. 03-01 (2001).

⁶¹ A portion of the quoted language is from ABA MODEL RULE R. 1.7 (a)(2), which reads as follows: "A concurrent conflict of interest exists if: ... (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client"

⁶² *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 1130, 1135 (Fla. 1990).

⁶³ Oregon State Bar, Formal Opinion 2007-178 (2007).

⁶⁴ *Id.* at 7.

D. Recommendations Related to Caseloads

American Bar Association

Criminal Justice Standards and “Ten Principles”

In the late 1970s, the ABA House of Delegates approved the second edition of standards dealing with indigent defense services, which contained a recommendation substantially similar to the admonitions contained in the opinion of the ABA Ethics Committee.⁶⁵ The current and now third edition of these standards quoted below differs only slightly from the earlier second edition:

Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel, or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.⁶⁶

Thus, the ABA has been on record for many years with a recommendation substantially consistent with the ABA Ethics Committee’s opinion issued in 2006. To a large extent, the ABA ethics opinion simply expanded upon and explained existing ABA policy contained in the standard. Both the standard and the ethics opinion apply to all persons who provide indigent defense representation, i.e., public defenders, assigned counsel, and contract attorneys.⁶⁷ Although the standard speaks of the goal to provide “quality representation,”⁶⁸ it is also based in part on rules of professional conduct,⁶⁹

⁶⁵ See ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-5 (2d ed., 1980).

⁶⁶ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-5.3 (b). The blackletter standards for this chapter were approved in 1990, although the entire chapter, which includes commentary for each standard, was not published until 1992. *Id.* at i.

⁶⁷ See *supra* note 39 and accompanying text.

⁶⁸ The “objective” of the ABA’s standards related to defense services is “to assure that quality representation is afforded to all persons eligible for counsel pursuant to this chapter.” ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-1.1.

⁶⁹ See *Id.* at Std. 5-5.3, commentary at n. 2, citing ABA Model Rules R. 1.16 (a), which requires that lawyers not represent clients if “the representation will result in violation of the rules of professional conduct” An ethics opinion of the Wisconsin Committee on Professional Ethics, which is

much like the ABA's ethics opinion, which is based entirely on the ABA Model Rules of Professional Conduct. In addition, both the foregoing standard and the ABA's ethics opinion use mandatory language to describe the conduct to be taken when caseloads are determined to be excessive. The standard uses the word "*must*" in referring to the need to "take appropriate action" when a breach of professional obligations will occur, while the word "should" is used in the other twenty-seven standards in the chapter. Unlike the ABA's ethics opinion, however, the standard contains, in its last sentence, an admonition to judges urging that they not require defense lawyers or programs to furnish representation in situations in which they are unable to comply with their professional duties.

The policy contained in the standard is also reflected in two other ABA policy statements adopted prior to ABA Formal Opinion 06-441, both of which complement the standard quoted above. The Ten Principles of a Public Defense Delivery System, approved by the ABA in 2002, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."⁷⁰ The blackletter of Principle 5 is as follows: "Defense counsel's workload is controlled to permit the rendering of quality representation."⁷¹ The "commentary" to this principle makes clear that "national caseload standards" should never be exceeded.⁷² Principle 5 of the ABA Ten Principles is also based upon ABA Standards for Criminal Justice related to the Defense Function, which contain the following statement: "Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation or may lead to the breach of professional obligations."⁷³

None of the foregoing standards has had significant impact in restraining excessive caseloads, as caseload problems persist across the country in public defense. However, the language of some national standards has been included in standards adopted in some states. For example, the Indiana Public Defender Commission borrowed

consistent with ABA Formal Opinion 06-441, is also cited.

⁷⁰ ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at Introduction.

⁷¹ *Id.*, Principle 5.

⁷² The significance of this sentence is discussed in addressing recommendations of the National Advisory Commission on Criminal Justice Standards and Goals. *See infra* notes 101–104 and accompanying text.

⁷³ ABA DEFENSE FUNCTION STANDARDS, *supra* note 13, Chapter 1, at Std. 4-1.3 (e). Juvenile defense representation is addressed in a joint set of principles approved by the National Juvenile Defender Center and the National Legal Aid & Defender Association, which provide that "[t]he Public Defense Delivery System Supervises Attorneys and Monitors Work and Caseloads." TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS, Principle 5 (2d ed. July 2008). The comment to this principle states that "workload of public defense attorneys, including appointed and other work, should never be so large that it interferes with competent and diligent representation or limits client contact." *Id.*, at cmt. A.

extensively from ABA standards in developing its own Standards for Indigent Defense Services in Non-Capital Cases and acknowledged that it was doing so.⁷⁴ However, in Indiana, the Commission's ability to control the caseloads of lawyers is not due to admonitions but to the Commission's ability to cut off state funds for county defense programs if caseloads of lawyers exceed maximum numbers of case assignments specified in its standards.⁷⁵

"Eight Guidelines"

In August 2009, the ABA House of Delegates adopted a comprehensive policy statement about defenders having too many cases, the full title of which is the "Eight Guidelines of Public Defense Related to Excessive Workloads."⁷⁶ Each of the Guidelines begins with blackletter statements, most of which are relatively brief, followed by relatively lengthy commentary. Because the ABA House of Delegates was asked to approve both the blackletter of the Guidelines *and* the commentary, both constitute ABA policy and may be cited as policy of the Association.⁷⁷

The Guidelines build upon the ABA's policy statements on public defense workloads, including the ABA's ethics opinion,⁷⁸ and suggest necessary steps that public defense programs should take to address excessive workloads. The Guidelines are consistent with what the ABA has said in the past, and in a few instances simply repeat what the ABA has said previously, but the Guidelines also contain new recommendations not previously approved by the ABA. The comments below summarize their content, focusing primarily on material in the Guidelines that comprise new ABA policy.

⁷⁴ See Standards for Indigent Defense Services in Non-Capital Cases, Indiana Public Defender Commission, Std. K. (2008), *available at* <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf>. Standard K. 1 relates to individual defenders and requires them to notify appropriate authorities in the defense program whenever they believe that their caseloads "will lead to the furnishing of representation lacking in quality or to the breach of professional obligations." Standard K. 2 relates to Chief Public Defenders and, in using the same standard for determining whether a caseload is excessive, requires that the Chief Public Defender "inform the appropriate judges and refuse to accept additional cases."

⁷⁵ The Indiana indigent defense program is discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 171–172.

⁷⁶ I proposed the idea of "guidelines" to the ABA Standing Committee on Legal Aid and Indigent Defendants, which served as their primary sponsor in the ABA House of Delegates. While I served as Reporter for the Guidelines, many persons and organizations made important contributions to them. See ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS, Acknowledgements (2009) [hereinafter ABA EIGHT GUIDELINES], *available at* www.indigentdefense.org.

⁷⁷ The resolution proposed to the ABA when the Guidelines were approved reads as follows: "Resolved, that the American Bar Association adopts the blackletter (and introduction and commentary) Eight Guidelines of Public Defense Related to Excessive Workloads, dated August 2009." See *infra* note 104 for an explanation of situations when the ABA House of Delegates adopts both blackletter recommendations and commentary.

⁷⁸ See *supra* notes 37–54 and accompanying text.

- The Guidelines contain terminology not previously used in the ABA Criminal Justice Standards or in the ABA Ten Principles. The Guidelines refer to “public defense provider” or “provider,” which includes “public defender agencies and ... programs that furnish assigned lawyers and contract lawyers.” In addition, the Guidelines apply “to members of the bar employed by a defender agency, and those in private practice who accept appointments to cases for a fee or provide representation pursuant to contracts.” The obvious goal was to have the Guidelines cover all organizations and persons involved in public defense representation.
- In addition to declaring that public defense providers should avoid excessive workloads, Guideline 1 challenges providers to consider the wide range of their performance obligations in representing clients (e.g., “whether sufficient time is devoted to interviewing and counseling clients”) as a means of determining whether their caseloads are excessive. This Guideline derives from concern that too often public defense providers and the lawyers who furnish representation accept as normal exceedingly high caseloads, perhaps because that is all they have ever known.
- Similar to Guideline 1, Guidelines 2, 3, and 4 contain recommendations that are not in either the ABA Criminal Justice Standards or the ABA’s Ten Principles. Guideline 2 states that public defense providers should have “a supervision program that continuously monitors workloads of its lawyers;” Guideline 3 states that lawyers providing representation should be trained respecting their “professional and ethical ... responsibilities ... to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable;” and Guideline 4 reminds programs that furnish public defense that they need to make conscious decisions about whether or not “excessive lawyer workloads are present.”
- Guideline 5 lists a range of non-litigation options for dealing with excessive workloads short of litigation, while acknowledging in the “comment” to the Guideline that the alternatives listed are “appropriate to pursue *only in advance* of the time that workloads actually have become excessive.”
- The options in Guideline 5 include, *inter alia*, reassigning cases to different lawyers (whether public defenders or private lawyers), arranging for appointments to private lawyers in return for reasonable compensation, seeking emergency resources, negotiating informal arrangements with those making appointments, and “urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate”⁷⁹

⁷⁹ A more permanent solution to alleviate caseload pressures on public defense programs is for some petty misdemeanors to be reclassified as infractions, violations, or simply not treated as offenses at all. For a summary of successful efforts to reclassify misdemeanor offenses, see AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING (The Spangenberg Project 2010), *available at* http://qa.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/20110321_aba_tsp_reclassification_report.authcheckdam.

- When no other viable options are available and excessive caseloads exist, Guideline 6 makes clear that the public defense provider or individual lawyer, consistent with the ABA's ethics opinion⁸⁰ and the ABA's Criminal Justice Standards,⁸¹ should make a motion in "court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate . . ." However, a comment to Guideline 5 suggests that a "separate civil action" may be an appropriate way to proceed, presumably when the lawyers believe that motions to withdraw from representation and to stop appointments are not likely to succeed.
- Guideline 7 is new and deals with the concern of many public defenders that motions to stop assignments and to withdraw from cases will lead, inevitably, to judges delving into the internal operations of public defense provider programs, thereby interfering with "professional and ethical duties [of lawyers] in representing their clients." To confront this potential problem, the Guideline urges "Public Defense Providers and lawyers [to] resist judicial directions regarding the management of Public Defense Programs . . ."
- Finally, Guideline 8, consistent with the ABA's ethics opinion,⁸² states that lawyers, as well as public defense providers, should appeal decisions of courts that reject motions to withdraw or to halt the assignment new cases. However, the second sentence of the comment to this Guideline adds something new to the ABA's policy in this area, because it states that "a writ of mandamus or prohibition should properly be regarded as a requirement of 'diligence' under professional conduct rules." This language was included because the denial of a motion to withdraw or to stop new assignments is normally not a final, appealable order.⁸³

Finally, it is important to emphasize an additional blackletter non-litigation option listed in Guideline 5 for avoiding excessive caseloads, namely, "[n]otifying the courts or other appointing authorities that the Provider [of defense services] is unavailable to accept additional appointments." The commentary to Guideline 5 explains: "A declaration of 'unavailability' has sometimes been used successfully, such as in some counties in California. This approach is seemingly based on the implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules."

pdf. See also ABA EIGHT GUIDELINES, *supra* note 76, n. 39 and *infra* note 16I and accompanying text, Chapter 9.

⁸⁰ See *supra* note 44 and accompanying text.

⁸¹ See *supra* notes 65–69 and accompanying text.

⁸² See *supra* note 45 and accompanying text.

⁸³ See Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 1, Introduction, at 12, n. 24–30.

Declaring “unavailability” is undoubtedly the most simple and straightforward way of dealing with the excessive caseload problem. Although the extent to which public defense programs in the United States are able to do this is unknown, the issue was addressed in a 2009 report of the Bureau of Justice Statistics. Based upon questionnaire data from 946 public defender offices across the country, statewide defender programs in eight states (Arkansas, Iowa, Massachusetts, Montana, New Hampshire, North Dakota, Virginia, and Wyoming) listed themselves as having the “authority to refuse appointments due to caseload.”⁸⁴ Because the information is self-reported, the extent to which cases are actually rejected by defender offices in these eight states and whether or not excessive caseloads are present is difficult to determine.⁸⁵ However, two of the states—Massachusetts and New Hampshire—are discussed later, and the authority of these programs to reject cases due to case overload is explained.⁸⁶ In a third state—Iowa—the authority of the state’s public defense program to reject cases is contained in the agency’s statute, which is perhaps the foremost example of how laws can protect a program from excessive caseloads. The Iowa statute provides that “[t]he local public defender shall handle every case to which the local public defender is appointed *if the local public defender can reasonably handle the case*.”⁸⁷ Further, the statute explicitly provides that “if the local public defender is unable to handle a case because of temporary overload of cases, the local public defender shall return the case to the court.”⁸⁸ If cases are returned, they are assigned to a private lawyer who has a contract with the public defender or, if none is available, to a noncontract private lawyer.⁸⁹ Obviously,

⁸⁴ See Lynn Langston and Donald J. Farole, Jr., *Public Defender Offices, 2007—Statistical Tables*, Table 7a, Bureau of Justice Statistics, U.S. Dept. of Justice (2009; revised June 22, 2010) *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1758>.

⁸⁵ To illustrate, Montana is one of the states listed in the Bureau of Justice Statistics report as having the capacity to reject cases. However, a 2009 assessment concluded that some public defenders in Montana have too many cases but were unlikely to complain. See BJA Criminal Courts Technical Assistance Project: TA Report No. 4-072, *Assessment of the Initial Period of Operations of the Montana Statewide Public Defender System* 62 (October 2009), *available at* <http://publicdefender.mt.gov/AUdocs/FinalReport.pdf>. Another state listed is Wyoming. However, a Wyoming newspaper article in 2007, the same year during which the Bureau of Justice Statistics compiled its data, reported on a public defender’s office with “heavy caseloads.” See *Public Defender’s Office Short on Staff and Long on Caseloads*, GILLETTE NEWS RECORD, Jan. 19, 2007, *available at* <http://www.nacdl.org/public.nsf/defenseupdates/wyoming006?OpenDocument>.

⁸⁶ See *infra* notes 127–130 and 142–145 and accompanying text. For additional discussion of Massachusetts, see *infra* notes 27–36 and accompanying text, Chapter 8.

⁸⁷ IOWA CODE § 13B.9 (1)(3) (West 2003 & Supp. 2011).

⁸⁸ *Id.* at § 13B.9 (1)(4).

⁸⁹ See IOWA CODE § 815.10 (2011). Nevertheless, according to Robert Rigg, a professor at Drake University law school and former first assistant in the Polk County Public Defender office in Des Moines, staff lawyers have extremely high caseloads as a result of budget cuts and pressure to demonstrate that they can handle cases inexpensively. Telephone interview with Robert Rigg (July 23, 2010). See also Robert Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 28–29 (1999) (“Iowa had originally established an Indigent Defense Advisory Commission . . .

the approach of the Iowa statute is unworkable unless there is substantial private bar involvement in the delivery of the state's indigent defense services.⁹⁰

National Advisory Commission

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC), established and funded by the federal government, recommended annual maximum caseloads for public defense programs. The NAC's recommendations have had—and continue to have—significant influence in the field of public defense respecting annual caseloads of public defenders. Specifically, the NAC recommended that annual maximum caseloads “of a *public defender office* should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.”⁹¹ No other national caseload numbers, whether expressed as maximum numbers or in some different fashion, have ever been recommended.

However, the commission was eliminated and the statute providing for its establishment was repealed . . . [T]he legislature turned the system over to the governor's office. The problem with the placement of the indigent defense system in the executive branch is immediately apparent. The governor has the responsibility of executing and enforcing the laws the clients of the indigent defense system have been accused of violating. As a practical matter, a governor is asked to perform very different and often contradictory roles: 1) advocating a crime policy and funds for law enforcement and corrections budgets, and 2) asking for funds for indigent criminal defense. The effect, as one would expect, is an underfunded indigent defense system. In Iowa, this has manifested itself in a salary differential between prosecutors and defense counsel performing the same work, and increased public defender caseloads.”)

⁹⁰ The Iowa Supreme Court has held that a \$1,500 fee cap for appellate work is unenforceable, thereby authorizing contract lawyers to be paid more than the fee cap when a higher fee is shown to be reasonable and necessary. *See Simmons v. State Public Defender*, 791 N.W.2d 69, 87 (Iowa 2010) (“Based on our review of the case, we conclude that the plaintiff has shown that if Iowa imposes a hard-and-fast fee cap of \$1500 in all cases, such a fee cap would in many cases substantially undermine the right of indigents to effective assistance of counsel in criminal proceedings under article I, section 10 of the Iowa Constitution.”). However, there were reports in 2011 that payments to appointed lawyers, who earn \$60 to \$70 per hour for indigent defense representation, were being held up due to budget battles in the Iowa legislature. *See* Jayson Clayworth, *Appointed Attorneys Await Their Payments*, DES MOINES REGISTER, March 30, 2011. *See also* Jon Mosher, *Gideon Alert: Facing an \$18M Indigent Defense Deficit, Iowa Can No Longer Afford Its Current Criminal Justice System*, April 7, 2011, available at <http://nlada.net/jscri/blog/gideon-alert-facing-18m-indigent-defense-deficit-iowa-can-no-longer-afford-its-current-cr>. The importance of the private bar to the success of indigent defense programs is discussed later. *See infra* notes 2–22 and accompanying text, Chapter 9.

⁹¹ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973) [hereinafter NAC STANDARDS]. “The standards are disjunctive, so if a public defender is assigned cases from more than one category, the percentage of the maximum caseload in each should be assessed and the combined total should not exceed 100%. Obviously, a public defender's pending or open caseload should be far less than the annual figure.” JUSTICE DENIED, *supra* note 2, Chapter 1, at 66 n. 102.

The commentary accompanying these blackletter recommendations shows that continued reliance on these numbers, which are now more than thirty-five years old, is unjustified. For example, the commentary conceded that “present practice was difficult to ascertain because some offices do not measure workload in terms of number of cases.”⁹² The Commission also noted that “the definition of a case varied from jurisdiction to jurisdiction.”⁹³ In addition, the Commission pointed out that “a given classification [of a case] in one jurisdiction may require more work than cases within that same classification in other jurisdictions.”⁹⁴ Moreover, the Commission noted that “physical and geographical factors that influenced an office’s caseload capacity differ among jurisdictions.”⁹⁵

In view of these caveats, how exactly did the NAC arrive at its recommended standards? From the NAC commentary, it is clear that no empirical study in support of its

⁹² *Id.* at 276.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* Another important reason for rejecting the NAC caseload numbers is that they were recommended during the 1970s, when defense lawyers did not need to be especially concerned about collateral consequences of criminal convictions. Today, as a result of the Supreme Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), lawyers who represent defendants must be well acquainted with deportation law. In *Padilla*, a defense lawyer told his client that he did not need to worry about deportation in the event he pled guilty to the crime with which he was charged. In fact, the advice was incorrect and the law was clear on the subject, i.e., deportation was a virtual certainty if the client was convicted. The Court held that the lawyer’s erroneous advice satisfied the first prong of the *Strickland* standard for ineffective assistance of counsel under the Sixth Amendment. (For discussion of *Strickland*, see *infra* notes 41–46 and accompanying text, Chapter 3.) In circumstances where the law is not clear, the Court stated that a defense lawyer should advise the client “that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 1483. The *Padilla* decision potentially extends well beyond the duty of defense counsel to advise clients about deportation but applies to numerous other collateral consequences:

While *Padilla*’s effects will be felt most immediately in the tens of thousands of criminal cases involving noncitizen defendants, defense lawyers must now concern themselves more generally with the broader legal effects of a criminal conviction on their clients. The systemic impact of this new obligation cannot be underestimated. *Padilla* may turn out to be the most important right to counsel case since *Gideon*, and the “*Padilla* advisory” may become as familiar a fixture of a criminal case as the *Miranda* warning . . .

The opinion does not explicitly require notice of other “collateral” consequences of conviction, such as sex offender registration and residency requirements, loss of licenses, firearm possession bans, ineligibility for public housing or other benefits, or the right to adopt or maintain other family relationships. Yet, from their perspective, clients have an interest in learning of severe and certain legal consequences of the plea in areas not related to immigration. In carrying out plea negotiations, avoiding a lifetime registration requirement or loss of a professional license may be just as important a goal as avoiding deportation, and those collateral consequences may be just as useful as bargaining chips.

Margaret Colgate Love and Gabriel J. Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, 34 THE CHAMPION 18, 19, 22 (Nat’l Assoc. Crim. Defense Lawyers, May 2010).

recommended caseload limits was ever undertaken. In fact, it appears that the NAC did not actually do any work of its own in order to come up with the caseload standards attributed to it for so many years. Instead, the caseload numbers were “accepted” by the NAC based upon the work of “the defender committee of the National Legal Aid and Defender Association,” which “[a]t a recent conference” had “considered the matter of caseloads”⁹⁶ Further, the commentary explains that the defender committee acknowledged “the dangers of proposing any national guidelines,” and the NAC itself offered “the caveat that particular local conditions—such as travel time—may mean lower limits are essential to adequate provision of defense services in any specific jurisdictions.”⁹⁷ Further, while acknowledging that the standards “could provide a method of evaluating the propriety of the caseload of a particular attorney,”⁹⁸ the NAC “emphasized” that the standards set “a caseload for a public defender’s office and not necessarily for each individual attorney in that office.”⁹⁹

Given the age and origin of the NAC caseload standards, and the NAC’s numerous warnings about relying upon them, it is surprising, if not remarkable, that its recommendations often are referred to as the accepted national caseload standards for individual lawyers working full-time in the field of public defense. Presumably this is because national organizations have embraced the NAC’s recommendations and given them an aura of respectability to which they are not entitled.

For example, commentary to ABA standards published in 1992 refers to the NAC standards as having “proven resilient over time, and provide a rough measure of caseloads.”¹⁰⁰ The ABA commentary sets forth the NAC recommended caseload numbers while completely ignoring how the NAC arrived at its numbers and the Commission’s various warnings about their use.

Ten years later, in “commentary” to Principle 5 of its Ten Principles, the ABA went much further, referring in a single sentence to the NAC recommendations as “national caseload standards” and stating that they “should in no event be exceeded.”¹⁰¹ However,

⁹⁶ NAC STANDARDS, *supra* note 91, at 277.

⁹⁷ The text of the Commission’s commentary reads as follows:

At a recent conference, the defender committee of the National Legal Aid & Defender Association considered the matter of caseloads. Acknowledging the dangers of proposing any national guidelines, the committee arrived at the cases per attorney per year adopted by the standard. The Commission has accepted these, with the caveat that particular local conditions—such as travel time—may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction.

Id.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at 72.

¹⁰¹ ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at 2, Principle 5 cmt.

the sentence continues by acknowledging, much like the ABA's ethics opinion,¹⁰² that "the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."¹⁰³ The sentence in the commentary is nonetheless quite important, because the Ten Principles adopted by the House of Delegates included both the blackletter principles as well as the commentary.¹⁰⁴ Thus, the ABA is on record as approving the NAC recommendations as maximum caseload standards, although its reasons for having done so are not explained.

The American Council of Chief Defenders (ACCD), which is a unit of the National Legal Aid & Defender Association, also has embraced the NAC standards. In 2007, the ACCD adopted a resolution in which it recommended "that public defender and assigned counsel caseloads not exceed the NAC recommended levels of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year. These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified."¹⁰⁵ A comparison with the NAC's recommendations reveals that the ACCD, except in two respects, endorsed the NAC's maximum caseload numbers. The ACCD qualified the maximum number of appeals by stating that they should be "non-capital appeals," and the ACCD stated that its recommendations applied to attorneys who had "adequate support staff," which was a subject that the NAC did not address either in its blackletter standards or commentary.

Despite the ACCD's endorsement of the NAC's recommended maximum caseload numbers, the extensive commentary in support of the ACCD resolution effectively

¹⁰² See *supra* note 50 and accompanying text.

¹⁰³ ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at 2, Principle 5 cmt.

¹⁰⁴ Normally, the ABA only approves blackletter recommendations, not the accompanying commentary, which is the work product of the reporter. This has been the practice in the approval of the ABA's Standards for Criminal Justice, in which the commentary is often quite lengthy. However, "commentary" may be approved as ABA policy when the resolution submitted to the House of Delegates asks the House to approve both blackletter recommendations and commentary or fails to distinguish between the two. While writing this book, I asked Terry Brooks, Chief Counsel to the ABA Standing Committee on Legal Aid and Indigent Defendants, whether both the blackletter principles *and commentary* to the Ten Principles were approved by the House of Delegates as ABA policy. Mr. Brooks consulted the ABA Director of the Division for Policy Administration, who confirmed that both the blackletter recommendations and commentary were approved by the House of Delegates when the Ten Principles were adopted because the resolution submitted to the House did not distinguish between the two. Although the word "commentary" is used in the printed version of the Ten Principles, the word does not appear in the proposed Ten Principles submitted to the House of Delegates for its approval.

¹⁰⁵ AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS I (2007) [hereinafter ACCD STATEMENT ON CASELOADS].

undermines the endorsement, making it clear that the NAC's maximum caseload numbers per attorney per year are too high. This point is emphasized in the Report of the National Right to Counsel Committee:

[T]he American Council of Chief Defenders ... statement ... outlines how over the years legal developments and procedural changes have made indigent defense much more difficult, placing on defense lawyers far greater time demands and requiring a higher level of expertise. As the ACCD explains, defense attorneys now have to deal with “entire new practice areas, including sexually violent offender commitment proceedings, and persistent offender (‘three strikes’) cases which carry the possibility of life imprisonment.” Further, the statement discusses the increased complexity of juvenile defense work, [and] the importance of defenders understanding the collateral consequences of convictions¹⁰⁶

In fairness to the ACCD, however, the commentary to its resolution acknowledged that “the NAC standards should be carefully evaluated by individual public defense organizations, and consideration should be given to adjusting the caseload limits to account for the many variables which can affect practice.”¹⁰⁷ The commentary, moreover, concludes with this admonition to defense agencies: “The ACCD reaffirms the NAC recommended maximum caseload limits, but urges thorough assessment in each jurisdiction to determine the impact of local practices and laws on those levels”¹⁰⁸

Although the National Association of Criminal Defense Lawyers (NACDL) has never adopted maximum caseload numbers, its leaders have sometimes praised the NAC standards. In 2009, in testimony before a U.S. House of Representatives Subcommittee, a former NACDL president explained that “these [NAC] standards have withstood the test of time as a barometer against which full-time public defender caseloads should be judged.”¹⁰⁹ Similarly, courts have sometimes relied upon the NAC standards. In *State v. Smith*,¹¹⁰ the Arizona Supreme Court relied on the maximum

¹⁰⁶ JUSTICE DENIED, *supra* note 2, Chapter 1, at 38.

¹⁰⁷ ACCD STATEMENT ON CASELOADS, *supra* note 105, at 4.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ Statement of John Wesley Hall, President, National Association of Criminal Defense Lawyers, 3 (*Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, March 26, 2009*), available at <http://www.michigancampaignforjustice.org/docs/NACDL%20testimony%2003-26-09.pdf>. However, Mr. Hall also stated “that caseloads should, in reality, be lower than the standards propose,” *Id.* at n. 3, and that “workload targets are best established through an individualized study that allows a locality to take into account its unique geographic issues, the administrative and other responsibilities of the attorney, as well as the format of its judicial system and the make-up of its criminal docket” *Id.* at n. 4.

¹¹⁰ 681 P.2d 1374 (Ariz. 1984).

NAC caseload numbers, at least in part, in declaring a county's system of defense representation unconstitutional.¹¹¹

The foregoing discussion reveals my skepticism about the accuracy of the NAC maximum caseload numbers. My concern relates primarily to the 150 felony cases per attorney per year, because I do not believe that defense lawyers, even if they have entirely adequate support services, including investigators, social workers, and paralegals, can effectively defend this many different clients over a twelve-month period and still furnish genuine quality representation. The lawyers employed by the District of Columbia Public Defender Service in its felony division could not do so in the 1970s, when I served as the agency's director, and they cannot do it today, despite having outstanding support services.¹¹² Nor can the full-time public defense lawyers employed by the Massachusetts Committee on Public Counsel Services represent as many as 150 felony defendants annually.¹¹³ The opinions of experienced private defense lawyers with whom I have discussed this subject over a period of many years further support my conclusion.

However, some persons might wonder why it matters if the NAC caseload numbers are too high, because they are expressed as maximums, not recommended numbers of cases that public defense lawyers should annually represent. The answer is that caseload numbers expressed as maximums all too frequently are regarded as the norm, i.e., the number of cases that a defense lawyer *should* be able to represent over a twelve-month period. Warnings about relying upon the numbers are soon forgotten, and public defense programs are reluctant to seek financial support to enable their lawyers to handle caseloads at any number below "national standards," even though the NAC numbers were never intended to be used as a nationwide measure of how many cases an individual lawyer should be able to handle each year. Moreover, in the few jurisdictions in which a public defender office and its lawyers are well below the "national standards," the defense program is understandably not anxious to admit it. The defender committee of NLADA was correct when it warned, even before the NAC standards were adopted, that there are "dangers" in having any national standards.¹¹⁴

¹¹¹ The court in *Smith* did not actually cite the NAC's report but listed the NAC's maximum caseload numbers per attorney per year, citing a 1983 report of the National Legal Aid & Defender Association. The decision in the *Smith* case is discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 129.

¹¹² See *infra* notes 98–99 and accompanying text, Chapter 7.

¹¹³ See *infra* note 38 and accompanying text, Chapter 7.

¹¹⁴ Admittedly, when a jurisdiction's caseloads are higher than the NAC's numbers, it is helpful to the defender agency to be able to cite to the NAC maximum caseload numbers and to explain that, even today, various national organizations recommend that these numbers not be exceeded. See, e.g., the website of the Connecticut Division of Public Defender Services, *available at* <http://www.ocpd.state.ct.us/Content/Annual2008/2008Chap2.htm>: "It is important to note that recently the American Bar Association (ABA) and the American Council of Chief Defenders (ACCD) reaffirmed caseload goals as set by the National Advisory Commission on Criminal Justice Standards and Goals (NAC

Finally, it is worth noting that there are no “national caseload standards” for prosecutors who handle criminal and juvenile cases in state courts. The National Association of District Attorneys has a research arm—the American Prosecutors Research Institute (APRI). In 2002, APRI published the results of a national project it undertook respecting prosecution workloads. The report’s conclusion applies with equal force to public defense:

On the national level, APRI spent 3 years collecting information to determine if national caseload and workload standards could be developed. After examining all the information collected to date and attempting to control for the effects of various external, and internal, and individual case factors on the overall workload, APRI found that it was impossible for such standards to be developed.”¹¹⁵

Although it is desirable to many to have national standards, APRI’S findings demonstrate that such standards would be fatally flawed without significant efforts to create a national method of case counting and for tracking those factors most likely to impact caseload¹¹⁶

Standards in State and Local Jurisdictions

Caseload standards or other mechanisms have sometimes been adopted in an effort to limit the number of cases that can be represented annually by full-time public defenders or other lawyers providing indigent defense representation. However, the standards are often not observed, and normally there are no consequences when the standards are exceeded. Moreover, the standards themselves might sometimes be too high, because, as noted earlier, whether caseloads are excessive requires an individualized assessment of each lawyer’s situation.¹¹⁷ As a report noted several years ago, caseload standards have been developed through various means, “including statute, court rule, contractual terms, court opinion, and published guidelines by national organizations.”¹¹⁸

In 2007, Louisiana revised its public defense statute and established the Louisiana Public Defender Board (LPDB), which was granted broad authority over the delivery of defense services throughout the state.¹¹⁹ In addition to promulgating “mandatory state-wide public defender standards and guidelines” governing the delivery of public defense

Standards) in 1973; these goals are considerably lower than those adopted by the Connecticut Public Defender Commission in 1999.”

¹¹⁵ AMERICAN PROSECUTORS RESEARCH INSTITUTE, HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 27 (2002).

¹¹⁶ *Id.* at 30.

¹¹⁷ See, e.g., *supra* notes 49–50 and accompanying text.

¹¹⁸ KEEPING DEFENDER WORKLOADS MANAGEABLE, *supra* note 6, Introduction, at 7.

¹¹⁹ See Public Defender Act, LA. REV. STAT. §§ 15:141–15:184 (2007).

in Louisiana,¹²⁰ the statute requires that the LPDB include among its “standards and guidelines ... [m]anageable public defender workloads through an empirically based case weighting system”¹²¹ Because a case-weighting study has not yet been completed, the standards of the agency do not contain mandatory caseload limits.¹²²

Similarly, Montana’s public defense statute, enacted in 2005, authorizes the state’s new commission to establish standards that would take into account “acceptable caseloads and workload monitoring protocols”¹²³ and “establish policies and procedures for handling excessive caseloads.”¹²⁴ Although Montana’s commission has suggested caseload standards, the commentary accompanying them surely summarizes the belief of many respecting the establishment of standards: “In considering maximum caseload standards, it is inherently difficult to compare the work required for different types of cases. Each case is so individually different, that it is nearly impossible to set rigid numerical objectives.”¹²⁵

Montana and Louisiana are examples of states in which legislatures have authorized state indigent defense commissions to develop caseload standards for lawyers providing representation. Similar to Louisiana, Nevada required weighted caseload studies for the state’s two most populous counties (where Las Vegas and Reno are situated) as a precursor to the development of caseload standards. However, in Nevada this result derived from an order of the Nevada Supreme Court, which directed that the counties conduct weighted caseload studies prior to the adoption of caseload standards.¹²⁶

New Hampshire has addressed caseload standards differently from seemingly any other state. The state’s nonprofit defender agency is the New Hampshire Public Defender (NHPD), which periodically signs an “Agreement” with the state’s Judicial Council to provide indigent defense services in return for a specified payment. For fiscal years 2008 and 2009, Exhibit A to the Agreement provides as follows:

¹²⁰ LA. REV. STAT. § 15:I48 (B)(i) (West 2005 & Supp. 2011).

¹²¹ *Id.* at § 15:I48 (B)(i)(a).

¹²² See Louisiana Public Defender Board Trial Court Performance Standards (Spring 2010), *available at* <http://lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/LPDB%20Trial%20Court%20Performance%20Standards.pdf>.

¹²³ MONT. CODE ANN. § 47-I-105 (2)(b) (2009).

¹²⁴ *Id.* at § 47-I-105 (6).

¹²⁵ Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act at 21 (October 2010), *available at* <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>. The caseload standards of public defenders in Montana are expressed as “suggested caseloads” to be represented at a given time. Thus, for example, lawyers should not have more than 50 noncapital felonies at one time or more than 100 misdemeanors at one time. The complete list of suggested caseloads is *available at* <http://publicdefender.mt.gov/forms/pdf/caseloadsuggestions.pdf>.

¹²⁶ See the website of the National Association of Criminal Defense Lawyers, which summarizes the actions of the Nevada Supreme Court and provides links to that court’s website, *available at* <http://www.nacdl.org/public.nsf/defenseupdates/nevada016>.

The Public Defender Program shall maintain and enforce caseload limitations for cases awaiting trial or sentencing as follows:

(i) New Hampshire Public Defender Staff Attorneys. Full-time attorneys providing general felony, misdemeanor, and juvenile delinquency representation shall maintain a caseload of not more than 55 open and active cases. This caseload shall be a mixture of felony, misdemeanor, juvenile, and other cases with maximums in each of these categories as follows:

- (a) Felony Maximum—35 cases;
- (b) Misdemeanor Maximum—35 cases;
- (c) Juvenile Delinquency Maximum—25 cases;
- (d) Other Cases—5 cases.

The mix of cases totaling 55 for each attorney shall be determined by the Public Defender Program Executive Director based upon the experience level of the staff attorney and the concentration of these case categories in the geographic area served by each office of the program.¹²⁷

In addition, Exhibit A specifies maximum caseloads for special categories of defenders, such as those handling major crimes or appeals, and for senior staff.¹²⁸ Further, Exhibit A authorizes the agency's leaders to "inform the appropriate courts when Public Defender Program attorneys are unable to accept new cases because they have reached maximum caseload limits, at which time the courts shall be requested to appoint other counsel"¹²⁹

The foregoing provisions are unusual in several respects. First, unlike caseload standards in most other states, New Hampshire has focused on the maximum number of a defender's active or pending cases instead of the maximum number of cases that a lawyer should represent over a twelve-month period. Focusing on the number of active cases makes considerable sense because a lawyer's volume of work at any given time is substantially determined by his or her pending caseload.¹³⁰ The provisions also are noteworthy because they expressly authorize the agency to advise the court when additional cases cannot be accepted, and there is seemingly an expectation that judges will assign private counsel to represent the defender's case overload.

¹²⁷ Plan for Public Defender Caseload Control and Management, Exhibit A, at 11, appended to Agreement between New Hampshire Judicial Council and New Hampshire Public Defender, transmitted via letter to New Hampshire Governor John H. Lynch by Nina C. Gardner, Executive Director of New Hampshire Judicial Council, dated June 11, 2007 (on file with author).

¹²⁸ *Id.* at 12.

¹²⁹ *Id.*

¹³⁰ But other factors must also be considered. *See supra* note 50 and accompanying text.

Indiana also has dealt with public defense caseloads in a manner that is different from other states. In 1989, Indiana created the state's Public Defender Commission, which is currently authorized to reimburse Indiana counties 40% of their noncapital indigent defense expenditures, except for misdemeanor cases, if counties comply with Commission guidelines, which include caseload standards.¹³¹ These guidelines impose limitations on the numbers of cases that lawyers providing defense representation may accept during a twelve-month period, with greater caseloads permitted if support services are deemed to be adequate.¹³² If attorneys in a particular county exceed the Commission's caseload guidelines, the Commission can decide to eliminate the county's 40% reimbursements. The ability to withhold funding has served as an important source of leverage, as counties are reluctant to forego funding to which they have become accustomed and have often built into their annual budgets.¹³³

Similar to Indiana, the State of Washington distributes state funds to assist counties and cities in covering some of the costs of indigent defense. However, the process for doing so differs from Indiana's, in which counties seek reimbursements for past indigent defense expenditures. In Washington, counties and cities apply to the state Office of Public Defense for a pro rata share of state funds to which they are entitled, assuming they can show that they are in compliance with "standards for provision of indigent defense services as endorsed by the Washington state bar association or that the funds received under this chapter have been used to make appreciable demonstrable improvements in the delivery of public defense services"¹³⁴ In addition, the law provides that "[e]ach county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office."¹³⁵ The standards must include, *inter alia*, "case load limits and types of cases [to be represented]"¹³⁶

As for the content of the caseload standards, the legislation provides that those approved by the Washington State Bar Association (WSBA), which are similar to the NAC standards,¹³⁷ "should serve as guidelines to local legislative authorities in

¹³¹ See IND. CODE 33-40-6-5 (2008).

¹³² See Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases, Standards J and K, *available at* <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf>.

¹³³ Some Indiana counties have not participated in the Commission's 40% reimbursement program, presumably because they have been unwilling to invest their own funds at the outset in order improve the county's defense services, reduce defense caseloads, and thus qualify for 40% reimbursements. I served as Chairman of the Indiana Public Defender Commission from 1990–2007. The effectiveness of the Commission also is discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 171–172.

¹³⁴ WASH. REV. CODE § 10.101.060 (1)(a) (West 2002 & Supp. 2011).

¹³⁵ *Id.* at § 10.101.030.

¹³⁶ *Id.*

¹³⁷ See *supra* note 91 and accompanying text.

adopting standards.”¹³⁸ Because the Office of Public Defense now distributes state funds for indigent defense to virtually every county in the state and also to some cities, caseload standards evidently have now been adopted throughout most, if not all, of Washington state.¹³⁹

Moreover, counties and cities that apply for funding through the Office of Public Defense are required to report “the expenditure for all public defense services in the previous calendar year, as well as case statistics for that year, including per attorney caseloads”¹⁴⁰ Thus, the Office of Public Defense should be able to discern whether public defenders, assigned counsel, and contract attorneys are in compliance with the caseload standards locally adopted. Finally, Washington’s legislation is noteworthy because it requires lawyers who contract to provide defense services to disclose the total hours billed for private defense representation, as well as the number and types of cases handled for private clients.¹⁴¹

Massachusetts also has focused on the amount of work that may be accepted by private lawyers who provide defense services. The Committee on Public Counsel Services (CPCS), which administers the state’s defense program, has adopted caseload limits, as authorized by statute.¹⁴² In addition a private lawyer “is prohibited from accepting any new appointment or assignment to represent indigents after he has billed 1400 billable hours during any fiscal year.”¹⁴³ In addition, CPCS sets an annual cap on billable hours per fiscal year, currently 1800 hours, and the agency’s policy states that lawyers “will not be paid for any time billed in excess of the annual limit of billable hours.”¹⁴⁴ CPCS explains that the purpose of its policy “is intended: 1) to enhance the quality of representation provided to CPCS clients; 2) to achieve a more equitable distribution of assignments among CPCS-certified counsel; and 3) as an essential guard against over-billing.”¹⁴⁵

¹³⁸ WASH. REV. CODE § 10.101.030 (West 2002 & Supp. 2011).

¹³⁹ The website of the Office of Public Defense contains a 2008 Status Report on Public Defense in Washington State, *available at* <http://www.opd.wa.gov/Reports/T-Reports.htm>. At page 5, the Executive Summary of the report indicates that in December 2007 the agency disbursed state funds to thirty-eight of the state’s thirty-nine counties and also to fifteen cities.

¹⁴⁰ WASH. REV. CODE § 10.101.050 (West 2002 & Supp. 2011).

¹⁴¹ *Id.*

¹⁴² “The committee shall establish standards for . . . the private counsel division which shall include . . . specified caseload limitation levels.” Mass. G. L., Ch. 211D, § 9 (c) (2009). Caseload standards for private counsel appear on the CPCS website, *available at* <http://www.publiccounsel.net/index.htm>. The CPCS also has an extensive program to monitor the defense representation of private lawyers who provide defense services as explained later. *See infra* notes 40–52 and accompanying text, Chapter 8.

¹⁴³ MASS. G. L., Ch. 211D, § 11 (2005 & Supp. 2011).

¹⁴⁴ *See* Assigned Counsel Manual, Policies and Procedures Governing Billing and Compensation, Chapter 5, Section 17, *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_index.html.

¹⁴⁵ *Id.*

Finally, important developments related to public defense caseloads in New York City were underway as this book was being completed. In 2009, the New York legislature passed a law requiring that by April 1, 2010, the state's chief administrative judge establish caseload caps in New York City for trial-level defenders.¹⁴⁶ The law also provides that the caseload caps should be phased in over a four-year period, with the understanding that the increased costs associated with the caps be borne by the State of New York.¹⁴⁷ Pursuant to this law, on March 9, 2010, the chief administrative judge issued an order, effective April 1, 2010, declaring that attorneys appointed to represent indigent clients in criminal matters "shall not exceed 150 felony cases; or 400 misdemeanor cases; or a proportionate combination of felony and misdemeanor cases; or a proportionate combination of felony and misdemeanor cases (at a ratio of 1:2.66)."¹⁴⁸ The order further provides that "these limits shall apply as an average per staff attorney within the organization, so that the organization may assign individual staff attorneys cases in excess of the limits to promote the effective representation of clients."¹⁴⁹ Consistent with the state law that led to this administrative order, the caseload caps "constitute non-binding guidelines between April 1, 2010 and March 31, 2014, and shall be binding effective April 1, 2014."¹⁵⁰ While noting that 80% of the 470 New York Legal Aid Society lawyers handling criminal cases have caseloads above the new caseload caps, the head of the agency hailed the new administrative order as a "huge breakthrough."¹⁵¹ The estimated cost for implementing the new caseload limits is \$40 million. For 2010–2011, the state's judiciary's budget "includes a proposed \$10 million appropriation to get the cap requirement off the ground."¹⁵² Whether or not all of the necessary funds to implement the caseloads caps are, in fact, appropriated and whether or not the caps are adequate caseload limits remain to be seen.

¹⁴⁶ See Hearing on the Fiscal 2010 Executive Budget for the Legal Aid Society/Indigent Defense Services 3, May 12, 2009. See also John Eligon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, NY Times, April 9, 2010, available at <http://www.nytimes.com/2009/04/06/nyregion/06defenders.html>.

¹⁴⁷ *Id.*

¹⁴⁸ Rules of the Chief Administrative Judge, *Workload of Attorneys and Law Offices Providing Representation to Indigent Clients in Criminal Matters in New York City* § 127.7 (a), April 1, 2010, available at <https://www.nycourts.gov/rules/chiefadmin/127.shtml#07>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at (c)

¹⁵¹ Joel Stashenko, *New Rules Are Established on Caseload Caps for Indigent Defense Counsel*, N.Y. LAW J., March 11, 2010. However, the head of the CUNY Criminal Defense Clinic published an op ed in which he questioned the caseload standards adopted in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) and now being embraced by New York State's Chief Administrative Judge. See Steven Zeidman, *Indigent Defense: Caseload Standards*, N. Y. LAW J., March 24, 2010.

¹⁵² *Id.*

CHAPTER 3

The Detrimental Effects and Risks of Excessive Caseloads

Few would dispute that unmanageable lawyer caseloads mean that clients are apt to be ill served. Yet, not *all* of the adverse consequences of excessive caseloads may be fully appreciated. In addition, a complete recitation of the difficulties and risks incident to having too many clients to represent might be a useful resource for those who must constantly seek adequate finances for the representation of indigent clients. When the range of detrimental effects and risks set forth below are understood, perhaps those who fund defense services can be persuaded to do more to implement this country's constitutional right to counsel.

A. Supervision and Mentoring

The ABA's Ten Principles of a Public Defense Delivery System stress the importance of supervision: "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."¹ However, when caseloads are excessive, the time pressures are enormous not only for the lawyers who provide daily representation but also for lawyers in management who should be providing essential supervision and mentoring. As a result, no one is really able to ensure on a case-by-case basis that competent and diligent representation is being provided as required by professional conduct rules² and defense performance standards.³

While the ABA Ten Principles calls for the systematic supervision of defense counsel, the most important authority in support of supervision is not cited.⁴ As noted earlier, Model Rule 5.1, which has been adopted by states throughout the country, requires that those in managerial positions ensure that organizations have "in effect measures giving reasonable assurance that all lawyers ... conform to the Rules of Professional Conduct."⁵ Rule 5.1 further states that those in charge of defense programs are "responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct ..."⁶ Also, the ethical duty to provide adequate supervision was expressly invoked by the ABA Ethics Committee in Formal Opinion 06-441.⁷

¹ ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, Principle 10.

² See *supra* notes 3–5, Chapter 2, and accompanying text.

³ See *supra* notes 30–35 and 66–67, Chapter 2, and accompanying text.

⁴ Each of The ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, is supported by footnotes that cite to sources that provide a basis for the Principle. Although Principle 10 calls for the systematic supervision of lawyers, rules of professional conduct are not cited in support of Principle 10 or, for that matter, in support of any of the other nine Principles.

⁵ ABA MODEL RULES R. 5.1 (a).

⁶ *Id.* at R. 5.1 (c)(1).

⁷ In its opinion, the ABA Ethics Committee summarized the duty of those in charge:
Rule 5.1 provides that lawyers who have managerial authority, including those with

Courts have addressed the failure of law partners in private practice to supervise subordinate lawyers. For example, in *Davis v. Alabama State Bar*,⁸ two partners were held to have violated Rule 5.1 for failing “to make reasonable efforts to ensure that the lawyers in their firm conformed to the Rules of Professional Conduct.”⁹ Here is how the Alabama Supreme Court summarized the evidence against the firm’s two partners:

There was testimony that these two attorneys imposed unmanageable caseloads on associate attorneys, many of whom were inexperienced Former associates testified that because of the sheer volume of cases, the amount of time that could be spent on each case was so limited as to make it impossible for them to adequately represent their clients. At the hearing before the Disciplinary Board, the attorneys’ own expert witness on Social Security law ... testified that the Social Security caseload ... could not have been adequately handled by the one attorney assigned to it [T]he evidence presented amply showed that the two attorneys, in an effort to turn over a huge volume of cases, neglected their clients and imposed policies on associate attorneys that prevented the attorneys from providing quality and competent legal services.¹⁰

Is there any real difference between this case and public defense agencies, in which inexperienced court-appointed lawyers carry overwhelming caseloads with little or no supervision? The substandard client representation is substantially the same. Although the law partners in the Alabama case were willful and motivated by financial profit in permitting their associates to operate with too many cases, heads of defense agencies, while morally less culpable, are nevertheless complicit in the government’s failure to provide adequate funding unless they vigorously object in court or take other

intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to insure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients.

ABA Formal OP. 06-441, *supra* note 36, Chapter 2, at 7.

⁸ 676 So.2d 306 (Ala. 1996).

⁹ *Id.* at 307.

¹⁰ *Id.* at 307–308. For similar cases, *see, e.g.*, Attorney Grievance Comm’n v. Kimmel, 955 A.2d 269 (Md. 2008) (law firm partners violated Rule 5.1 by failing to provide adequate supervision of relatively inexperienced associate); Attorney Grievance Comm’n v. Mooney, 753 A.2d 17 (Md. 2000) (system for assignment of criminal cases to associate did not assure adequate time to prepare and thus violated Rule 5.1); Attorney Grievance Comm’n v. Ficker, 706 A.2d 1045 (Md. 1998) (lawyer’s practice of assigning too many cases to too few lawyers violated Rule 5.1); *In re Ritger*, 556 A.2d 1201, 1203 (N.J. 1989) (“when lawyers take on the significant burdens of overseeing the work of other lawyers, more is required than that the supervisor simply be ‘available’”).

appropriate action.¹¹ In fact, if chiefs of such agencies do not challenge the status quo (e.g., ask the court to halt new appointments and perhaps also request permission to withdraw from some cases), they will almost certainly violate rules of professional conduct. This is because the heads of such agencies, due to excessive caseloads, cannot ensure compliance by subordinate lawyers with professional conduct rules, thereby violating Rule 5.1; this, in turn, triggers a mandatory duty to seek withdrawal from representation as required by Rule 1.16.¹² Although no heads of public defense agencies appear to have been disciplined as a result of inadequate supervision or otherwise failing to ensure compliance with professional conduct rules, they are nevertheless at some risk if they refuse to take action to alleviate the agency's caseload problems.

Consider, again, the situation that confronted Pat, discussed in the Introduction, who was simultaneously representing more than 300 clients. Because of his caseload, Pat lacked adequate time to meet with a supervisor, assuming there was even someone available to meet and review with him his cases. Such a meeting, moreover, would likely not have been especially helpful to Pat, because he probably was unfamiliar with most of his 300 plus cases and could not have had a meaningful discussion about them.¹³

The duty of lawyers to take responsibility for their own professional conduct was discussed earlier.¹⁴ Ultimately, unless there is "an arguable question of professional

¹¹ In the last chapter of this book I suggest several approaches that I believe those in charge of defense programs should consider pursuing. See *infra* notes 85–128 and accompanying text, Chapter 9. My reference in the text to "heads" or "chiefs" of "defense agencies" is not language contained in the ABA Model Rules or in the professional conduct rules of states. However, the words are synonymous with language in Rule 5.1, which refers to those with "managerial authority" and "supervisory authority." Given how indigent defense is structured in the United States, "heads" or "chiefs" of defense agencies should apply to the head of a single office of indigent defense, whether or not part of a statewide program, as well as the head of a statewide program. But given the broad language of Rule 5.1, others with "managerial authority" may also have a professional duty to take action. See Rule 5.1 (a) and (c)(2). Finally, supervisors of a defense agency also are included under Rule 5.1. For example, Rule 5.1 (b) states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

¹² Model Rule 1.16 was discussed earlier in connection with the duty of an individual lawyer to seek relief from his or her excessive caseload. See *supra* notes 7–12, Chapter 2, and accompanying text. Rule 6.2 (a), also discussed earlier (see *supra* notes 14–15, Chapter 2, and accompanying text), should be considered, too, if appointments are made to the head of the public defense agency or program rather than to a specific lawyer designated to handle the case. This rule authorizes lawyers to decline representation if acceptance of a matter "is likely to result in a violation of the Rules of Professional Conduct."

¹³ In reflecting on Pat's situation, consider the language of the New Jersey Supreme Court in a case in which law firm partners were chastised for the "sink or swim" attitude that they displayed towards their new associates: "This sorry episode points up the need for a systematic, organized routine for periodic review of a newly admitted attorney's files." *In re Yacavino*, 494 A.2d 801, 803 (N.J. 1985) (quoting *In re Barry*, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting)).

¹⁴ See *supra* notes 16–20, Chapter 2, and accompanying text.

duty” about which a supervisor and subordinate lawyer disagree, every lawyer must assume responsibility for his or her own duty to provide competent legal services.¹⁵ As a result, I advised Pat to talk to the agency supervisor and, if necessary, to the head of the defender agency to seek help dealing with his enormous caseload. In retrospect, however, I also should have told Pat to remind his supervisor and the head of the defender program that they had a duty to supervise his representation of clients. Why? Because, as a subordinate lawyer in the defender agency, Pat had a duty to be competent in representing his clients, and the failure of supervision was contributing to his inability to be competent. In these circumstances, therefore, to withhold supervision is not “a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”¹⁶

Recruitment also suffers when subordinate lawyers are not routinely supervised. The strongest indigent defense programs routinely attract the most highly qualified applicants who are committed to their work and to their employer. In the private practice of law, the importance of supervision and mentoring in attracting and retaining new lawyers is well understood:

Law firms throughout the world seek new ways to attract and retain young lawyers Strong mentoring and coaching programs meet the needs of both law firms and their lawyers and may become essential if they are to compete successfully in the future Young professionals are looking for better ways to increase their worth to their organization, while at the same time, developing the transferable skills needed to enhance their own market value Research indicates that employees’ job performance is a function of their ability, their motivation to engage with their work, and the opportunity to deploy their ideas, abilities and knowledge

¹⁵ See ABA MODEL RULES R. 5.2 (b).

¹⁶ One writer has explained the ethical duty of a subordinate lawyer to seek appropriate supervision this way:

If the subordinate lacks the time, training, resources, or expertise to represent the client competently, or if the subordinate is not receiving adequate guidance or supervision in the handling of clients’ matters, the subordinate is obligated to correct that situation to avoid potential ethical breaches. To correct the deficient practice setting, the subordinate may need to bring the matter to the attention of his or her supervisor. Rule 5.2(b) obligates the supervisor to provide a reasonable resolution of the issue of professional duty raised by the subordinate. The subordinate’s permission to defer to the supervisor’s resolution (within the meaning of Rule 5.2(b) disciplinary immunity) is dependent upon the reasonableness of the resolution. The only reasonable resolution under these circumstances is for the supervisor to take positive steps to ensure that the subordinate is properly supervised. The subordinate’s obligation under Rule 5.2(b) is to determine whether the steps taken by the supervisor are reasonable under the circumstances.

Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 299 (1994).

effectively One-on-one mentoring and coaching each contribute to professional development by helping individuals reach their professional goals faster, building on strengths, developing skills, providing encouragement, while increasing confidence.¹⁷

From my personal experience in directing the D.C. Public Defender Service in the 1970s, I learned the importance to a defender agency of controlling its caseloads, having an effective training program, and providing close supervision.¹⁸ Because it had all of these, the agency was able to provide excellent client services.¹⁹ As the reputation of the agency became well known, our recruitment of new lawyers significantly improved. Each year, with relatively little outreach on the agency's part, the organization attracted hundreds of applications from outstanding law graduates and practicing attorneys from around the country. Because of the volume of our applications, we became extremely selective in our hiring. One year the agency hired three new lawyers who joined the agency immediately after completing their clerkships with U.S. Supreme Court justices—something that no other government agency or private law firm in Washington could boast at the time. Affording our lawyers the opportunity to practice criminal and juvenile defense in a manner similar to the private practice of law, which included close supervision and mentoring, greatly enhanced our hiring and retention of new lawyers.

B. Disciplinary Sanction

Chapter 2 reviewed the professional conduct rules that indigent defense lawyers are most apt to violate due to excessive caseloads.²⁰ These include the duty to be competent, which requires “legal knowledge, skill, thoroughness and preparation,”²¹ as well as the requirements of “diligence”²² and prompt “communication” with the client.²³ Consider, for example, the testimony of an assistant public defender in July 2008, during a hearing in Miami on the motion of the Dade County Public Defender for relief

¹⁷ Stephen P. Gallagher and Leonard B. Sienko, Jr., “Put Me in Coach!” *Mentoring and Coaching at Today's Law Firm*, 18 PROF. LAW I, No. 4 (2008).

¹⁸ I served as Deputy Director of the agency from 1969–1972 and as director from 1972–1975. When I started at the agency, it was known as the Legal Aid Agency. In 1970, the agency's statute was revised, and its name changed to the D.C. Public Defender Service.

¹⁹ The current status of the D.C. Public Defender Service is discussed later. *See infra* notes 53–104 and accompanying text, Chapter 8.

²⁰ *See supra* notes 3–29, Chapter 2, and accompanying text.

²¹ ABA MODEL RULES R 1.1.

²² *Id.* at R. 1.3.

²³ *Id.* at R. 1.4.

from alleged excessive felony caseloads.²⁴ On the day of the hearing, the assistant's caseload consisted of sixty-two serious felonies. She explained that she and her fellow assistant public defenders were "drowning" in cases and unable to do a number of things on behalf of their clients, such as prompt and complete interviews of defendants in custody, adequate investigations of their cases, filing of motions, and visits to crime scenes.

Most troubling, she described a case in which she had failed to inform a client of a plea offer extended by the prosecutor and the adverse impact of her failure on the client:

I recently had a case set for trial in April of this year. I had 11 A cases set for the same day in front of Judge Reyes. One of my cases was not ready for trial. It hadn't been prepared and I wasn't ready to go forward. But there was a plea offer extended to my client.

It was a child pornography case, so accepting any plea offer would make my client a sexual offender, basically a social pariah for the rest of his life. It was a serious case.

The offer that was extended was 364 [days]. That was followed by seven years probation, but it would have gotten him out of jail, if not immediately, almost immediately. The prosecutor had extended the offer to me.

My client was brought over from the jail that day and he was in the back. He wasn't brought into the courtroom, but he was in a holding cell.

As I said, I had 12 other cases set for trial that day, and one of them actually did go to trial We started picking a jury before lunch. I spent my lunch break writing my cross of the victim who testified on that same day.

Because all of this was going on, I did not convey the offer to my client. I didn't ask for him to be brought out. I didn't go in the back to see him. I didn't tell him about the offer.

Shortly after that ... [day], I was informed by the State that, because my client had ... rejected the offer, they were revoking the offer I made it clear to the prosecutor I had never conveyed it; it was not rejected by any means, and asked if I could convey it.

She responded that I could not.²⁵

²⁴ I served as an expert witness in the case on behalf of the Dade County Public Defender and was in court when the assistant public defender, a graduate of Cornell University and the Yale Law School, described her caseload. She had been with the Public Defender's office for almost five years and was assigned to handle "A" felonies, the most serious noncapital felonies prosecuted in Florida.

²⁵ Transcript of Record at 271–272, *In re Reassignment and Consolidation of Public Defender's Motions*

The defendant ultimately accepted “an offer of five years in state prison followed by probation.”²⁶ When asked whether, “with the caseloads that you are handling currently ... , you are able to provide competent representation to your clients, as required by the Florida Rules of Professional Conduct,”²⁷ she responded:

I don't. I think I do the best I can for them. They all have to be shuffled and prioritized. There's a triage, as everyone says

So there are a lot of things that I can't do for my clients because I don't have sufficient time, and lots of choices that I have to make between one client and another.²⁸

Not only did the assistant public defender's testimony require courage, because she publicly acknowledged that her representation of one of her clients had likely not been competent,²⁹ but it also effectively demonstrated the direct relationship between excessive caseloads and their adverse consequences for clients. Yet, I doubt that the lawyer feared that she would be disciplined by the Florida bar as a result of her testimony.

Although many public defenders throughout the country could tell similar stories and could be charged with not providing competent and diligent representation, most are not at serious risk of disciplinary sanction. As noted in a recent national report, “defense attorneys who represent the indigent are rarely disciplined even when their caseloads are excessive, and they fail to provide competent representation.”³⁰ This is apparently because clients of lawyers engaged in public defense services do not often complain to state disciplinary agencies about their lawyers, and such agencies normally respond only to complaints.³¹ Moreover, disciplinary authorities may be sympathetic to the plight of those furnishing indigent defense services and reluctant to file complaints against overworked defense lawyers.

But even if overworked public defense lawyers are unlikely to be disciplined, the risk of discipline cannot be completely eliminated. To illustrate, consider the situation in Missouri,

to Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 08-1, The Eleventh Judicial Circuit, Miami-Dade County, Florida (July 30, 2008).

²⁶ *Id.* at 273.

²⁷ *Id.* at 270.

²⁸ *Id.*

²⁹ The defense lawyer failed to communicate “promptly” with her client on a matter of considerable importance on which “the client’s informed consent” was required, knowing that the favorable guilty plea offer could be withdrawn by the prosecutor at any time. *See* ABA MODEL RULES R. 1.4 (a)(1). The lawyer reported to the court what occurred and another public defender was substituted to represent the client. For discussion of caseload litigation concerning the Miami-Dade County Public Defender Office, *see infra* notes 51–62 and accompanying text, Chapter 7.

³⁰ JUSTICE DENIED, *supra* note 2, Chapter 1, at 203 n. 88.

³¹ *Id.* at 36–37.

which has a statewide public defender program that has been overwhelmed with cases for a number of years.³² In 2009, the then deputy director of the Missouri State Public Defender sent a letter to a committee of the state's legislature in which she revealed that "[t]hree public defenders have been called before the disciplinary counsel for balls dropped on cases already this year—good lawyers who simply have too much to do."³³

While the cases of the three public defenders in Missouri were settled informally without creating a public record of what happened, in other reported disciplinary cases courts have rejected claims of lawyers who argued that their mistakes were due at least in part to having too much work. Several of the cases involved private lawyers who provided indigent defense representation either as assigned counsel or pursuant to contracts. To illustrate, an attorney was disciplined for neglect of legal matters and a failure to communicate with clients; the attorney defended his actions in part, arguing that he had accepted "too many appointments at the appellate level from the ... [state public defender's] office."³⁴ In another case, a court sustained discipline against a defense lawyer who claimed that his failure to file briefs in two indigent criminal appeals was "because of his heavy caseload" and the cases "fell between the cracks."³⁵ Still another lawyer who neglected client matters and was disciplined claimed that his failures were due to his "inability to turn away persons seeking legal assistance and a resulting oppressive case load."³⁶

³² See *Nixon Approves, Vetoes Final Bills from 2009 Session, Among them Bills Regarding Private Jails, Public Defenders*, Kansas City Star, July 13, 2009 ("Public defenders, who represent defendants in criminal trials who cannot afford their own lawyers, have been chronically underfunded and understaffed for years. This has led to huge caseloads that defenders say prevent them from providing effective counsel and could endanger their law licenses."). See also THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 8 (2005) ("Some public defenders describe their practice as 'triage.' Public defenders are forced to choose between providing adequate assistance to some clients and neglecting others. Work on some cases does not begin until the trial date is near Similarly, a District Defender stated to us that the volume of cases is so high that some public defenders cannot provide effective assistance of counsel to many clients.")

³³ Memorandum of Cat Kelly, Deputy Director of the Missouri Public Defender System, to Members of the House General Law Committee, Missouri Legislature (April 15, 2009) (on file with author). Kelly is now the head of the Missouri public defender program.

³⁴ *In re Disciplinary Proceedings against Artery*, 709 N.W.2d 54, 62 (Wis. 2006). See also *Matter of Cohn*, 194 A.D.2d 987, 991, 600 N.Y.S.2d 501, 504 (N.Y. App. Div. 1993) (neglect is not only a lack of diligence, which is required in Rule 1.3 of the ABA Model Rules, but it also "may be considered a species of failure to act competently"); *Office of Disciplinary Counsel v. Henry*, 664 S.W.2d 62 (Tenn. 1983) (lawyer in first degree murder case did not act competently when he failed to conduct an investigation, did not try to discover the State's case, and did not talk to possible witnesses); *State ex rel. Nebraska State Bar Ass'n v. Holscher*, 230 N.W.2d 75, 80 (Neb. 1975) (county attorney disciplined for failing to research applicable statute; fact "that he was extremely busy with criminal prosecutions does not absolve" lawyer of ethical violation).

³⁵ *Matter of Whitlock*, 441 A.2d 989, 990 (D.C. 1982).

³⁶ *Matter of Klipstine*, 775 P.2d 247, 249 (N.M. 1989).

Discipline also was sustained against a lawyer who had “a case load of over 250 active cases because of his belief that he has an obligation to provide inexpensive legal services ... and because he is under contract with the Public Defender to represent indigent persons accused with criminal acts.”³⁷ The state’s disciplinary board conceded that the lawyer “was not motivated by malice, fraud, dishonesty, or any other state of mind in his violations of the Code of Professional Responsibility.”³⁸ But the court pointed out that it “has the responsibility of protecting the public from attorneys who exhibit an inability, for whatever reason, to provide clients with competent and timely legal services.”³⁹ The court also invoked the well-established principle that “[t]he purpose of attorney discipline is not to punish the attorney but to insure that members of the public can safely assume that the attorney to whom they entrust their cases is worthy of trust.”⁴⁰

³⁷ Matter of Martinez, 717 P.2d 1121, 1122 (N.M. 1986). Services provided by contract defense programs occasionally have led to disciplinary violations. See LOW-BID CRIMINAL DEFENSE CONTRACTING: JUSTICE IN RETREAT, REPORT FOR PRESENTATION TO NATIONAL, STATE AND LOCAL BAR ASSOCIATIONS (National Association of Criminal Defense Lawyers 1997):

In California State Bar Case No. 93-0-10027 ... discipline was imposed on a lawyer who contracted for more cases than he could handle, and then subcontracted the bulk to another lawyer, also unable to handle the load—several times the recommended maximum. Stipulated facts in that [unreported] case include failure to investigate; failure to contact clients prior to hearings; failure to obtain discovery; failure to file motions, or even submit jury instructions. While hundreds of clients too poor to choose their own attorney were trundled off to prison, the lawyer responsible was ordered suspended from the practice of law for one year, with execution of suspension stayed during two years of probation.

See also Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 166, n. 357 (2009). A contract defense lawyer from the State of Washington was disbarred for a range of offenses, including conflict-of-interest violations, lack of diligence and communication with clients, as well as dishonesty, fraud, deceit, and misrepresentation. In one of the cases that was the subject of the disciplinary complaint, the hearing officer found that the lawyer had voluntarily assumed an “excessive caseload [that] was prejudicial to the administration of justice.” Discipline Notice of Washington State Bar Association re Thomas Jay Earl, May 13, 2004, available at <http://www.mywsba.org/default.aspx?tabid=180&RedirectTabId=178&cid=594>. See also *infra* notes 107–110 and accompanying text, which discusses a § 1983 case involving the same lawyer.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

C. Ineffective Assistance of Counsel

The test for ineffective assistance of counsel under *Strickland v. Washington*⁴¹ requires appellant to establish that defense counsel's representation at trial "fell below an objective standard of reasonableness"⁴² and those "deficiencies in counsel's performance must be prejudicial to the defense."⁴³ Thus, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁴⁴ Although prevailing on a claim of ineffective assistance of counsel is extremely difficult, especially because of the need to show prejudice to the defendant,⁴⁵ occasionally cases are reversed and remanded due to errors of lawyers.⁴⁶ Such reversals not only mean that the defendant has been deprived of representation guaranteed by the Constitution, but, because of remands to the trial court, that additional expenses are incurred by the defense, prosecution, and court.

The causal connection between high public defender caseloads and ineffective assistance of counsel is highlighted by a case decided in 2009 by a California appellate court, which relied in part on the ABA's 2006 ethics opinion. *In re Edward S*⁴⁷ involved a seventeen-year-old juvenile, who was adjudicated delinquent for two counts of prohibited sexual acts with his ten-year-old niece. The juvenile was represented at a jurisdictional hearing by a deputy public defender from Mendocino County and sentenced to more than seven years confinement in a residential treatment facility.

Later, the case was transferred to Humboldt County, where a new deputy public defender assumed responsibility for the juvenile's representation. This lawyer sought a new jurisdictional hearing in the trial court, arguing that her client had been denied

⁴¹ 466 U.S. 668 (1984).

⁴² *Id.* at 688.

⁴³ *Id.* at 691.

⁴⁴ *Id.* at 694.

⁴⁵ Justice Marshall, the lone dissenter in *Strickland*, complained about the requirement to show prejudice, noting that "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and argument would have stood up against rebuttal and cross-examination by a shrewd and well-prepared lawyer." *Id.* at 710. He also noted that "evidence of injury to the defendant may be missing precisely because of the incompetence of defense counsel." *Id.* The *Strickland* test for ineffective assistance and its shortcomings are further discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 39–41.

⁴⁶ A recent study of more than 2500 California state and federal appellate cases alleging ineffective assistance of counsel found a success rate of 4%. See Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 265, 324 (2009) [hereinafter, Benner, *Presumption of Guilt*]. While this is undoubtedly a meager success rate, it is better than the success rate reported in a recent study of noncapital federal habeas petitions filed by prisoners convicted of felonies in state courts. See Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N. Y. U. L. REV. 791 (2009).

⁴⁷ 92 Cal. Rptr. 3d 725 (Cal. Ct. App. 2009).

the effective assistance of counsel due to a whole host of errors committed by the first deputy public defender, including the failure of this lawyer to interview the client's aunt and uncle with whom the victim's mother spoke prior to calling the police.⁴⁸

To his credit, the juvenile's former deputy public defender from Mendocino County filed an affidavit in support of the motion for a new jurisdictional hearing, acknowledging his shortcomings in representing his client. He explained, *inter alia*, that "his 'excessive caseload' made it impossible to 'thoroughly review and litigate each and every case' he was then litigating, including appellant's case; ... the Mendocino County Public Defender's Office lacked an investigator and he was expected to conduct his own investigations, which was 'all but impossible' in light of his heavy caseload"⁴⁹ In addition, his affidavit recounted "numerous [unsuccessful] attempts to discuss [his] cases and caseload with [the county's chief public defender]."⁵⁰ One of his exchanges with the head of the office is especially memorable, as the appellate court explained: "[W]hen [the deputy public defender] told [the chief public defender] his unmanageable caseload interfered with his ability to represent appellant and his other clients ... [the chief public defender] responded: 'I'm doing a murder case, do you want to trade?'"⁵¹ The deputy public defender ended his affidavit, stating his belief "that much more should have been done in defending [appellant's] case. Specifically, this case required more resources, support from experienced attorneys, proper investigation None of these things were possible in light of my fear that I would lose my job if I pushed these issues with the [Mendocino County] Public Defender."⁵²

The trial court's refusal to grant a new jurisdictional hearing was reversed by the appellate court on grounds of ineffective assistance of counsel. Specifically, the appellate court held that the deputy public defender's "performance was deficient in that he (1) failed to investigate potentially exculpatory evidence, (2) sought an inadequate continuance based on a mistake of law, and, (3) *failed to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend appellant*."⁵³

In re Edward S appears to be the first case in the country to hold that a failure to move to withdraw from representation, as a result of an excessive caseload, can be the basis

⁴⁸ Among the alleged errors was the failure to seek a continuance of sufficient length, the failure to impeach the victim with a prior recorded statement that differed from her trial testimony, and the failure to impeach the investigating officer with an audiotape that showed that the officer's questions of the victim during the investigation of the case were leading and the victim's answers coached by her mother. *Id.* at 734.

⁴⁹ *Id.* at 735.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 741 (emphasis added).

for finding that counsel's representation was "deficient" under the *Strickland* standard. In doing so, the appellate court discussed the ABA ethics opinion dealing with the duty of defense lawyers faced with excessive caseloads.⁵⁴ After noting the position of the ethics opinion that the duties of "public defenders and other publically funded attorneys who represent indigent persons charged with crimes are no different from those of privately retained counsel,"⁵⁵ the appellate court explained how the opinion applied to deputy public defenders in California:

Under the ABA opinion, a deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisory approval, attempt to reduce the caseload, as by transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, the ABA opinion provides that he or she must "file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients." ... The conduct prescribed by the ABA Opinion, which is fully consistent with the California Rules of Professional Conduct, may also be statutorily mandated.⁵⁶

In a footnote, the appellate court discussed factors for trial courts to consider in determining whether a public defender's workload is excessive:

Suffice it for us to simply to note that whether a public defender's workload is so excessive as to warrant his or her removal and the substitution of other counsel requires an evaluation not just of the size of the workload but the complexity of the cases that comprise it, available support services, and the attorney's nonrepresentational duties.⁵⁷

The court also suggested that it would be reasonable for trial courts to take into consideration "national maximum public defender workload standards."⁵⁸ In the case before it, the appellate court concluded that both the deputy public defender and his supervisor were either aware, or should have been aware, that the office could not

⁵⁴ For discussion of the ABA ethics opinion, see *supra* notes 36–54, Chapter 2, and accompanying text.

⁵⁵ *In re Edward S.*, 92 Cal. Rptr. 3d at 746.

⁵⁶ *Id.* In a decision in 2009, the Missouri Supreme Court fashioned a remedy for excessive caseloads in that state, also relying in part on the ABA's ethics opinion. See *State ex rel. Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870 (Mo. 2009). The case is discussed at *infra* notes 85–103 and accompanying text, Chapter 7.

⁵⁷ *In re Edward S.*, 92 Cal. Rptr. 3d at 747.

⁵⁸ *Id.*

provide “effective representation,” yet “failed to take reasonable steps to avoid reasonably foreseeable prejudice to appellant’s rights.”⁵⁹

State v. A.N.J.,⁶⁰ a 2010 unanimous decision of the Supreme Court of Washington, further demonstrates the relationship between excessive caseloads and ineffective assistance of counsel. The defender in that case represented indigent persons pursuant to a flat-fee contract with a Washington county. As in *In re Edward S.*, the client was a juvenile; however, the issue was not the defense lawyer’s representation at an adjudication hearing but the defense services provided to the juvenile in connection with his decision to plead guilty. On appeal, A.N.J. argued that he should be permitted to withdraw his plea, because he was not told prior to pleading to a charge of child molestation that the offense would remain on his record for the rest of his life. He also maintained that his defense counsel spent inadequate time discussing the guilty plea with him and also failed to investigate the case before recommending that the prosecutor’s plea offer should be accepted. The Washington Supreme Court concluded that defense counsel had, in fact, misled A.N.J. about the consequences of his guilty plea and that the defense representation provided “fell below the objective standard guaranteed by the constitution and that A.N.J. was prejudiced.”⁶¹

The case is notable for a number of the court’s observations about indigent defense both nationally and in Washington:

- After pointing out that public funds are insufficient for indigent defense throughout much of the country, often leading to extremely high caseloads,⁶² the court turned to indigent defense in the county that hired the contract lawyer who represented A.N.J. Calling the county’s approach to indigent defense a “dysfunctional system,”⁶³ the court noted the extremely large caseload that the defense lawyer was handling on an annual basis. During the year A.N.J. was defended, the lawyer “represented 263 clients under the contract. Additionally, he carried an average of

⁵⁹ *Id.* at 748.

⁶⁰ 225 P.3d 956 (Wash. 2010).

⁶¹ *Id.* at 970. The court’s opinion emphasized the importance of a defendant being advised of the direct consequences of a guilty plea. Under a United States Supreme Court decision rendered two months after *A.N.J.*, the failure to inform a defendant of a guilty plea’s collateral consequences may also be a basis for a court finding ineffective assistance of counsel. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (counsel provided deficient representation in failing to advise defendant that his guilty plea made him subject to automatic deportation). *Padilla* is also discussed at *supra* note 95, Chapter 2.

⁶² “While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance. Public funds for appointed counsel are sometimes woefully inadequate, and public contracts have imposed statistically impossible case loads” *A.N.J.*, 225 P.3d at 960.

⁶³ *Id.* at 967.

30–40 active dependency cases at any one time, and about another 200 cases.”⁶⁴ The defense lawyer’s only assistance was provided by “his wife, who had been home with a sick child at the time he was representing A.N.J.”⁶⁵

- The court also was extremely critical of the requirement that funds for experts, investigators, other services, even including the expense of conflict counsel, had to be paid by the defense lawyer from his or her contract with the county. The court deemed this to be a clear conflict of interest, which is now prohibited under Washington’s Rules of Professional Conduct.⁶⁶
- Further, the court’s opinion stressed the importance of defense lawyers investigating a case before advising a client about whether or not to plead guilty: “While no binding opinion of this court has held an investigation is required, a defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the state’s evidence.”⁶⁷ In A.N.J.’s case, the defense lawyer phoned two potential witnesses who might have been helpful to the defense, but he never called them back when he failed to reach them on his first attempt. The defense also failed to interview the investigating officer, consulted no expert witnesses, did not request any discovery, and filed no motions.
- And, finally, after noting that “state law [in Washington] requires that each city and county providing public defense adopt [standards for indigent] defense . . . ,”⁶⁸ the court noted that “while not binding, relevant standards are often useful to courts in evaluating things like effective assistance of counsel.”⁶⁹

The lack of adequate investigation is the most frequent reason that courts find ineffective assistance of counsel.⁷⁰ *In re Edward S and A.N.J.*, based upon failures to conduct

⁶⁴ *Id.* at 961.

⁶⁵ *Id.*

⁶⁶ See Washington Rules of Professional Conduct, R. 1.8 (m):

A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or (2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

⁶⁷ *A.N.J.*, *supra* note 60, at 965. The court also noted that “[e]ffective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.” *Id.* at 966.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ A California study found that nearly half the cases in the state reversed on grounds of ineffective

sufficient investigations, are typical of decisions in which courts have found prejudice to clients and reversed under *Strickland*.⁷¹ In death penalty cases, the U.S. Supreme Court also has emphasized the importance of investigations concerning mitigation evidence. Thus, in *Rompilla v. Beard*,⁷² the Supreme Court found two public defenders ineffective due to their failure to inspect a court file that would have yielded possible mitigation evidence relevant to the penalty hearing.⁷³ In doing so, the Court quoted from ABA Criminal Justice Standards respecting the duty of counsel to conduct investigations,⁷⁴ once again noting that ABA standards are “guides to determining what is reasonable.”⁷⁵

Arguably, a defense lawyer who fails to conduct an investigation, whether because of excessive caseloads, inadequate investigative staff, or a combination of both, violates the client’s right to counsel and should not need to demonstrate prejudice under *Strickland*. While no court appears to have embraced such an argument, it follows from Supreme Court decisions, beginning in 1984 with *United States v. Cronin*,⁷⁶

assistance of counsel were due to a failure to investigate. See Benner, *Presumption of Guilt*, *supra* note 46, at 327.

⁷¹ See, e.g., *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997) (defense lawyer’s failure to investigate was deficient representation that prejudiced defendant); *People v. Grant*, 684 N.W.2d 686 (Mich. 2004) (defense lawyer’s failure to investigate was not a strategic decision but a fundamental abdication of duty to conduct a complete investigation).

⁷² 545 U.S. 374 (2005).

⁷³ *Rompilla* was a 5:4 decision of the Supreme Court. Justice Kennedy dissented, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. In his opinion, Justice Kennedy noted the lack of adequate investigative services for the Lehigh County Public Defender agency that represented the defendant at trial:

Today’s decision will not increase the resources committed to capital defense. (At the time of *Rompilla*’s trial, the Lehigh County Public Defender’s Office had two investigators for 2,000 cases.) If defense attorneys dutifully comply with the Court’s new rule, they will have to divert resources from other tasks. The net effect of today’s holding in many cases—instances where trial counsel reasonably can conclude that reviewing old case files is not an effective use of time—will be to diminish the quality of representation.

Rompilla, 545 U.S. at 403 (Kennedy, J., dissenting). Allentown, Pennsylvania’s third-largest city, is located in Lehigh County.

⁷⁴ The ABA’s position on the need to conduct investigations is clear and unequivocal:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.

ABA DEFENSE FUNCTION, *supra* note 13, Chapter 1, at Std. 4-4.1 (a). The position of the National Legal Aid & Defender Association is similar. See NLADA PERFORMANCE GUIDELINES, *supra* note 30, Chapter 2, at Guideline 4.1.

⁷⁵ *Rompilla*, 545 U.S. at 387. See also *Strickland*, 466 U.S. at 688.

⁷⁶ 466 U.S. 648 (1984).

decided the same day as *Strickland*. In *Cronic*, the Court explained that there are situations in which prejudice is not required to be shown in order to find a Sixth Amendment violation of the right to counsel:

The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.⁷⁷

The foregoing passage suggests two lines of argument. First, the defense failure to investigate a client's case pretrial is a denial of counsel at a "critical stage." Second, there cannot be "meaningful adversarial testing" unless there has been a thorough investigation of the client's case prior to trial or entry of a guilty plea. These arguments received important support from the Supreme Court's 2009 decision in *Kansas v. Ventris*,⁷⁸ in which a defendant, who was represented by counsel, made incriminating statements to a government informant in violation of the Court's decision in *Massiah v. United States*.⁷⁹ Writing for the majority in *Ventris*, Justice Scalia explained that the "core of this right [to counsel] has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.' ... [W]e conclude that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the 'Assistance of Counsel' is denied."⁸⁰ Thus, if counsel fails to investigate factual innocence or mitigating circumstances prior to trial, the defendant has been denied the right to counsel at a "critical stage," and prejudice should not need to be established.⁸¹

⁷⁷ *Id.* at 659. The Court noted in *Cronic* that it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n. 25.

⁷⁸ 129 S. Ct. 1841 (2009).

⁷⁹ 377 U.S. 201 (1964) (defendant's Fifth and Sixth Amendment rights were violated by use in evidence against him of incriminating statements made to codefendant after indictment and release on bail and in absence of defendant's retained counsel).

⁸⁰ *Ventris*, 129 S. Ct. at 1844–1845, 1846.

⁸¹ This argument was first advanced in Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, Issue Brief, AM. CONST. SOC'Y (2011):

The strategy outlined here is premised upon the argument that the period between arraignment and trial—the investigatory stage—is a critical stage at which the accused is entitled to counsel's assistance. In sum, the argument is that because excessive caseloads make it impossible for defense counsel to conduct a reasonable investigation into factual innocence and/or mitigating circumstances relevant to punishment, this inability to provide "core" assistance of counsel renders counsel constructively absent at a critical stage of the proceedings.

D. Section 1983 Liability and Wrongful Convictions

Title 42 U.S.C. Section 1983 (hereinafter § 1983) can be the basis for bringing civil suit against a person who, acting under color of state law, deprives another person of a constitutional or federally guaranteed and protected right. A party who prevails under § 1983 potentially has available all of the usual civil remedies, including monetary damages, declaratory judgment, and injunctive relief.⁸² A party filing suit must satisfy the following jurisdictional requirements: (1) defendant must be a person or persons, (2) who acted under color of state law, and (3) deprived plaintiff of a constitutional or federal right.⁸³

Civil liability under § 1983 can result from deficiencies in indigent defense representation due to excessive caseloads. Thus, defendants represented by overworked defenders may be able to bring successful § 1983 lawsuits against (1) individual defenders who failed to provide adequate client services; (2) the heads of defender programs responsible for the work of assistant defenders who permitted case overload situations

Id. at 2. Professor Benner also stresses the relevance of the *Ventris* decision:

[The decision is relevant] to the excessive caseload problem because it logically follows that a violation of the Sixth Amendment likewise occurs at the time a public defender has such an excessive caseload that he or she is precluded from being able to conduct a prompt investigation Because excessive workloads prevent defense attorneys from fulfilling their “core” investigative function, a substantive violation of the Sixth Amendment occurs prior to trial. Following *Ventris*, the violation occurs at the moment a public defender office accepts new indigent appointments under circumstances that preclude the ability to promptly investigate the merits of the defendant’s case, both with respect to factual innocence or mitigating circumstances reducing punishment.

Id. at 7.

⁸² The statute provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C § 1983.

⁸³ Some courts and commentators list the elements in a different order or with more or fewer elements that require proof. *See, e.g.,* Gomez v. Toledo, 446 U.S. 635, 640 (1980) (Section 1983 lawsuits have two elements: allegation that a plaintiff was deprived of a federal right and that the responsible person was acting under color of state law.); MARY MASSARON ROSS & EDWIN P. VOSS, JR., SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION (3d ed. 2006) (there are at least four elements: (1) conduct by a “person,” (2) who acted under color of state law, (3) proximately causing, (4) a deprivation of a federally protected right). Thus, as in any civil action, it is necessary to prove that the defendant’s action *caused* the injury in question. The Supreme Court has stated that “§ 1983 liability should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” Malley v. Briggs, 475 U.S. 335, 345 (1986) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

to persist; and (3) city, county, or other jurisdictional authorities responsible for the defense services provided.

Section 1983 litigation typically occurs in wrongful conviction cases where the defendant has been exonerated.⁸⁴ Those responsible for funding indigent defense should understand the potential liability under § 1983 for operating defense systems that fail to furnish adequate representation.⁸⁵ Moreover, as noted earlier, the causes of wrongful conviction are matters that competent defense counsel can address and may be able to prevent.⁸⁶

Individual Liability: Defenders Who Represents Clients

A deputy public defender is a “person” within the meaning of § 1983. Yet, if the defender has too many cases and routinely deprives defendants of constitutional rights,⁸⁷ a lawsuit against the defender under § 1983 will not likely succeed because the defender was not “acting under color of state law.” In *Polk County v. Dodson*,⁸⁸ the Supreme Court addressed whether or not a public defender acts “under color of state law” in representing an indigent defendant in state criminal proceedings.⁸⁹ In *Polk County*, because the public defender filed the equivalent of an “*Anders* brief” under state law,⁹⁰ the defendant alleged that his lawyer had “deprived him of his right to

⁸⁴ See generally BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (SAUNDRA D. WESTERVELT & JOHN A. HUMPHREY EDS., 2001); C. RONALD HUFF & ARYE RATTNER, *CONVICTED BUT INNOCENT; WRONGFUL CONVICTION AND PUBLIC POLICY* (1996); MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); MARTIN YANT, *PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED* (1991); and Samuel L. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

⁸⁵ See *infra* notes 111–149 and accompanying text.

⁸⁶ See *supra* note 14 and accompanying text, Introduction.

⁸⁷ Defendants have argued that they have been deprived of various constitutional rights due to inadequate systems of indigent defense representation. See, e.g., *infra* notes 104–131, Chapter 7, and accompanying text.

⁸⁸ 454 U.S. 312 (1981).

⁸⁹ The lawsuit also named as defendants the Polk County Offender Advocate (the county’s public defender program), Polk County, and the Polk County Board of Supervisors.

⁹⁰ See *Anders v. California*, 386 U.S. 738 (1967). In *Anders*, the Court spelled out the duties of counsel in representing the indigent on appeal:

His role as advocate requires that he support his client’s appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal

counsel, subjected him to cruel and unusual punishment, and denied him due process of law.”⁹¹ The Supreme Court disagreed, holding “that a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.”⁹²

The Supreme Court explained that public defenders must act independently in representing their clients and are not, therefore, controlled by the State to the same extent as are other government employees:

State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer . . . , a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.⁹³

The Supreme Court further explained that the State has an obligation to respect the independence of public defenders and that there was no evidence that Polk County had sought to interfere with the work of defenders in ways that were inconsistent with providing defendant Dodson the right to legal representation.⁹⁴ In addition, the Court noted that the handling of defendant’s case was not attributable to the lawyer’s “divided loyalties” between the State and client. Instead, the Court observed that rules of ethics limit a lawyer’s “permissible advocacy” and that “[i]t is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals.”⁹⁵

In deciding that the public defender in *Polk County* did not act “under color of state law in exercising her independent professional judgment,” the Court made clear that

requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744.

⁹¹ *Polk County*, 454 U.S. at 315.

⁹² *Id.* at 325.

⁹³ *Id.* at 321. Immediately after the material quoted, the Supreme Court referenced the rule of professional responsibility applicable at the time: “A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.” DR 5-107 (B), ABA Code of Professional Responsibility (1976).” A similar provision is contained in the current ABA MODEL RULES R. 1.8 (f).

⁹⁴ “At least in the absence of pleading and proof to the contrary, we . . . cannot assume that Polk County, having employed public defenders to satisfy the state’s obligations under *Gideon v. Wainwright*, has attempted to control their action in a manner inconsistent with the principles on which *Gideon* rests.” *Polk County*, 454 U.S. at 322.

⁹⁵ *Id.* at 323.

it was not suggesting “that a public defender never acts in that role.”⁹⁶ The Court suggested that if a public defender were “performing certain administrative and possibly investigative functions,” the conduct might properly be regarded as actions “under color of state law.”⁹⁷ Although not explained in any detail, the distinction between “traditional” versus “administrative” functions of public defenders is one of the major teachings of the *Polk County* case. Whereas “traditional” functions of lawyers are not actions under color of state law, “administrative” actions are.⁹⁸

How does the decision in *Polk County* relate to a public defender, private appointed lawyer, or contract lawyer when, because of excessive caseloads, they fail to represent their clients effectively? In general, failures of public defenders to provide adequate legal representation (e.g., the failure to conduct a sufficient factual investigation, adequately prepare for hearings, or perform necessary legal research) will almost certainly be classified as shortcomings related to the “traditional functions” of lawyers under *Polk County* and its progeny. Accordingly, public defenders will be held not to have acted under color of state law. Private lawyers serving as assigned counsel and private contract lawyers could assert a similar defense and could also claim that they are never state actors for purposes of § 1983.⁹⁹

Consider also a public defender who files a motion to withdraw from a number of her cases and whose motion is granted by the trial court because of the defender’s excessive caseload. If the defender is later sued under § 1983 by a disappointed client forced to accept representation from a new lawyer, the lawsuit could easily be defended on grounds that the lawyer was engaged in “traditional” defense representation, in accordance with professional conduct rules, and thus not acting under color of state

⁹⁶ *Id.* at 324–325.

⁹⁷ *Id.* at 325. In explaining the distinction, the Court cited *Branti v. Frankel*, 445 U.S. 507 (1980), in which hiring and firing decisions by a public defender were classified as administrative.

⁹⁸ *Polk County* was an 8:1 Supreme Court decision, with only Justice Blackmun dissenting. In Justice Blackmun’s opinion, the majority’s distinction between public defenders and other state employees ignored reality, and thus he concluded that public defenders do, in fact, act under color of state law:

As is demonstrated by the pervasive involvement of the county in the operations of the Offender Advocate’s Office, the Court, in my view, unduly minimizes the influence that the government actually has over the public defender. The public defender is not merely paid by the county; he is totally dependent financially on the County Board of Supervisors, which fixes the compensation for the public defender and his staff and provides the office with equipment and supplies The county’s control over the size of and funding for the public defender’s office, as well as over the number of potential clients, effectively dictates the size of an individual attorney’s caseload and influences substantially the amount of time the attorney is able to devote to each case.

Polk County, 454 U.S. at 332, (Blackmun, J., dissenting).

⁹⁹ Lawyers do not act under color of state law by virtue of being “officers of the court,” and appointed counsel are similar to retained counsel; like retained counsel, they, too, must act independently of the government and oppose it in adversary litigation. See *Polk County*, 454 U.S. at 318–319.

law. Essentially, the public defender would have acted much like the defender in *Polk County*, who filed an “*Anders* brief” in the client’s case to avoid making frivolous arguments on appeal that would have been inconsistent with a lawyer’s duty under professional conduct rules.

Now, consider the alternative situation, in which a public defender does *not* file a motion to withdraw, despite having a clearly excessive caseload that prevents adequate client representation. While the issue has never been litigated, arguably, the failure of a public defender to file motions to withdraw in any of his or her cases, despite a clear duty to do so under rules of professional conduct, is wholly inconsistent with “traditional” functions of defense representation. It is the mirror opposite of what occurred in *Polk County*, in which the defense lawyer took action in order to avoid filing what she believed to be a frivolous appeal. The argument would be that the defender’s failure to make any effort at all to reduce his or her excessive caseload was tantamount to an “administrative” or “policy” decision not to act, which necessarily means that the lawyer’s inaction was conduct “under color of state law.”¹⁰⁰

¹⁰⁰ This argument finds support in the case of *Powers v. Hamilton County*, 501 F.3d 592 (6th Cir. 2007). In *Powers*, the court held the failure of a defender agency to ask for hearings on behalf of certain defendants to determine whether or not they were indigent was within the “administrative” exception of *Polk County*, although the court conceded that “requesting indigency hearings is within a lawyer’s ‘traditional functions.’” *Id.* at 612. The court in *Powers* further explained:

It is by no means clear that the Supreme Court intended to suggest a strict dichotomy between “administrative” practices of a public defender that may be deemed state action and “traditional functions” of a public defender, which may not. Stated differently, we do not read *Polk County* to mean that in using the term “administrative,” the Supreme Court meant to limit a finding of state action only to managerial tasks, such as hiring, firing, and resource allocations, which are different in kind from the “traditional functions” of a lawyer in representing a client.

Id.

Similarly, in *Georgia v. McCollum*, 505 U.S. 42 (1992), the Supreme Court held that a criminal defendant was a “state actor” when exercising peremptory challenges during voir dire in a racially biased way. “In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body—indeed, the institution of government on which our judicial system depends.” *Id.* at 54. Although *McCollum* dealt with the Equal Protection clause and not § 1983, the Court held that the Equal Protection requirement of a “state actor” and the § 1983 requirement of a person acting “under color of state law” are exactly the same inquiry. The Court also elaborated on the meaning of its decision in *Polk County*:

[*Polk County*] did not hold that the adversarial relationship of a public defender with the State precludes a finding of state action—it held that this adversarial relationship prevented the attorney’s public employment from *alone* being sufficient to support a finding of public action. Instead, the determination whether a public defender is a state actor depends on the nature and context of the function he is performing.

Id.

Individual Liability: Heads of Public Defense Programs

Unlike a deputy public defender, the head of a public defense program sued under § 1983 is much more likely to be subject to liability. As noted in the preceding discussion of *Polk County*, a public defender acts “under color of state law” when they are engaged in “administrative” functions, such as the hiring and firing of personnel.¹⁰¹ Obviously, the head of a defender program makes all kinds of administrative decisions, and at least some of the decisions could be the basis of a § 1983 lawsuit if they lead to deprivation of defendants’ Constitutional rights.

For example, assume the head of a defense program requires deputy defenders to handle extraordinarily high caseloads that prevent defenders from delivering effective representation to clients. If, for example, a convicted defendant who is later exonerated sues the head of the program, alleging that his or her defender failed to provide effective representation consistent with the Sixth Amendment due to an excessive caseload, the head of the program would almost certainly be deemed to have acted under color of state law by virtue of his “administrative” decisions respecting defender caseloads. Moreover, for purposes of § 1983 liability, it would not matter whether the head of the defender program was employed by a city, county, or state government.¹⁰² Although a state may not be sued under § 1983, state officials are subject to § 1983 liability if sued in their personal capacity rather than in their official capacity.¹⁰³

In *Miranda v. Clark County*,¹⁰⁴ a defendant whose conviction of capital murder was reversed in state court based upon ineffective assistance of counsel brought suit under § 1983. Although the action was dismissed in the trial court, the Ninth Circuit Court of Appeals reversed and remanded the case for further proceedings. The court considered, whether, in deciding how financial resources of a defender agency should be spent, a chief public defender was engaged in performing “administrative” functions pursuant to the Court’s decision *Polk County*. The defendant pointed to the office practice of subjecting clients to polygraph tests to determine probable guilt or innocence. If, based upon the test, it seemed that the client was likely guilty, the office committed only minimal time and resources to the defense representation. The court concluded that “[t]he conduct alleged falls within the type of administrative action adumbrated by the Supreme Court in *Polk County*, when it recognized the possibility that a public defender’s ‘administrative functions and possibly investigative functions’

¹⁰¹ See *supra* note 97 and text accompanying notes 97–98.

¹⁰² As noted earlier, a § 1983 lawsuit requires that a “person” be named as the defendant. See *supra* note 83 and accompanying text.

¹⁰³ See *Hafer v. Melo*, 502 U.S. 21 (1991) (State officers sued in their personal capacity can be held liable for damages under § 1983 based upon actions taken in their official capacity); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (actions based upon § 1983 do not lie against a State).

¹⁰⁴ 319 F.3d 465 (9th Cir. 2002).

would constitute state action.”¹⁰⁵ Accordingly, the court in *Miranda* held that Clark County’s chief public defender had acted under color of state law and thus was subject to § 1983 liability. (Clark County also was named as a defendant in *Miranda*, and the case is further discussed below.)¹⁰⁶

Another case in which a lawyer, serving as a county contract public defender, was held individually liable under § 1983 is *Vargas v. Earl*, which was tried in federal court in Spokane, Washington. Mr. Earl had a contract with Grant County, Washington, in which he agreed for the annual sum of \$500,000 to defend all persons charged with felonies. The plaintiff, Mr. Vargas, was charged with child molestation and spent more than seven months in jail while Mr. Earl did absolutely no investigation or any other work on his behalf. Had he investigated the case, he would have discovered that Mr. Vargas was innocent of the crime with which he was charged and that the alleged victim actually recanted her charges against Vargas three days after he was arrested. The jury in the case awarded Mr. Vargas slightly more than \$3 million.¹⁰⁷

The lawyers on behalf of Mr. Vargas successfully avoided the argument under *Polk County* that Mr. Earl was engaged in “traditional functions” of client representation and, therefore, not subject to liability under § 1983. In their complaint, they alleged that Mr. Earl adhered to “administrative” policies that dictated the manner in which Mr. Vargas, like other defendants, was to be represented. Specifically, they claimed that Mr. Earl determined the following:

how the overall resources of the fixed-fee public defense contract with Grant County were to be spent and allocated between himself, his subcontractors, investigators, expert witnesses, and other expenses; ... the circumstances under which investigators and expert witnesses would be hired; ... when to petition the court or the county for additional resources for investigators and expert witnesses; ... his own caseload and the caseload of his subcontractors; ... how much time to allocate to public defense; and ... how to allocate his time between public defense and private practice.¹⁰⁸

¹⁰⁵ *Miranda*, 319 F.3d at 469.

¹⁰⁶ See *infra* notes 124–129 and accompanying text. In addition to suing the head of the defender program in Clark County, the defendant also sued the public defender who had represented him and Clark County. On appeal, based upon the authority of *Polk County*, the trial court’s dismissal of the case against the defendant’s lawyer was upheld.

¹⁰⁷ The jury awarded \$762,000 in compensatory damages and \$2.25 million in punitive damages. See *Grant County Man Gets Millions for Poor Defense*, Seattle Times, Feb. 1, 2009, available at http://seattletimes.nwsources.com/html/localnews/2008694272_pubdefender01.html. Earl was disbarred by the State of Washington in 2004. See also *infra* note 128.

¹⁰⁸ *Vargas v. Earl*, Complaint at 26–27, U.S. Dist. Court, E. Dist. Wash., CV-06-146-JLQ, (2006).

The complaint alleged that the foregoing decisions “did not involve the exercise of independent professional judgment in the representation of Felipe Vargas ...,” but instead made “Thomas Earl ... a policy-making official of Grant County.”¹⁰⁹ Consistent with plaintiff’s complaint, the trial court instructed the jury as follows:

[A] County Defender does not act under “color of state law” when exercising his independent judgment as a lawyer for a person in a particular case. The distinction is between administrative decisions as a whole resulting in the loss of effective assistance of counsel which are “under color of state law” and the specific decisions, or the lack thereof, while serving as lawyer in only a specific case which are not “under color of state law.”¹¹⁰

Thus, the theory of plaintiff’s case was the approach successfully pursued by plaintiff’s lawyers in the *Miranda* case from Clark County, Nevada.

“Municipal” Liability

In addition to lawsuits against “persons,” § 1983 makes it possible in certain situations for defense agencies and municipal governments to be sued.¹¹¹ Pursuant to § 1983, liability can be based on the presence of a “policy” or “custom” that resulted in a deprivation of a person’s constitutional or federal right. Similarly, liability can be predicated on a “failure to train” theory, which results in the deprivation of a constitutional or federal right.¹¹²

The legal framework for municipal liability under § 1983 was largely created by the Supreme Court’s 1978 decision in *Monell v. Department of Social Services*.¹¹³ In *Monell*,

¹⁰⁹ *Id.* at 27.

¹¹⁰ *Vargas v. Earl*, Instructions as Given by the Court, Instruction No. 3, U.S. Dist. Court, E. Dist. Wash., CV-06-146-JLQ (2009).

¹¹¹ “Municipal” includes government at the city, county, and local level. Section 1983 will not support a suit brought against a state or state agency, because the Supreme Court has held that a state is not a “person” within the meaning of § 1983 and therefore not amenable to suit. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1988). Eleventh Amendment and Sovereign Immunity issues can also preclude suit. Additionally, although § 1983 allows suit to be brought against a municipal agency, i.e., the public defender agency, the suit is essentially against the local government itself, because any award that results would be paid from the local government’s treasury. *See, e.g., Brandon v. Holt*, 469 U.S. 464 (1985) (suit against a municipal official in his or her official capacity is considered a suit against the municipality itself).

¹¹² Although technically “failure to train” cases are a subcategory of “policy” liability cases, it is easier, analytically, to analyze them separately. *See infra* notes 140–149 and accompanying commentary.

¹¹³ 436 U.S. 658 (1978). In *Monell*, a class of female employees of the Department of Social Services and the Board of Education brought suit against the Department of Social Services, the Commissioner of the Department, the Board of Education of the City of New York, the Chancellor of the Board of Education, the City of New York, and the Mayor of the City of New York. The question presented was “whether local government officials and/or local independent school boards are ‘persons’ within

the Court held that a municipality was a “person” within the meaning of § 1983 and thus amenable to suit.¹¹⁴ The Court then specified ways in which a municipality could be subject to liability under the statute: “Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body’s officers.”¹¹⁵ Moreover, “local governments ... may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.”¹¹⁶

Although *Monell* greatly expanded municipal liability under § 1983, the Court embraced an important limiting principle:

Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.¹¹⁷

The Court in *Monell* did not fully address what would satisfy the “policy” or “custom” requirement to establish municipal liability, preferring instead to leave the task to future decisions.¹¹⁸ In cases decided after *Monell*, the Court has discussed persons who may properly be regarded as policymakers and what is an acceptable municipal “policy” for § 1983 purposes.¹¹⁹

the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacity.” *Id.* at 663. After undertaking an extensive analysis of the legislative history of § 1983, the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), deciding that a municipality is a “person” under § 1983 and thus is subject to liability.

¹¹⁴ *Monell*, 436 U.S. at 690.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 690–691.

¹¹⁷ *Id.* at 691.

¹¹⁸ The court in *Monell* explained:

Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.

Monell, 436 U.S. at 694–695 (1977).

¹¹⁹ See, e.g., *McMillian v. Monroe County*, 520 U.S. 781 (1997) (a sheriff is a policymaker for the State and not the county for § 1983 purposes); *Board of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (an inadequate hiring decision is different than a failure to train case, and the latter is not an adequate “policy” for § 1983 purposes, because it is too much like *respondeat superior* liability).

“Policy” and Damages Awards

The most common theory upon which municipal liability is imposed under § 1983 is that of an impermissible “policy.” The Court has stated that a “policy” implies “a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.”¹²⁰ Although it is clear from the language in *Monell* and subsequent cases that a “policy” is much more formal than a “custom,” it does not necessarily need to be in writing or created in the same manner as legislation: “To be sure, ‘official policy’ often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time.”¹²¹ By using these standards, the Court has found a “policy” in cases that range from a formal written policy of requiring pregnant employees to take unpaid leave before they are medically required,¹²² to a single instance of a city assistant prosecutor instructing police to serve a *capias* in an unconstitutional manner.¹²³

Based upon requirements established by the Court in *Monell* and applied in subsequent cases, governments, as well as persons, responsible for “policy” that leads to inadequate defense representation of the indigent are subject to liability under § 1983. As discussed above, in its *Miranda* decision, the Ninth Circuit refused to dismiss the case against the chief defender because he had acted in an “administrative” capacity, which made him liable as a state actor. The court of appeals also noted a separate basis on which the chief defender, as well as Clark County, could be found liable under § 1983:

The resource allocation policy alleged in this case constitutes a viable claim and subjects ... [the chief public defender] to suit as a policymaker on behalf of Clark County Here, according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of the representation by limiting the

in almost every case); *City of Canton v. Harris*, 489 U.S. 378 (1989) (a municipality’s failure to train city police officers can amount to a “policy” in certain instances); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (the question of who is a “policymaker” is a question of State law); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (determining when a single occurrence may be found to represent a “policy” attributable to the municipality); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (“policy” may not be inferred from single instance of conduct without a showing of an unconstitutional municipal policy attributable to municipal policymaker).

¹²⁰ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

¹²¹ *Id.* at 480–481.

¹²² *Monell*, 436 U.S. 658.

¹²³ *Pembaur*, 475 U.S. 469 (1986). “A ‘*capias*’ is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt.” *Id.* at 472.

investigatory and legal resources provided. The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt ... [T]he complaint states claims against ... the chief public defender] and the County for the *policy* of allocating resources on the basis of apparent guilt or innocence.¹²⁴

The practice of the public defender agency in *Miranda* is analogous to what occurs in many public defender programs, in which lawyers have overwhelming caseloads that prevent sufficient client interviews, comprehensive investigations, and thorough case preparation. Surely a defendant who is wrongly convicted, represented by a lawyer burdened with far too many cases, can argue just as the defendant did in *Miranda* that both the defender agency and the government entity responsible for the program's funding had "a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt."¹²⁵ Even in the case of *Strickland v. Washington*,¹²⁶ in which the Court set forth an exceedingly difficult test for showing ineffective assistance of counsel, the Court was clear that substantially more than simply a "warm body" is required to represent the accused: "That a person who happens to be a lawyer is present at trial alongside the accused ... is not

¹²⁴ *Miranda*, 319 F.3d at 469–470 (emphasis added). The court's conclusions in *Miranda* were similar to those in *Powers v. Hamilton County*, 501 F.3d 592 (6th Cir. 2007). In that case, a class-action lawsuit was filed against the Hamilton County Public Defender Office and the Hamilton County Commission, alleging that constitutional rights of defendants were violated by the "policy or custom" of the public defender agency not to seek indigency hearings on behalf of defendants facing jail time for unpaid fines. After deciding that the failure to seek such hearings "was within the 'administrative' exception alluded to in *Polk County*," *id.* at 612, the court addressed the policy or custom issue:

He [referring to the appellant] argues that the Public Defender [referring both to the public defender office and the county commission] systematically violates class members' constitutional rights by failing to represent them on the question of indigency. Given the reasoning of *Polk County*, it makes sense to treat this alleged policy or custom as state action for purposes of § 1983.

Id. at 613. The *Powers* case is also discussed at *supra* note 100.

¹²⁵ Professor Adele Bernhard has drawn from the *Miranda* decision a substantially similar lesson:

But all individual public defenders prioritize cases and allocate resources in some way. They must. No one can carry the caseloads that defenders shoulder without deciding which clients are going to get the most attention. Most public defender organizations provide little guidance to their staff about making those decisions and fail to review the decisions that are made. It seems entirely plausible that other innocent clients, upon release from jail, will sue for failing to investigate, to devote resources, or to train and evaluate staff. The *Miranda v. Clark County* decision condemned an affirmative policy as systematically ineffective, but there is no reason why another organization's omissions or failures might not likewise be considered bureaucratic malfeasance establishing liability.

Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, 18 CRIM. JUST. 37, 42 (2003).

¹²⁶ 466 U.S. 668 (1984).

enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."¹²⁷

Because the court of appeals held that the chief public defender and Clark County were subject to § 1983 liability, the plaintiff who filed the lawsuit—Roberto Miranda—who spent fourteen years on death row, was provided the necessary leverage to settle his case. The year after the *Miranda* decision, Clark County agreed to pay Roberto Miranda \$5 million.¹²⁸ An attorney who represented Mr. Miranda offered an assessment of the resolution of her client's case: "This sends a clear message to the Clark County Commissioners about how important it is to allocate money to the public defender's office If you don't spend the resources on the front end to provide experienced attorneys, investigators and researchers you'll pay a lot more."¹²⁹

Just how many millions of dollars governments have paid to defendants inadequately represented by defense lawyers is unknown, because this information is not collected in any central place. As a result of § 1983 litigation, some jurisdictions have settled with defendants who were exonerated. For example, in 2009 a California newspaper reported that during the past four years Santa Clara County had paid out \$4.6 million to four convicted defendants due to "wrongful convictions."¹³⁰ The newspaper story was prompted by a pending \$1 million settlement to a defendant who spent five years in jail for an armed robbery. His conviction was reversed by an appellate court as a result of "poor performance by his trial attorney," among other reasons.¹³¹ The prosecutor decided not to retry the case "because of doubts about the identification of . . . [the defendant]" by the victim.¹³²

The case of Jimmy Ray Bromgard is another in which a financial settlement was obtained because the defendant's lawyer "clearly failed to do his job."¹³³ Bromgard spent fourteen years imprisoned in Montana for the rape of an eight-year-old girl that he did not commit. While there were a number of errors during his trial, including mistaken eyewitness identification and the introduction of faulty scientific evidence, the defense lawyer's performance was undeniably inadequate, for he "failed to challenge the girl's courtroom identification, . . . undertook no investigation, gave no opening statement,

¹²⁷ *Id.* at 685.

¹²⁸ Jace Radke, *Former Inmate's Lawsuit Settled for \$5 Million*, LAS VEGAS SUN, June 30, 2004. Similarly, in the case of *Vargas v. Earl*, *supra* notes 107–110 and accompanying text, Grant County settled the lawsuit brought by Mr. Vargas for \$250,000. See news article cited at *supra* note 107.

¹²⁹ *Id.*

¹³⁰ Tracey Kaplan, *Wrongfully Convicted San Jose Man to Receive \$1 Million Settlement from Santa Clara County*, SAN JOSE MERCURY NEWS, August 15, 2009.

¹³¹ *Id.*

¹³² *Id.*

¹³³ JUSTICE DENIED, *supra* note 2, Chapter 1, at 47.

[and] did not file an appeal”¹³⁴ Bromgard settled a civil rights case against the State of Montana for \$3.5 million.¹³⁵

“Custom”

Liability under § 1983 can also be based on an impermissible “custom” attributable to the municipality, according to the Court in *Monell*:

Congress included customs and usages in [§ 1983] because of the persistent and widespread discriminatory practices of state officials Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a “custom or usage” with the force of law.¹³⁶

In another § 1983 case, the Court stated that “an act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.”¹³⁷ Consequently, parties who file § 1983 actions complaining of a “policy” also often argue the existence of an unlawful “custom.”¹³⁸ For example, in the Jimmy Ray Bromgard case discussed above, the complaint alleged that “this action seeks to redress the unlawful practices, customs, and policies, pursuant to which defendants, acting under color of state law, violated Mr. Bromgard’s clearly established

¹³⁴ *Id.* See also *State v. Bromgard*, 948 P.2d 182 (Mont. 1997).

¹³⁵ Clair Johnson, *Bromgard Appeals Ruling that Favored County*, BILLINGS GAZETTE, December 24, 2008. Montana presumably waived sovereign immunity, thereby enabling Bromgard to bring his lawsuit. See *supra* note 103, citing Supreme Court decision holding that States are not subject to suit under § 1983. Bromgard also sued the Montana County responsible for the indigent defense system through which his legal representation was provided. His complaint alleged that county “policymakers ... knowingly established a woefully inadequate system of indigent defense representation in criminal cases” Complaint at 3, *Bromgard v. Montana*, Civil No. CV-04-192-M, (D. Mont., Sept. 23, 2004). However, the lawsuit was unsuccessful. See Clair Johnson, *Yellowstone County Wins in Bromgard Case*, BILLINGS GAZETTE, November 29, 2009, available at http://billingsgazette.com/news/local/crime-and-courts/article_966a83d4-d53c-11de-af72-001cc4c002e0.html.

¹³⁶ *Monell*, 436 U.S. at 691, quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–168 (1970).

¹³⁷ *Board of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997). See also *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004) (“A municipal ‘custom’ may be established by proof of the knowledge of policymaking officials and their acquiescence in the established practice.”).

¹³⁸ This is what occurred in *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989):

In this Court, in addition to suggesting that the city’s failure to train its officers amounted to a “policy” that resulted in the denial of medical care to detainees, respondent also contended the city had a “custom” of denying medical care to those detainees suffering from emotional or mental ailments However, to the extent that this claim poses a distinct basis for the city’s liability under § 1983, we decline to determine whether respondent’s contention that such a “custom” existed is an alternative ground for affirmance.

rights ... secured by ... § 1983.”¹³⁹ If the persistence of unmanageable caseloads were not deemed to be a “policy” for purposes of § 1983, a court could conceivably regard them as the “custom” of the municipality.

“Failure to Train”

Municipal liability based on § 1983 can also be predicated on an impermissible “policy” to train employees adequately, or a complete failure to train, which results in a deprivation of constitutional or federal rights. The Supreme Court embraced this theory of liability in *City of Canton v. Harris*,¹⁴⁰ holding that “there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis of liability under § 1983.”¹⁴¹ Such liability, the Court explained, is possible “where the city’s failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.”¹⁴² Or, as the Court said in a later case, “a plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.”¹⁴³ The complaint in the *Bromgard* litigation, referenced in the preceding paragraph, includes an allegation respecting an “inadequate system of ... supervision and training” in the operation of the county’s indigent defense system.¹⁴⁴

The practice of criminal and juvenile defense is unquestionably demanding, often difficult, invariably time consuming, and requires knowledge of complex subject areas as well as specialized skills. Consequently, lawyers who provide defense services must be adequately trained; a law school education alone is not nearly sufficient. Standards for providing defense services emphasize the importance of adequate training.¹⁴⁵ Thus,

¹³⁹ Complaint, *supra* note 135, at 3.

¹⁴⁰ *City of Canton*, 489 U.S. 378.

¹⁴¹ *Id.* at 387.

¹⁴² *Id.* at 392.

¹⁴³ *Board of County Comm’rs of Bryan County, Okl.*, 520 U.S. at 411. The term “failure to train” is not intended to be taken literally, as court decisions do not limit this type of claim to a total absence of all training. Typically, courts treat allegations of “failure to train” and “inadequate training” interchangeably. Claims range from a complete absence to train to inadequate training in light of potential risks. However, the Supreme Court has held that a district attorney’s office cannot be found liable under § 1983 for failure to train its prosecutors based on a single *Brady* violation. See *Connick v. Thompson*, 2011 WL 1119022, decided March 29, 2011.

¹⁴⁴ Complaint, *supra* note 135, at 3.

¹⁴⁵ See, e.g., ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-1.5 (“The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff in providing defense services.”); ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, Principle 9 (“Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice ...”); NLADA PERFORMANCE GUIDELINES, *supra* note 30, Chapter 2, at Guideline 1.2 (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.”)

when public defense programs assign lawyers to courts without sufficient training or, even worse, ask them to represent clients only with on-the-job training combined with enormous caseloads, arguably, the head of the defense program, the defense program itself, and the government responsible for the program demonstrate “deliberate indifference” to the risk of providing ineffective representation under the Sixth Amendment.

As discussed above, the *Miranda* case held that both the head of the defender program and Clark County were subject to liability under § 1983, because resources for defense services were allocated based on successful passage of polygraph examinations.¹⁴⁶ But, in addition, plaintiff’s complaint alleged a policy of “assigning the least experienced attorneys to capital cases without providing any training, thus demonstrating callous indifference to the defendant’s constitutional rights.”¹⁴⁷ And, on this basis as well, the court of appeals refused to dismiss plaintiff’s lawsuit against the chief public defender and the county, concluding instead that the complaint “alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys [T]he allegations are sufficient to create a claim of ‘deliberate indifference to constitutional rights’ in the failure to train lawyers to represent clients accused of capital offenses.”¹⁴⁸ Although the allegation that no training was provided to lawyers representing defendants in capital cases is unusual,¹⁴⁹ a lack of adequate training, which is typical in many public defense programs, can also satisfy the “deliberate indifference” necessary for § 1983 liability.

E. Malpractice Liability

In the majority of states, lawyers who represent the indigent in criminal and juvenile cases are potentially subject to malpractice liability if their representation is negligent, thus failing to measure up to what can be expected of a reasonably prudent attorney.¹⁵⁰

¹⁴⁶ See *supra* notes 106 and 124 and accompanying text.

¹⁴⁷ *Miranda*, 319 F.3d at 471.

¹⁴⁸ *Id.* The *Miranda* decision was an appeal from a motion to dismiss that was granted in the trial court. The court of appeals did not decide the ultimate issue of liability in plaintiffs favor, but only that the failure to train alleged in the complaint was sufficient to withstand defendants’ motion to dismiss.

¹⁴⁹ As the court explained, “the complaint . . . construed liberally, alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases” *Miranda*, 319 F. 3d at 471.

¹⁵⁰ “[T]he traditional four elements of a professional negligence action . . . [are] duty, breach, causation, and harm” Meredith J. Duncan, *Criminal Malpractice: A Lawyer’s Holiday*, 37 GEO. L. REV. 1251, 1266 (2003). Duncan further explains:

Regarding the duty component of the plaintiff’s case, an attorney owes his client a duty

High defense caseloads, moreover, undoubtedly prevent clients from being represented as they should, thereby increasing the risk of malpractice liability. However, malpractice actions against defense lawyers for the indigent are difficult to maintain due to a variety of barriers that courts have erected. But because the risk of malpractice liability ordinarily cannot be completely ruled out, public defender programs and private attorneys who represent indigent clients should be insured for malpractice.¹⁵¹ This section summarizes the law respecting malpractice liability¹⁵² and also provides examples of cases in which former clients succeeded in pursuing malpractice claims against their former indigent defense providers.

Impediments to Malpractice Liability

In 1979, the Supreme Court held in *Ferri v. Ackerman*¹⁵³ that a lawyer appointed in federal court to represent an indigent defendant in a criminal trial, was not, as a matter of federal law, entitled to immunity in a state malpractice suit brought against him by his former client. While recognizing that immunity makes sense for judges and prosecutors, in order to provide “such public officials with the maximum ability to deal fearlessly and impartially with the public at large,”¹⁵⁴ these considerations were deemed inapplicable to appointed counsel. Instead, the court reasoned that counsel’s “duty is not to the public at large ... [but] to serve the undivided interests of his client ...

to perform as the reasonably prudent attorney would perform under the same or similar circumstances. All things considered, this reasonably prudent attorney standard is low. By this standard, to avoid civil liability, a lawyer need only act as the minimally competent attorney, a standard usually established by expert testimony. In order to establish breach, the malpractice plaintiff must prove that the attorney failed to meet that standard. If able to establish duty and breach, the malpractice plaintiff undertakes the most difficult component of any legal malpractice action, that of establishing that the attorney’s breach of the standard of care caused a cognizable harm to the plaintiff. The causation component requires the plaintiff to prove that the lawyer’s breach caused in fact and proximately caused actual harm to the plaintiff.

Meredith J. Duncan, 2002 B.Y.U.L. REV. 1, 30–31 *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform* (2002) [hereinafter Duncan, LIABILITY OF CRIMINAL DEFENSE ATTORNEYS].

¹⁵¹ The cost of such insurance, covering both liability for malpractice and violations of § 1983 (*see supra* notes 82–148 and accompanying text), should be borne by the governmental unit that funds indigent defense. There is no known source of data on the extent to which public defenders and private counsel who represent the indigent in criminal and juvenile cases carry malpractice insurance. However, James R. Neuhard, former chief of the Michigan State Appellate Defender Office and a member of the board of directors of the National Legal Aid & Defender Association Insurance Program, has told me that he believes there are many public defender programs in the U.S. that are not insured against malpractice loss. Telephone Interview with James R. Neuhard (December 7, 2009).

¹⁵² For any particular jurisdiction, the applicable statutes and court decisions need to be consulted.

¹⁵³ 444 U.S. 193 (1979).

¹⁵⁴ *Id.* at 203.

independently of the Government, and to oppose it in adversary proceedings.”¹⁵⁵ The Court, therefore, concluded that that a malpractice action “provides the same incentive for appointed and retained counsel, to perform ... competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.”¹⁵⁶ The approach of the Supreme Court in *Ferri* was similar to its analysis in *Polk County*, decided two year later. In *Polk County*, the Court held that public defenders must act independently of the state and are not *always* exempt from § 1983 liability.¹⁵⁷

Despite the rationale of the Supreme Court’s decisions in *Ferri* and *Polk County*, a few state courts, usually based upon their interpretation of state immunity laws, have granted public defenders and private counsel either qualified or complete immunity from malpractice liability. Under qualified immunity, a lawyer is immune from liability for all discretionary acts (i.e., negligent acts or omissions but not for willful, wanton or malicious acts), whereas complete immunity affords lawyers total immunity for all acts or omissions related to the defense representation.¹⁵⁸

States that have recognized complete immunity for defenders include Minnesota¹⁵⁹ and New Mexico.¹⁶⁰ Qualified immunity has been extended to defenders by courts

¹⁵⁵ *Id.* at 204.

¹⁵⁶ *Id.*

¹⁵⁷ See *infra* notes 88–98 and accompanying text.

¹⁵⁸ Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent Defense Crisis*, 45 DUKE L. J. 783, 784 (1996) [hereinafter Chen, *Malpractice Immunity*]; Arthur J. Lachman, *Malpractice Claims Against Criminal Defenders: A Chink in the Armor?*, Bulletin NLADA Insurance Program, Vol. 1, Summer 2005, at 2 [hereinafter, Lachman, *Malpractice Claims*]. See also David J. Richards, *The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability*, 29 VAL. U. L. REV. 511 (1994); Clinton M. Daugherty, Student Commentary, *You Only Get What You Pay For? The Current Status of Malpractice Immunity for Indigent Defense Counsel*, 23 J. LEGAL PROF. 293 (1999); *Public Defender’s Immunity from Liability for Malpractice*, 6 A.L.R. 4TH 774 (1981).

¹⁵⁹ *Dziubak v. Mott*, 503 N.W. 2d 771, 776 (Minn. 1993) (“It would be an unfair burden to subject the public defender to possible malpractice for acts or omissions due to impossible caseloads and an under-funded office: something completely out of the defender’s control.”).

¹⁶⁰ *Coyazo v. State*, 897 P.2d 234 (N.M. Ct. App. 1995) (citing *Herrera v. Sedillo*, 740 P.2d 1190 (N.M. Ct. App. 1987) and relying upon New Mexico immunity statute).

in at least four states: Delaware,¹⁶¹ Nevada,¹⁶² Ohio,¹⁶³ and Vermont.¹⁶⁴ Law review commentary has been virtually unanimous in condemning any form of immunity for those who defend the indigent, believing that the lack of civil sanctions for negligent conduct removes a necessary impetus to improve the quality of defense services.¹⁶⁵ Moreover, the majority of courts that have considered the issue have rejected any immunity for public defense providers.¹⁶⁶

¹⁶¹ *Vick v. Haller*, 512 A.2d 249 (Del. Super. 1986) (relying upon Delaware immunity statute), *aff'd in part, rev'd in part on other grounds*, 522 A.2d 865 (Del. 1987). A New York State Supreme Court rendered one of the first decision's extending qualified immunity to public defenders. *See Scott v. City of Niagra Falls*, 407 N.Y.S.2d 103 (N.Y. Sup. 1978). In justifying its decision, the court acknowledged that public defenders typically have excessive caseloads; therefore, the court approved the rationing of defense services to those cases in which the defender believed there was a chance of making a difference:

Since our society does not have either unlimited funds to provide legal service or unlimited legal talent, the Public Defender is often put in a position where he is assigned an overwhelming number of cases The imposition of potential liability to every assigned client will no doubt have a detrimental effect on the Public Defender's ability to effectively allocate his limited time and resources to those matters which in his judgment have a realistic chance for success.

Id. at 106. The court's approach is reminiscent of the sort of triage system for defense services condemned in *Miranda v. Clark County*, discussed *supra* at notes 104–106 and accompanying text. In that case, the practice of the public defender's office was to withhold certain defense services from clients if they failed to pass a polygraph examination. Although never overruled, the *Scott* decision is not controlling law in New York State, as the New York Court of Appeals has recognized that a claim of legal malpractice can be brought in that state subject to the so-called “exoneration rule,” discussed *infra* at notes 167–169 and accompanying text. *See Carmel v. Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126 (1987); *Britt v. Legal Aid Society*, 95 N.Y.2d 443, 741 N.E.2d 109 (2000).

¹⁶² *Ramirez v. Harris*, 773 P.2d 343, 344–345 (Nev. 1989) (relying on Nevada statute, court concludes that “respondents cannot be sued for malpractice arising out of discretionary decisions that they made pursuant to their duties as public defenders.”); *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994) (by virtue of an amendment to a Nevada statute, “court-appointed attorneys now enjoy the same degree of immunity as is extended to public defenders” and “cannot be held liable for malpractice arising out of discretionary decisions . . .”).

¹⁶³ *Thorp v. Strigari*, 800 N.E.2d 392 (Ohio App. 2003) (Ohio immunity statute applies to public defenders who act negligently).

¹⁶⁴ *Bradshaw v. Joseph*, 666 A.2d 1175 (Vt. 1995) (public defender is “state employee” under Vermont statute and not subject to being sued for negligence while acting within scope of his employment).

¹⁶⁵ *See, e.g., Harold H. Chen, Malpractice Immunity, supra* note 158, at 808:

The immunity courts fail to understand that the right to sue for malpractice is the indigent defendant's sole guarantee that his appointed attorney will mount a competent, vigorous defense. It is self-evident that the right to sue for malpractice is an essential right for all criminal defendants. While relatively few criminal defendants actually sue their attorneys for malpractice, the importance of this right lies not in necessarily winning damages but in deterring sub-standard representation. The implicit threat of initiating a malpractice suit deters shoddy representation because the stigma of defending oneself from malpractice is in itself a huge stain on an attorney's professional reputation.

¹⁶⁶ *See, e.g., Barner v. Leeds*, 13 P.3d 704, 705 (Cal. 2000) (representations of defendants by a deputy public defender do not involve the type of basic policy decisions that are insulated from liability

But even if complete or partial immunity is not available to a public defender, assigned counsel, or contract lawyer, a defendant who sues his or her former lawyer for malpractice is still usually confronted with major obstacles. Foremost among these is the “exoneration rule,” pursuant to which, in a majority of jurisdictions, a defendant must obtain either post-conviction relief or establish actual innocence of the crime for which he or she was convicted.¹⁶⁷ As one court has explained:

[P]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime. As such, it is against public policy for the suit to continue in that it “would indeed shock the public conscience, engender disrespect for courts and generally discredit the administration of justice.”¹⁶⁸

A few states, however, have rejected the prevailing view and have held that successful post-conviction relief or a showing of innocence is not a prerequisite for maintaining a claim for legal malpractice based upon negligent representation.¹⁶⁹

under California law); *Reese v. Danforth*, 406 A.2d 735, 739 (Pa. 1979) (“[W]e hold that once the appointment of a public defender in a given case is made, his public or state function ceases and thereafter he functions purely as a private attorney concerned with servicing his client. His professional relationship with his client takes on all the obligations and protections attendant upon a private attorney-client relationship except one: the public pays his fee. In this respect, he is like the physician rendering professional services which are paid for out of public funds and, like that physician, he ought to be subject to liability for tortious conduct.”).

¹⁶⁷ The difficulty that confronts the plaintiff is spelled out in the following passage:

In the majority of jurisdictions a plaintiff is barred from pursuing a criminal malpractice action if that plaintiff has not first obtained post-conviction relief. In these jurisdictions, an unsuccessful effort at post-conviction relief operates as collateral estoppel for the criminal defendant seeking to bring a malpractice action against his former attorney [I]n addition . . . , many jurisdictions also require that a criminal malpractice plaintiff prove that the plaintiff was actually innocent of the charges against which the attorney defended him. These jurisdictions suggest that without a showing of actual innocence, the criminal malpractice plaintiff is the sole proximate cause of his predicament. Liability for any harm suffered by the criminal defendant is not, as a matter of law, extended to his lawyer, even if the lawyer performed incompetently.

Duncan, *LIABILITY OF CRIMINAL DEFENSE ATTORNEYS*, *supra* note 150, at 32–33, 37–38. A state-by-state chart, depicting whether either post-conviction relief or actual innocence must be established by a malpractice plaintiff, current as of April 30, 2005, is contained in Lachman, *Malpractice Claims*, *supra* note 158, at 6. *See also* Johanna M. Hickman, *Recent Developments in the Area of Criminal Malpractice*, 18 GEO. J. LEGAL ETHICS 797 (2005); Meredith J. Duncan, *Criminal Malpractice: A Lawyer’s Holiday*, 37 GA. L. REV. 1251 (2003).

¹⁶⁸ *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985) (quoting *In re Estate of Laspy*, 409 S.W.2d 725 (Mo. Ct. App. 1966)).

¹⁶⁹ *See, e.g., Gebhardt v. O’Rourke*, 510 N.W.2d 900 (Mich. 1994); *Silvers v. Brodeur*, 682 N.E.2d 811 (Ind. Ct. App. 1997).

Successful Malpractice Claims Against Defense Lawyers

Despite obstacles in maintaining malpractice lawsuits, there is considerable evidence that defendants sometimes succeed in suing their former defense lawyers. Financial recoveries are possible when defendants are locked up for conduct that does not constitute a crime, but defense counsel negligently fails to determine this. Sometimes defense counsel's negligence relates to advice given to the defendant about the effects of pleading guilty or about sentencing options. But recoveries are probably most common in cases in which defendants are found to be innocent of the underlying offense and counsel negligently handled the client's case. Whatever the basis for recovery, research into this area is difficult because many malpractice lawsuits are settled, and the facts of the cases and settlement amounts are not publicly disclosed.

Examples of reported malpractice decisions in which persons were wrongfully incarcerated for conduct that was not illegal under state law are *Taylor v. Davis*¹⁷⁰ and *Rowell v. Holt*.¹⁷¹ There was no oversight of the defense services provided in *Taylor*, whereas *Rowell* is a startling example of what can happen when vertical representation (i.e., continuous representation by the same lawyer) is absent. Both cases reflect grossly incompetent defense services.

In the *Taylor* case, plaintiff filed a malpractice action against his former lawyers, one of whom represented him at trial and the other on appeal. In the underlying criminal case, plaintiff, whose Virginia driver's license was suspended, was charged with driving a moped in violation of his license suspension. However, the operation of mopeds was specifically exempted by Virginia law for those with a suspended driver's license, a fact the plaintiff reported to his appointed defense lawyer who failed to advise the trial court of the exclusion. Plaintiff was convicted at a bench trial and sentenced to sixty days in jail plus \$100 and court costs. Remarkably, a new lawyer appointed for appeal insisted that "plaintiff ... was incorrect, that he had no appealable issue ...".¹⁷² Nevertheless, with the agreement of the local prosecutor, plaintiff convinced the trial court to vacate his conviction and refund all fines and court costs. In light of these facts, the Virginia Supreme Court held that "plaintiff in this appeal did not participate in an illegal act and, therefore, if he is able to recover judgments against his former attorneys, he will not profit from the commission of an illegal act."¹⁷³

The *Rowell* case involved an appeal from a malpractice judgment rendered against a public defender office in which the plaintiff was awarded \$504 for loss of earning capacity and \$16,500 for mental anguish, pain, and suffering due to his wrongful

¹⁷⁰ 576 S.E.2d 445 (Va. 2003).

¹⁷¹ 850 S.E.2d 474 (Fla. 2003).

¹⁷² 576 S.E.2d at 446.

¹⁷³ *Id.* at 447.

incarceration. In the underlying criminal case, plaintiff was charged with being a felon in possession of a firearm, in violation of Florida law. On July 7, the day following his arrest, plaintiff immediately advised his assistant public defender that his civil rights had been restored, and he gave his lawyer a document that proved he was correct and thus permitted to possess a firearm. However, the public defender failed to present the documentation either to the prosecutor or to the court, so the defendant remained in custody. On July 12, the next assistant public defender assigned to represent the plaintiff, as part of the office's zone representation system, reviewed Plaintiff's case file. However, the file did not contain the document showing plaintiff's restoration of rights. Consequently, plaintiff's second lawyer delayed meeting with his new client until July 18. When this meeting occurred, plaintiff gave his new public defender a copy of his document showing that his rights had been restored and within two days his public defender arranged for his release from custody. In sustaining the jury's award in this case for psychological injury, the Florida Supreme Court offered the following assessment:

Our holding today is limited to matters involving wrongful ... extended pretrial confinement where the incarcerated individual's attorney holds the key to freedom, but fails to deliver material to a judge as instructed, and either discards or misplaces the evidence. It is beyond dispute that Rowell was innocent of the crime charged, should not have been arrested, and was wrongfully confined on a continuing basis in pretrial detention To obtain his client's release, Rowell's attorney here needed only to deliver, transmit, or hand over to the judge the document which he had been provided and which he held in his hands. The attorney simply and completely failed to follow through or do anything¹⁷⁴

Seemingly the best source of information respecting settlements and verdicts in criminal defense malpractice cases is contained in an article posted on the Internet and written by lawyers from a law firm that represents malpractice insurers.¹⁷⁵ The article begins with a warning to criminal defense lawyers:

A review of recent professional liability cases over the past five years provides a chilling example of the types and magnitude of legal malpractice claims criminal defense lawyers must battle Even the most routine cases can result in significant plaintiff's verdicts when the attorney simply

¹⁷⁴ 850 S.E.2d at 480–481.

¹⁷⁵ Joyce F. Clough, Barrett A. Breitung, and Charlene R. Ryan, *Criminal Defense Attorneys Face High Dollar Malpractice Claims*, available at <http://www.cemins.com/crimdefarticle.pdf>. A note at the end of the article states that the authors are employed by the law firm of Lord, Bissell and Brook in Chicago and represent Underwriters at Lloyd's, London, and other London market companies in insurance coverage matters involving professional malpractice claims. The article is undated and does not appear to have been published anywhere except on the Internet.

has not been able to devote the time to the case that hindsight deems appropriate.¹⁷⁶

The article then sets forth the facts of twenty-eight malpractice cases that were either settled or tried and resulted in jury verdicts favorable to the plaintiffs. Here is a sample of some of the cases presented in the article:

- Plaintiff, a seventy-seven-year-old great grandmother, pled guilty to endangering the welfare of a child upon the advice of defense counsel. Counsel assumed that defendant would receive probation, but instead she was sentenced to three years imprisonment. “Plaintiff’s defense counsel did not investigate the underlying charge, interview witnesses, obtain crucial documents or discuss with plaintiff the prosecution’s burden of proof and her possible defenses.”¹⁷⁷ In fact, the charges were not well founded, and a key witness recanted testimony given at trial. This came to light when new counsel was retained who investigated the case and succeeded in getting the conviction reversed. Plaintiff, who served one year in prison, sued her first defense attorney, and the jury returned a judgment of \$1.77 million.
- Plaintiff, charged with drug trafficking, informed officials that he was misidentified and innocent. His appointed defense attorney did not appear at defendant’s arraignment or at two subsequent hearings and failed to communicate promptly with his client. “Nearly two months after ... [Plaintiff’s] arrest, the attorney met with Plaintiff who informed him that he was not the individual sought by the police. The attorney did nothing, except determine the case would require more hours than his contract allowed and therefore requested that the case be reassigned.”¹⁷⁸ Subsequently, a new attorney investigated the case and arranged for Plaintiff’s release within a month. By that time, Plaintiff had been in custody for four months. A malpractice lawsuit against Plaintiff’s first attorney proceeded to trial, but was settled before verdict for \$450,000. Costs of defending the malpractice action totaled \$76,000.
- In another case involving mistaken identification, Plaintiff was incarcerated for nine weeks before defense counsel investigated his client’s contention that the police had the wrong person in custody. Plaintiff’s malpractice action against his defense lawyer was settled for \$55,000. Defense costs totaled \$14,000.
- Plaintiff was arrested on a traffic violation and mistaken by the police as the suspect in a rape based on a composite drawing posted at the police station. Plaintiff was then identified by the rape victim and charged with sexual assault. At trial, defense counsel did not request a continuance when a key alibi witness was unavailable on

¹⁷⁶ *Id.* at 1.

¹⁷⁷ *Id.* at 2.

¹⁷⁸ *Id.*

the morning of trial. Defense counsel also did not pursue advanced DNA testing, although he was advised that more conclusive DNA testing might be possible. “Plaintiff was convicted and sentenced to 19 years in prison. DNA testing eventually ruled out plaintiff as a suspect and the conviction was overturned four years later.”¹⁷⁹ Plaintiff’s malpractice action against his defense lawyer, who did not carry malpractice insurance, resulted in a jury verdict of \$2.6 million.

- Plaintiff was convicted of aggravated arson. A defense attorney was appointed to handle Plaintiff’s appeal but failed to perform any work on the case, which resulted in the appeal’s dismissal. Plaintiff was then sentenced to prison. “Two years and nine months later, an assistant public defender discovered that the statute pursuant to which the plaintiff had been convicted had been invalidated six months before plaintiff’s trial.”¹⁸⁰ Accordingly, the public defender moved to vacate the conviction, the State confessed error, and Plaintiff was released from prison. In a lawsuit against his appellate counsel, Plaintiff won a motion for summary judgment. A trial was then conducted on the issue of damages, resulting in an award for Plaintiff of \$244,332.

The authors offer their advice to criminal defense practitioners at the conclusion of the article:

As these cases demonstrate, ... criminal defense attorneys are exposed to situations with the potential to spark dangerous malpractice claims. Seemingly routine matters can be a minefield of danger for busy defense attorneys The magnitude of these problems may not be widely known because many cases involve confidential settlements entered into prior to trial. Criminal defense attorneys consistently face high risks and high costs and can no longer afford to practice without professional liability protection.¹⁸¹

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.* at 4.

¹⁸¹ *Id.* at 10.

CHAPTER 4

Understanding Lawyer Behavior: Why Leadership Matters

In the Introduction to this book, I wondered why so few defenders complained about their caseloads to supervisors and heads of defender programs the way Pat did. Rules of ethics have long required lawyers to refuse continued client representation if doing so would violate their professional duty.¹ This duty was emphatically reinforced for those providing indigent defense services in 2006 by the ABA's ethics opinion dealing with excessive caseloads.²

Other defenders besides Pat have conceivably challenged their caseloads and were threatened with termination since the ABA's ethics opinion. Perhaps a few defenders have even survived with their jobs after filing motions to withdraw opposed by the heads of their defense programs. However, if this has happened, it has escaped the attention of the media and many others who carefully monitor indigent defense developments nationwide.³ But regardless of whether a few motions to withdraw have been filed or some lawyers have been permitted informally to reduce their caseloads, every day across the country literally thousands of defenders are burdened with way too many cases.⁴ While I am confident that the overwhelming majority of these lawyers do

¹ For discussion of professional responsibility rules and the mandatory duty of lawyers to take action when confronted with excessive caseloads, see *supra* notes 3–10 and accompanying text, Chapter 2. Before 1983, when the ABA Model Rules of Professional Responsibility were adopted, states adhered to an earlier ABA code of ethics, which contained similar requirements. See, e.g., ABA MODEL OF CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110 (B)(2) (1981).

² See *supra* notes 36–54 and accompanying text, Chapter 2.

³ For many years, I have subscribed to several news clipping services that gather stories about indigent defense in the United States. Almost every day, a story appears somewhere in the country about some facet of indigent defense. I also am in constant contact with staff and other persons associated with national organizations that deal with indigent defense, including the American Bar Association, the National Association of Criminal Defense Lawyers, and the National Legal Aid & Defender Association. Yet, during the past twenty-five years, I have neither read nor heard of a single case anywhere in the country in which a defender, over the opposition of the head of the defender program, filed a motion to withdraw from a case due to an excessive caseload.

⁴ As for the number of public defenders in the United States, see *supra* note 12, Chapter 1. The excessive caseload issue sometimes arises when lawyers allege they are unable to proceed with a trial because they have a very heavy caseload and have had insufficient time to prepare. For example, in 2004, Carol Huneke, an assistant public defender in Spokane, Washington, sought a continuance in a case set for trial, claiming that she needed more time to prepare and would be ineffective in her representation if forced to proceed with the case. In support of her motion, she filed an affidavit with the trial judge that included, *inter alia*, a list of her 101 active felony cases, the staff size of the public defender's office compared to the prosecutor's office, and affidavits of her colleagues attesting to her diligence in defending her clients, steps needed to be taken to prepare the defendant's case for trial, and the lack of sufficient support staff in the public defender's office which impedes trial preparations. Although news reports indicated that the judge threatened Ms. Huneke with contempt, the judge ultimately granted the continuance that Ms. Huneke requested. See Kevin Blocker, *Judge Lays Down the Law to Attorney*, SPOKESMAN-REVIEW, March 2, 2004, available at <http://news.google.com/newspapers?nid=0klj8wIChNAC&dat=20040302&printsec=frontpage>. For discussion of a case in which an unprepared public defender was held in contempt because he refused to proceed to trial, see *infra* notes 120–128, Chapter 9.

the best they can for their clients under very difficult circumstances, they do not seek to withdraw from cases as rules of professional conduct require.

In 2010, I spoke at a symposium sponsored by the University of Missouri School of Law. The conference was titled “Broke and Broken: Can We Fix Our State Indigent Defense Systems?” During my remarks, I referred to Missouri’s State Public Defender agency, which began in 1982 and has been overloaded with cases for many years.⁵ Rhetorically, I asked the audience, which included public defenders from the Missouri program, whether, in the history of indigent defense in Missouri, any public defender had ever complied with the state’s rules of professional conduct and filed a motion to withdraw from one or more cases as a result of an excessive caseload. While I had not expected an answer to my question, a member of the audience, presumably an assistant defender employed by the Missouri program, shouted, “no!”⁶

What explains the failure of the vast majority of defenders to act in the face of excessive caseloads? Why do they not either individually or perhaps as part of small groups file motions to withdraw from some of their cases, even if they lack management’s permission to do so? As this chapter explains, the answer lies in principles of social psychology and the organizational culture that permeates defense programs.⁷

⁵ In 1993, following a site visit to the Missouri program, a report of The Spangenberg Group concluded that defenders in Missouri believe that “without additional resources, they will not be able to provide competent representation to their clients. We echo this sentiment in very strong terms.” See THE SPANGENBERG PROJECT, THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 4 (2009). In fact, the caseload problem in Missouri has persisted for years. However, the leadership of the Missouri program is now challenging its caseloads and in December 2009, the Missouri Supreme Court acknowledged the problem: “The public defender’s office . . . is facing significant case overload problems. Its lawyers and its staff are overworked.” State *ex rel.* Missouri Public Defender Commission v. Pratte, 298 S.W.3d 870, 875 (Mo. 2009). This case and its aftermath are discussed in Chapter 7. See *infra* notes 85–103 and accompanying text.

⁶ No one contradicted the person who shouted “no” from the audience. Later in the day, an official of the Missouri program, who was present when “no” was shouted, spoke at the conference. This person did not suggest that the audience member had been incorrect or claim that motions to withdraw from cases had been filed. This story is recounted in Norman Lefstein, *Commentary*, 75 Mo. L. Rev. 793, 798 (2010).

⁷ The initial focus of this chapter is on public defenders with excessive caseloads. Although assigned counsel and contract lawyers also sometimes have too many cases, as previously noted, the excessive caseload problem is usually easier for them to resolve. These lawyers can refuse to enter into contracts that will require them to represent too many clients for too little compensation, and assigned counsel are normally better able to resist court assignments than are public defenders and the agencies for whom they work. See also *supra* note 8, Introduction, and *supra* note 22, Chapter 1, and accompanying text.

A. Social Psychology

To understand why defenders are willing to accept excessive caseloads and rarely complain, it is important to appreciate a body of scholarly work related to the practice of law, albeit not directly dealing with indigent defense or excessive caseloads. A good starting point is an essay of Professor David Luban, who notes that, while rules of ethics apply to individual lawyers rather than to law firms,⁸ the importance of the law firm to the decision-making of individuals cannot be ignored:

Psychologists, organization theorists, and economists all know that the dynamics of individual decision making change dramatically when the individual works in an organizational setting. Loyalties become tangled, and personal responsibility gets diffused Chains of command not only tie people's hands, they fetter their minds and consciences as well No dilemma causes [my students] more anxiety than the prospect of being pressured by their boss to do something unethical. Not only do they worry about losing their jobs if they defy their boss to do the right thing, they also fear that the pressures of the situation might undermine their ability to know what the right thing is.⁹

Professor Luban illustrates his point about the power of organizations and hierarchy with several examples. First, he recalls a well-known antitrust lawsuit in which a senior partner in a large New York law firm committed obvious perjury in the presence of an associate, but the associate took no action to correct the testimony except to warn the partner in a whispered conversation as it was occurring. The associate's explanations for why he did nothing additional included references to "hierarchy: the guy was his boss. Second, to personal loyalty: the guy was a great guy. Third, to helplessness: . . . [the lawyer] had no idea what to do. Fourth, . . . [the lawyer] couldn't believe it. He kept thinking there must be a reason."¹⁰

Professor Luban also discusses the Milgram experiments dealing with wrongful obedience to authority conducted at Yale University in the 1960s. In these experiments, volunteers were recruited in response to newspaper advertisements and invited to participate in a study of the effect of punishment on memory and learning. One of the volunteers—the "learner"—was to memorize word-pairs, while the other volunteer—the "teacher"—would administer electric shocks in the event of wrong answers. The

⁸ Although inconsistent with the ABA Model Rules of Professional Conduct, there are at least two states in which a "law firm" can be found to have breached ethical duties. *See* N.Y. RULES PROF. CONDUCT R. 5.1, 5.3, 5.4; N.J. RULES PROF. CONDUCT R. 5.1, 5.3, 5.4.

⁹ David J. Luban, *The Ethics of Wrongful Obedience*, ETHICS IN PRACTICE 94 (Deborah L. Rhode, ed., 2000).

¹⁰ *Id.* at 95.

learner, however, was actually a confederate of the “official” conducting the experiment and prepared to give intentional wrong answers and to feign pain when the teacher believed electric shocks were being administered. The person conducting the experiment exuded authority, dressed in a gray lab coat. Before the experiments began, teachers were shown the “shock machine,” which had thirty switches, with voltage ranging from 15 to 450. From 375 to 425 volts, the machine was marked “Danger Severe Shock.” And from 435 to 450 volts, the machine was marked “XXX” in red.

Once the experiments started, learners were strapped to their seats, and as the voltage was increased because of wrong answers, the learners screamed, indicated that they had heart problems, and in other ways made it clear that they wanted the experiments to end. But the officials administering the experiment told the teachers that it was important that they continue. In the end, 63% of the teachers complied with the experiment all the way to 450 volts, and replications of the experiment in other countries yielded similar results.

So what does the failure to report perjury of a senior partner and the Milgram experiments have to do with the failure of defenders to resist excessive caseloads? Surely the failure to resist excessive caseloads is not the moral equivalent of failing to report perjury or inflicting electrical shocks on innocent persons risking serious bodily injury or death. Professor Luban would not disagree, but he does maintain “that if an ordinary person’s moral judgment can be corrupted to the point of failure even about something as ... shocking an innocent experimental person to death!—it is entirely plausible to think that the same organizational and psychological forces can corrupt our judgment in lesser situations. The extreme situations illuminate their ordinary counterparts even if, in the most obvious ways, they are utterly unlike them.”¹¹

Professor Luban is not alone in drawing upon psychological studies to understand the reason that subordinate lawyers are reluctant to challenge the authority of those in charge of law firm management. Citing some of the same research upon which Professor Luban relies, Professor Andrew Perlman offers observations about pressures on lawyers to conform their conduct to the wishes of law firm supervisors regardless of the rules of professional conduct:

[R]esearch in the area of social psychology suggests that, in some contexts, a subordinate lawyer will often comply with unethical instructions This basic, but crucial, insight into human behavior suggests that there is often a significant gap between what the legal ethics rules require and how lawyers will typically behave. Indeed, lawyers will too often obey obviously unethical or illegal instructions or fail to report the wrongdoing of other lawyers

¹¹ *Id.* at 105.

Studies on conformity and obedience suggest that professionals, whom we would ordinarily describe as “honest,” will often suppress their independent judgment in favor of a group’s opinion or offer little resistance in the face of illegal or unethical demands. These studies demonstrate that we ascribe too much weight to personality traits like honesty, and that contextual factors have far more to do with human behavior than most people recognize

Recall that numerous factors contribute to conformity, including the size of the group, the level of unanimity, the ambiguity of the issues involved, group cohesiveness, the strength of an individual’s commitment to the group, the person’s status in the group, and basic individual tendencies, such as the desire to be right and to be liked.

Attorneys typically work in settings where other group members, such as senior partners or corporate executives (e.g., in-house counsel jobs), control the professional fates of subordinates, a condition that increases the likelihood of conformity. So, for example, . . . young lawyer[s] . . . feel a powerful, though perhaps unconscious, urge to conform, especially given . . . trouble finding a job and . . . significant financial burdens.¹²

But what if the lawyer engages in conduct for which disciplinary sanction is a real possibility? Professor Perlman concedes that the “powerful concern for professional survival might trump the other social forces that favor obedience and conformity”¹³ While this is Professor Perlman’s speculation, it sounds right. Defenders would likely be far less willing to accept excessive caseloads if they knew they would likely be disciplined. As noted in Chapter 3, however, while some lawyers have been disciplined for conduct arising out of handling too many cases, the number of such instances is relatively small, and virtually none of them have involved lawyers from public defender programs.¹⁴

Moreover, many lawyers involved in serious wrongdoing do not have a good grasp of the ethical problems they encounter. Professor Leslie Levin explains that in most of the cases “the lawyers do not see the problems with their misconduct at the time that they are engaging in it and are unable to acknowledge that what they did was ethically problematic even once they find themselves in discipline proceedings. Instead, they engage in profound ‘self deception.’”¹⁵ If this is true of lawyers engaged in blatant

¹² Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 3 HOFSTRA L. REV. 451, 451–453, 460–461 (2007).

¹³ *Id.* at 469.

¹⁴ See *supra* notes 20–40 and accompanying text, Chapter 3.

¹⁵ Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. L. J. 1549, 1552 (2009). [hereinafter Levin, *Bad Apples*]. The article

ethical misconduct, is it any wonder that public defense lawyers, who are genuinely trying to assist clients, have little difficulty rationalizing their behavior when they are overwhelmed with too many cases?

Much like Professor Perlman, Professor Levin emphasizes several considerations relevant to the willingness of defenders to take on too much work. For example, she notes that “[p]sychologists have found that moral behavior of individuals is disconnected from moral reasoning.”¹⁶ Also, like Professor Luban, Professor Levin notes that “[l]awyers learn from other lawyers” and that “[t]he psychological pressure on the individual to conform to the behavior of a group can be powerful.”¹⁷

Similarly, Professor Alex Long points out “that the culture and structure of a law firm may have a profound influence on the professional ethics of its individual lawyers”¹⁸ He continues with the following observation:

Over time, organizations develop their own cultures, which may shape the values of those within the organization. At the beginning of a lawyer’s career in a law firm, it is natural to look to others to develop a sense of the prevailing norms within the organization. Recent law school graduates in particular look “up and around” in order to learn what is expected of them.¹⁹

This discussion is not intended as justification for the failure of defenders to file motions to withdraw when they cannot possibly adequately represent all of their clients, but to help understand their failure to act. Obviously, we should not be surprised when public defenders, whether new to the practice of law or seasoned veterans, go along with excessive caseloads and disregard their duties under rules of professional conduct.

B. Organizational Culture

The discussion until now has sought to explain why subordinate lawyers, influenced by the power of the group and other factors, are willing to accept unreasonable caseloads, even if it means ignoring their ethical duties. While countless reports have documented

is a book review essay of RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008). The ethical violations of the lawyers discussed in Abel’s book included neglect of client matters, lying, fabrication of documents, and fee-related misconduct. See Levin, *Bad Apples*, at 1551–1552.

¹⁶ *Id.* at 1553.

¹⁷ *Id.* at 1556–1557.

¹⁸ Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 791 (2009).

¹⁹ *Id.* at 793.

excessive caseloads and other deficiencies in public defense, none has analyzed from a social psychology perspective the willingness of defenders to take on more work than they can competently handle. However, relying upon principles of organizational culture, Professor Jonathan Rapping has explored defense services furnished by the Orleans Indigent Defender Program (OIDP) in pre-Katrina New Orleans.²⁰

Drawing upon the work of business school professors, Professor Rapping offers a definition of “organizational culture”:

The deepest and most engrained level [of organizational culture] is in the tacit assumptions shared by the members of the group. At this level, the members world view is so taken for granted that there is little variation among them. Indeed, members would have trouble articulating what their world view is. When asked why they behave a certain way the response might simply be “that’s how things are done around here.”²¹

As applied to public defense programs, culture includes the practices and characteristics of the program and the views that lawyers and management have about them. The way in which lawyers and management regard caseloads is an important component of a defense program’s overall culture.

When Hurricane Katrina struck the Louisiana coast on August 29, 2005, the OIDP in New Orleans was staffed by part-time public defenders with extremely high caseloads and plagued with numerous other deficiencies. In October 2006, Professor Rapping became personally familiar with the OIDP, although the indigent defense practices that he describes predated his arrival by many years.²² Professor Rapping discusses the problems in providing defense services before Katrina and their acceptance of them by the public defenders employed by the program. In doing so, the organizational culture of the New Orleans’ defender program clearly emerges.

²⁰ Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. LAW 177 (2008) [hereinafter Rapping, WINDS OF CHANGE]. Professor Rapping worked in the defense program in New Orleans as part of a new management team from October 2006 through June 2007. *Id.* at 181.

²¹ *Id.* at 202. See also Edgar A. Schein, *Three Cultures of Management: The Key to Organizational Learning*, 38 MIT SLOAN MGMT. REV. 9, 11 (1996) (“A culture is a set of basic tacit assumptions about how the world is and ought to be that a group of people share and that determines their perceptions, thoughts, feelings, and to some degree, their overt behavior.”); Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantanamo*, 47 CASE W. RES. J. INT’L LAW 125, 126 (2009) (“Organizational cultures are slowly evolving reflections of the shared and learned values, beliefs, and attitudes of an organization’s members.”).

²² For example, Professor Rapping cites a 1997 study of The Spangenberg Group, which states that “conditions in the OIDP ‘are often significantly below the standards of almost all of the public defender programs across the country we have visited in the past five years.’” Rapping, WINDS OF CHANGES, *supra* note 20, at 183 n. 11.

Professor Rapping identifies four major structural problems of the defender program in New Orleans. First, the agency's board of directors was controlled by the city's criminal court judges, who made all appointments to the board. Accordingly, when judges were faced with defense lawyers deemed to be too zealous in representing their clients, the judges were able to arrange for the lawyers to be reassigned or even terminated.²³ Second, lawyers were assigned to judges' courtrooms, leading defenders to feel an "allegiance to judges over their own clients."²⁴ In addition, after their arrest, unless a defendant could afford a lawyer, they typically spent forty-five to sixty days in jail without any defense representation while the prosecutor's office decided which charges to file.²⁵ Public defenders accepted these delays and the absence of legal representation as normal operating procedures.²⁶ Finally, Professor Rapping identifies the part-time status of the public defenders as a fourth structural defect.²⁷ Since the defenders were paid only \$29,000 annually, they needed to supplement their incomes which meant they were "less than dedicated to ... [their] public defender clients."²⁸

Among the program's many other problems, the office space was terrible, electronic databases were not furnished, and there was virtually no support staff. There also were no training programs for the lawyers, and staff meetings were not held. And, of course, the program was woefully underfunded, which led to out-of-control caseloads.²⁹ As noted by Professor Rapping, "[t]he lawyers carried caseloads of 60–90 cases at a time, an extraordinary number given that they were part-time public defenders"³⁰ The caseloads of the lawyers handling capital cases were even worse as "each handled approximately 20 such cases per year, and few used experts in their representation."³¹ Moreover, the lawyers rarely saw their clients outside of court and did minimal pretrial preparation of their cases.³²

In the early 1990s, while public defense in New Orleans had all of the foregoing problems, a sole public defender, Rick Teissier, practicing in one of the city's felony courts, filed a motion seeking to reduce his caseload and asking for other relief. Teissier's motion led to *State v. Peart*,³³ a 1993 Louisiana Supreme Court decision on the subject

²³ *Id.* at 186–187.

²⁴ *Id.* at 192.

²⁵ *Id.* at 188.

²⁶ *Id.* at 190.

²⁷ *Id.* at 186.

²⁸ *Id.* at 185 and 189.

²⁹ *Id.* at 184–186.

³⁰ *Id.* at 185.

³¹ *Id.* at 184.

³² *Id.* at 203.

³³ 621 So.2d 780 (La. 1993).

of caseloads. While *Peart* is discussed in Chapter 7 dealing with litigation,³⁴ the case is important to mention now for two reasons. First, it confirmed the extent of the caseloads among OIPD lawyers, as well as other impediments to indigent defense in the city's criminal courts. In its opinion, the Supreme Court summarized the findings of the trial judge:

At the time of his appointment, Teissier was handling 70 active felony cases. His clients are routinely incarcerated 30 to 70 days before he meets with them. In the period between January 1 and August 1, 1991, Teissier represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case set for trial for every trial date during that period.³⁵

The court then described the lack of adequate investigative assistance (three investigators to cover ten different courts and more than 7000 cases) as well as a total lack of funds for expert witnesses. Based upon the trial record, the state's highest court "found that ... the provision of indigent defense services ... [in the criminal court in which the action was filed] is in many respects so lacking that defendants ... are not likely receiving the effective assistance of counsel"³⁶

Peart is also important to mention now because it illustrates that occasionally a public defender may actually object to his or her caseload and seek to do something about it. Rick Teissier is one of those rare defenders who protested his caseload and filed a motion in court without the active support of his boss.³⁷ While writing this chapter, I phoned Teissier and asked him if he discussed his proposed motion with the head of the OIPD. He said that he did and that he was given no encouragement. The chief defender told him that "the motion was not a good idea and not likely to succeed."³⁸ However, unlike Pat whose story is told in this book's Introduction, the head of the program did not threaten to fire Teissier if he filed his motion.³⁹

The significant impediments in New Orleans to providing effective defense representation identified in the *Peart* decision continued for years afterwards, all the way

³⁴ See *infra* notes 10–12 and accompanying text, Chapter 7.

³⁵ *Peart*, 621 So.2d at 784.

³⁶ *Id.* at 791.

³⁷ The motion was titled, "Motion for Relief to Provide Constitutionally Mandated Protection and Resources." Essentially, the motion asked that the court find in advance of criminal convictions of defendants that Teissier was unable to provide effective assistance of counsel as required by the Sixth Amendment. *Id.* at 784. Another case in which a public defender objected to his caseload arose in the 1980s and involved a lawyer employed by the New York Legal Aid Society. The dispute was resolved through an arbitration pursuant to the union contract applicable to the Association of Legal Aid and Attorneys and the Society. See *infra* note 8 and accompanying text, Chapter 5.

³⁸ Telephone interview with Richard C. Teissier (March 31, 2010).

³⁹ *Id.*

through Katrina.⁴⁰ In Professor Rapping's opinion, the structure of the justice system, its lack of adequate funding and various defects "led to lawyers feeling allegiance to judges over their own clients,"⁴¹ which meant that lawyers "should strive to fulfill ... [the judges'] wishes."⁴² This view was substantially confirmed by a study of the New Orleans program conducted approximately six months after Katrina, which concluded that the public defender attorney "tends to focus on the preferences and work patterns of the particular judge to whom s/he is assigned and with whom s/he works every day, rather than on the indigent defendants who pass through the court."⁴³ In order to reform indigent defense in such an environment, Professor Rapping argues in addition to addressing funding and structural problems the "organizational culture" of such programs must change.⁴⁴

C. Change from the Top

Changing Culture in General

When Katrina struck in 2005, the New Orleans public defense agency was probably as deficient as any defender program in the country. Fortunately, public defense in New Orleans today is much improved, because most of the major structural problems identified by Professor Rapping have been addressed. In 2007, pursuant to a new statute governing indigent defense, the Louisiana Public Defender Board assumed jurisdiction over defense services throughout the state and local public defender boards ceased to

⁴⁰ See, e.g., NICHOLAS CHARKIS, D. ALAN HENRY AND RANDOLPH N. STONE, AN ASSESSMENT OF THE INTERMEDIATE AND LONGER-TERM NEEDS OF THE NEW ORLEANS PUBLIC DEFENDER SYSTEM (2006), [hereinafter NICHOLAS CHARKIS ET AL., AN ASSESSMENT].

⁴¹ Rapping, WINDS OF CHANGE, *supra* note 20, at 193.

⁴² *Id.* at 203.

⁴³ NICHOLAS CHARKIS ET AL., AN ASSESSMENT, *supra* note 40, at 11.

⁴⁴ Rapping explains:

Efforts to reform any indigent defense system will obviously need to address financial shortcomings and structural impediments. But if we do not change the underlying assumptions that evolve from an underfunded, structurally corrupt system, reform cannot be achieved. While reformers have traditionally used legislative reform to target financial and structural problems, this avenue is incapable of addressing ... cultural factors Unfortunately, leaders in the indigent defense arena are often blind to the profound link between organizational culture and effective leadership. Chief defenders are not to blame for this as circumstances pressure them to narrowly define their role as finding a way to survive in a world in which their lawyers carry overwhelming caseloads, are constantly dealing with profound budget shortages, and must tend to more immediate political firestorms.

Rapping, WINDS OF CHANGE, *supra* note 20, at 200.

exist.⁴⁵ No longer is there a board of directors for the New Orleans program appointed by and answerable to the city's criminal court judges. In addition, there are now many fewer part-time public defenders,⁴⁶ and those who remain provide representation in only misdemeanor and traffic court cases.⁴⁷ In addition, the agency's full-time lawyers are prohibited from representing private clients.⁴⁸ Lawyers also are no longer assigned to courtrooms, and attorneys provide continuous representation throughout a case.⁴⁹ Also, there is a new agency director, a new management team, and more public defenders, most of whom were not part of the former defender agency.⁵⁰ The program even has a new name—Orleans Public Defenders (OPD). Although there are still delays before the prosecution files charges against defendants, the district attorney and the head of OPD are working on a plan to end the practice.⁵¹

Given the changes that have occurred since 2005, one would expect a much improved organizational culture exists in the Orleans Public Defenders agency; lawyers can now treat their client's rights as paramount and be far less concerned with satisfying the wishes of judges. While changing the culture of an organization is often difficult and frequently met with resistance,⁵² change is facilitated when the head of the

⁴⁵ See LA. REV. STAT. ANN. § 15:146 (West 2005 & Supp. 2011). According to the LPDB Annual Board Report:

Effective August 15, 2007 ... all local public or indigent defender boards ceased to exist and the supervision and oversight of the local offices transferred to the new 15 member Louisiana Public Defender Board (LPDB). The seminal difference between pre and post August 15, 2007 indigent defense practice is LPDB's active involvement in the oversight and supervision of the local offices and 501 (c)(3) not-for-profit corporations which provide representation to accused indigents.

LPDB 2009 Annual Board Report, at i (2009).

⁴⁶ "The ... [Orleans Public Defenders agency] has 54 full-time attorneys, nine part-time attorneys. *Id.* at 631.

⁴⁷ Telephone interview with Chris Flood, former Deputy Director, Orleans Public Defenders (April 5, 2010).

⁴⁸ *Id.*

⁴⁹ *Id.* The only exception is when a different lawyer provides representation at the initial presentment.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Based on the work of business school professors, Professor Rapping discusses the reasons that existing staff of an organization are often resistant to changes in the way business is conducted:

First, the resistant person, more focused on self-interest than the good of the organization, may fear the personal cost of change. Second, due to a lack of trust in leadership or a misunderstanding of the leader's vision, s/he wrongly perceives that the cost of change will outweigh the benefits. Third, s/he may assess the situation differently than the leader and thus conclude that the organizational cost will be greater than the leader realizes. Fourth, s/he may fear s/he "will not be able to develop the new skills and behavior that will be required of [him or her]."

Rapping, WINDS OF CHANGE, *supra* note 20, at 215.

organization and management team are new and able to work with new staff unaccustomed to the ways things used to be.⁵³

Just as in business organizations, change in public defender programs occurs when leaders have a clear idea of how things should operate. As noted by two prominent emeritus professors of the Harvard Business School, “[l]eadership from one or two people at the very top of an organization seems to be an absolutely essential ingredient when major cultural change occurs.”⁵⁴ Based upon their study of successful businesses that changed their organizational cultures, they explain how it was done:

Each new leader created a team that established a new vision and set of strategies for achieving that vision. Each new leader succeeded in persuading important groups and individuals in the firm to commit themselves to that new direction and then energized the personnel sufficiently to make it happen⁵⁵

While there are obvious differences between for-profit companies and public defender programs dependent on public funds, both leadership and the need for vision are prerequisites for effecting change in Professor Rapping’s view.⁵⁶ The leaders of Bronx Defenders, which provides a more holistic model of defense services, agree: “Changing the culture of a public defender office requires clear vision, shared investment, and sustained momentum The chief defender and top management must all share a unified vision of what the office should be.”⁵⁷

⁵³ Rapping further notes:

In the struggle to build an organization that is receptive to and supportive of a new vision, the most obvious strategy is to hire new staff members who are neither invested in the old culture nor threatened by the prospect of change. This focus has obvious benefits; new employees will not come in with the assumptions that hamper change Bringing in new personnel who do not share the existing assumptions will certainly reduce the resistant proportion of the workforce. However, while helpful, this will not be enough. The leader must find and bring on board new team members who embrace the new vision and either share, or are receptive to adopting, its underlying assumptions.

Rapping, *WINDS OF CHANGE*, *supra* note 20, at 212.

⁵⁴ JOHN P. KOTTER AND JAMES L. HESKETT, *CORPORATE CULTURE AND PERFORMANCE* 92 (1992).

⁵⁵ *Id.* at 84.

⁵⁶ “The change process begins with the leader using a vision, or specific set of beliefs, to guide his or her efforts.” Rapping, *WINDS OF CHANGE*, *supra* note 20, at 204.

⁵⁷ Robin Steinberg and David Feige, *Cultural Revolution: Transforming the Public Defender’s Office*, 29 N.Y.U. REV. LAW & SOC. CHANGE 123, 125 (2004). Ms. Steinberg is the Executive Director of Bronx Defenders; at the time of the article’s publication, Mr. Feige was the agency’s Supervising Trial Attorney.

Changing Culture About Caseloads

Because the budget for the New Orleans defender program is greater now than it was before Katrina, both the number of lawyers and support staff has increased. However, the budget for the OPD is still not nearly sufficient. As a result, the caseloads of the public defenders are still much too high, especially because private lawyers provide representation in only a small minority of the city's indigent defense cases.⁵⁸ For example, in February 2009, a news report told of a public defender in New Orleans who was simultaneously representing 135 clients.⁵⁹ In March 2010, public defenders in New Orleans were reported to be handling 300 felony cases a year, twice as high as standards recommended nationally.⁶⁰ Because of its caseloads, the "chief defender said in the next two months half of his staff will have to refuse new felony cases because the New Orleans office is saddled with more than it can handle."⁶¹

Although most of the defenders are new, is the culture among public defenders in New Orleans respecting their caseloads any different than before Katrina? Do the new public defenders in New Orleans believe that their caseloads are much too high, and are they clamoring for something to be done about it? Or have they accepted their caseloads as simply the way things are in public defense and that they need to do the best they can under the circumstances because nothing is ever likely to change?

Over the years, I have learned of many situations in which it is obvious that excessive caseloads are accepted as part of a defense program's culture. For example, just after the ABA Standing Committee on Ethics and Professional Responsibility issued its opinion in 2006, declaring that defenders had a duty to comply with rules of professional responsibility,⁶² a legal affairs reporter for the *Chicago Sun-Times* interviewed two lawyers employed by the Cook County Public Defender. The reporter asked the lawyers about their caseloads and how the ABA's ethics opinion would impact them. In response, an assistant defender handling felony cases said that she was representing 140 clients at a time, whereas a lawyer representing misdemeanor clients reported that she received 400 new cases a month! While these are extraordinarily high caseloads, the statement of one of the lawyer's revealed the culture of the Cook County Public

⁵⁸ Telephone interview with Chris Flood, Deputy Director, Orleans Public Defenders (April 5, 2010).

⁵⁹ David Winkler-Schmit, *The Life of a New Orleans Public Defender*, BEST OF NEW ORLEANS.COM, Sept. 29, 2009, available at <http://bestofneworleans.com/gyrobase/Content?oid=oid%3A51258>. The article also reports a conversation with Derwyn Bunton, chief public defender of the OPD, who said that the caseloads are too "high." To illustrate, Bunton pointed to "an attorney [last year] who blew through 500 cases ... , most of them felonies."

⁶⁰ *Chief Public Defender: New Orleans Office Has More Than It Can Handle*, WDSU.COM, March 5, 2010, available at <http://www.wdsu.com/news/22757902/detail.html>. The so-called national caseload standards are discussed elsewhere. See *supra* note 91 and accompanying text and note 122, Chapter 2.

⁶¹ *Id.*

⁶² For discussion of the ABA's ethics opinion, see *supra* notes 36–54 and accompanying text, Chapter 2.

Defender: “To be perfectly honest, we’re not at liberty to reject any cases.”⁶³ In other words, that’s how things are done around here, and the ethics opinion would make no difference.

Similarly, in the Introduction to this book, I reported the comment of the head of Pat’s defender agency when Pat complained to him about his caseload. The director advised Pat that he worked in “triage” courts and that “nothing can be done or will change.” Thus, the agency’s director expressed the culture of the office and told Pat, in effect, to take it or leave it.

The culture of Pat’s organization also was reflected in the response of Pat’s colleagues when they learned that he was departing the agency and had been threatened with termination if he filed a motion to withdraw. While Pat’s colleagues were “shocked” that Pat might actually be fired if he sought to withdraw from some of his cases, they expressed no real “solidarity” with Pat. The lawyers undoubtedly had come to accept high caseloads as part of the culture of the office and, much like the defenders in Cook County, did not plan to complain to management about their caseloads, let alone file motions to withdraw from any of their cases.

While writing this book, I had a conversation with the head of a defender program whose lawyers representing defendants charged with felonies had truly outrageous caseloads, typically more than 700 appointments per year. The head of the office told me that lawyers in his agency sometimes arranged for defendants to plead guilty at arraignments. This was before any investigation of the case was conducted, defenses to the charges could be considered, or admissible evidence evaluated. To plead a defendant in this situation clearly violates accepted standards of defense conduct,⁶⁴ but unfortunately it happens in public defense programs.⁶⁵ While the head of the program did not approve the practice of pleading defendants guilty at arraignments, he implic-

⁶³ Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 1, Introduction, at 19.

⁶⁴ See, e.g., ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 4-6.1 (b): “Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.” Apparently some defenders argue that they are not violating this standard when a defendant pleads guilty at arraignment because the defense lawyer is not “recommending” that the defendant plead guilty, but simply affording the defendant the option of doing so. Moreover, by pleading guilty, defendants might be able to be released from custody on probation whereas otherwise they will remain locked up. While this is undoubtedly true in many cases, it nevertheless reduces the right to counsel to a sham. Moreover, there surely are many instances in which defendants should not plead guilty at arraignment at all or should plead guilty to lesser offenses and would have done so if the defense had had the opportunity to fully consider the facts and law pertaining to the client’s case. Also, when a defendant pleads guilty at an early stage of the case, there is a substantial risk that potential adverse collateral consequences will not be adequately considered in advance either by the client or defense counsel. See discussion of the Supreme Court’s *Padilla* decision at *supra* note 95, Chapter 2, and note 61, Chapter 3.

⁶⁵ See, e.g., ABA GIDEON’S BROKEN PROMISE, *supra* note 34, Chapter 1, at 16.

itly acknowledged that he had not banned the practice. Further, he told me of a recent conversation with one of his lawyers who saw nothing wrong with pleading defendants guilty at arraignments because often they receive “good deals” from prosecutors. Thus, notwithstanding the chief defender’s belief that there should be no guilty pleas at arraignments, his lawyers accepted the reality of excessive caseloads and early guilty pleas as a satisfactory way of dealing with too many cases.

Stories like these demonstrate that defenders often need a better appreciation of what is required of them in representing their clients, which in turn ought to make them unwilling to accept excessive caseloads as a permanent part of their organizational culture. The adoption of standards for defense representation help to fulfill this goal by advising defenders of their responsibilities in representing clients,⁶⁶ but only if the standards are used regularly in training programs and are otherwise frequently consulted. In short, the goal must be to develop cultures within defense programs in which excessive caseloads are unacceptable because they prevent competent and diligent representation as required by rules of professional conduct.

Change can only occur when those in charge of defense programs appreciate the excessive caseload problem and actively address it. Because the overwhelming majority of defenders will not protest excessive caseloads, as discussed earlier in this chapter, it is incumbent upon management to institute reform efforts.⁶⁷ However, when lawyers are educated about the problem, question their caseloads, and relief is not forthcoming, frustration and resignations may result.⁶⁸ But when management decides to take a stand, whether in court proceedings or with those who appropriate funds for defender programs, the support of program staff will likely be essential. For example, if litigation over a program’s caseload is instituted, management is apt to need its lawyers to testify or furnish affidavits explaining how their caseloads undermine the quality of representation they provide. If the lawyers in the defender program do not understand that their caseloads are genuinely excessive, they will be of limited help to management if the agency’s caseload is challenged in court. In one case involving exceptionally high caseloads in which I testified as an expert witness, the head of the defender program told me that several of his lawyers were not convinced they were doing anything wrong in the way they represented their clients and thus were reluctant to sign affidavits. The reluctance of these

⁶⁶ National performance standards for defense representation were discussed earlier, as well as standards applicable in Louisiana. See *supra* notes 30–35 and 119–122 and accompanying text, Chapter 2.

⁶⁷ Of course, management also has an ethical duty to seek relief for its lawyers. See *supra* notes 21–27 and accompanying text, Chapter 2.

⁶⁸ Chris Flood of the OPD expressed this concern when I spoke to him about current caseloads. Because the agency has a number of new lawyers who have been well trained and appreciate that their current caseloads are impeding their ability to provide competent representation, the lawyers are experiencing considerable frustration. Telephone interview with Chris Flood, former Deputy Director, Orleans Public Defenders (April 5, 2010).

lawyers to furnish affidavits suggests they had lost sight of their responsibilities to their clients and the detrimental impact of their excessive caseloads on their representation.⁶⁹ In other words, the prevailing culture of the organization accepted outlandish caseloads as normal, even if it meant cutting all kinds of corners in delivering defense services.

In addition, a well-organized and effective defender program needs to encourage its lawyers to assess their caseloads and to make judgments about whether they have too much work or, conceivably, can take on additional work. Lawyers themselves know better than anyone else whether they can handle the caseload assigned to them. When they cannot do so, defenders need to communicate this to the appropriate management officials so that management can determine if alternative arrangements are possible, assuming agreement with the lawyer who has brought the problem to their attention. This is the point of Guideline 3 of the ABA's Eight Guidelines of Public Defense Related to Excessive Workloads: "The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable."⁷⁰

Although the ABA's Eight Guidelines are discussed in Chapter 2, I mention them again here because the first four Guidelines serve as a roadmap for defender programs in developing an organizational culture in which excessive caseloads are rejected as acceptable. In addition to Guideline 3 quoted above, Guideline 1 challenges "Public Defense Providers" to examine whether lawyers employed by the program are discharging basic performance obligations; and, in the event they are not, whether the failure of lawyers to do so is attributable to excessive workloads. Guideline 2 stresses the importance of supervision programs to monitor the workloads of lawyers in order to make sure that all essential tasks on behalf of clients are being performed, and Guideline 4 urges Public Defense Providers to determine whether workloads are excessive. Adherence to these Guidelines should do much to ensure that lawyers employed by defender programs are well aware of their duties in representing clients and that they are prepared to support management when action is required to challenge caseloads in court proceedings or to raise the caseload issue with those responsible for funding the defender program.

⁶⁹ It may also be that the lawyers did not want to publicly acknowledge that they had been failing to furnish competent representation or were concerned with being disciplined if they did so. The possibility of discipline would seem to be extremely unlikely since their affidavits would have been furnished as part of an effort to improve representation and avoid charges of unethical conduct.

⁷⁰ For a discussion of the Guidelines, *see supra* notes 76–90 and accompanying text, Chapter 2.

CHAPTER 5

Remedies for Defenders Terminated Due to Caseload Challenges

I suggest in Chapter 4 that the vast majority of lawyers employed by public defense organizations rarely challenge their caseloads in court or in other ways, even though they often have far too many clients to represent. Occasionally, however, there are lawyers willing to do so or, at the least, willing to inform management that something needs to be done about their caseloads. In these situations, the lawyers may fear dismissal in the event management is upset by their conduct, especially if motions to withdraw are filed without permission.

I told Pat's story in the Introduction to this book. Pat wanted to file motions to withdraw from some of his more than 300 pending cases consisting mainly of misdemeanors and some felonies.

But his supervisor and the head of the defender agency forbade filing motions to withdraw from any of his cases under threat of termination. In the end, the threat had its desired effect. Pat backed down and quietly resigned rather than furnish representation that he was convinced would not—and could not be—competent.

Pat's story led me to investigate legal subjects of which I had relatively little knowledge. Suppose Pat had persevered, filed motions to withdraw, and then was fired. Would the public defender program have incurred civil liability if Pat had sued for wrongful termination? In other words, if a public defender has a genuinely excessive caseload so that the matter is not subject to reasonable argument, is the defender without legal recourse if he or she is fired for acting in a manner that is mandatory under professional conduct rules?¹ *The answer is vitally important not only for a public defender who is overwhelmed with cases and wants to challenge his or her caseload but also for those in charge of defense programs who are unaware of the legal consequences when they insist that their lawyers either accept overwhelming caseloads or face dismissal.* To understand this area of law requires an excursion into employment law and discussion of matters with which most defense practitioners are probably unfamiliar.

A. Chapter Overview

The primary focus of this chapter is on the recourse that may be available to public defenders whose employment is terminated because they have either protested their caseloads or taken some other action in an effort to reduce their caseloads without management permission. The most obvious example would be filing a motion to withdraw from one or more cases, even though management has ordered the defender not to file any such motions.

¹ See *supra* notes 7–9 and 18–20 and accompanying text for discussion of applicable ABA Model Rules, i.e., R. 1.16 (a)(1) and 5.2 (b), Chapter 2.

Although it is difficult to generalize, probably a majority of public defenders do not sign employment contracts and are “at-will employees” regardless of whether they work for a governmental agency or a nonprofit corporation.² This means that they have agreed to work for an indefinite period of time and are promised, implicitly, continued employment “so long as they do their job” or “perform in a satisfactory manner.” Even explicit promises of these sorts do not remove employees from the at-will category. Absent a fixed time period for the duration of employment, the employment relationship is presumed to be at-will.

However, an employee who signs an employment contract is normally not an at-will employee. The contract may specify the duration of employment and, whether it does or not, often the contract will contain specific criteria or circumstances related to termination (e.g., employment will be terminated only “for good cause”). The contract, therefore, usually will govern the basis for any challenge in the event of termination.³

In addition, many defenders within public defense agencies belong to a union, including lawyers employed by the New York Legal Aid Society and the Cook County Public Defender in Chicago, as well as lawyers employed in a statewide agency (e.g., the Minnesota Board of Public Defense). Just like with other kinds of contracts, persons covered by union contracts are not at-will employees. Courts consistently have treated union employees differently since collective bargaining agreements contain provisions regulating employee terminations, requiring that they be based on “just cause” or some other similar standard.⁴

² However, civil service rules undoubtedly apply to some public defenders employed by state or local government programs. Such public defenders, therefore, *may* not be at-will employees; instead, their employment termination *may* be governed by civil service regulations. See, e.g., 63C AM. JUR. 2D *Public Officers and Employees* § 151 (2011) (“for public employees, at-will employment may be modified by agreement with the employer, as in a personnel manual, and through civil service systems.”).

³ But suppose a contract was construed to require lawyers to handle an excessive caseload, thereby preventing the delivery of competent and diligent representation under a State’s rules of professional conduct. Arguably, the terms should be held unenforceable as a violation of public policy. 17A AM. JUR. 2d *Contracts* § 243 (2009) (“[C]ourts have a duty to refuse a contract that is contrary to public policy. In this regard, it has been stated that courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society.”); RESTATEMENT (SECOND) OF CONTRACTS § 178 (2009) (“A promise or other term of agreement is unenforceable or the interest in its enforcement is outweighed in the circumstances by a public policy against the enforcement of such terms.”). See also 17A C.J.S. *Contracts* § 218 (2009).

⁴ See, e.g., *Simmons Airlines v. Lagrotte*, 50 S.W.3d 748 (Tex. Ct. App. 2001) (parties under a union collective bargaining agreement are different than at-will employees, because they are guaranteed contractual protection under the agreement). Typical of union contracts applicable to public defenders is the contract governing public defenders in Spokane, Washington: “The employer shall not discharge or otherwise discipline any APD [Assistant Public Defender] without just cause.” Labor Agreement Between Spokane County, Spokane County Public Defender, and Teamsters Local Union No. 690, January 1, 2008 through December 31, 2010, para. 14.3 [hereinafter Spokane County Labor Agreement].

Because union contracts also have grievance procedures to deal with disputes between union members and management, heads of defender agencies are invariably prohibited from summarily terminating assistant public defenders for filing motions to withdraw in some of their cases.⁵ While union contracts negotiated on behalf of public defenders often recite that lawyers employed by the defense agency “are bound ... by the ethical obligations of the ... Rules of Professional Conduct,”⁶ grievances based on excessive caseloads are rare. However, in 2010 a grievance based upon excessive caseloads was filed by public defenders in 11 counties in southeastern Minnesota.⁷

⁵ Summary dismissal is exactly what Pat faced if he filed one or motions to withdraw as a result of his caseload. *See supra* notes 2–6 and accompanying text, Introduction. Under the typical union contract, even if a defender was unjustified in filing motions to withdraw from cases alleging too much work, management still could not dismiss the employee in summary fashion. Instead, under the collective bargaining agreement, management would be required to invoke provisions of the contract related to termination. For example, the Spokane County Labor Agreement, *supra* note 4, pars. 14.3, 14.3.1, provides that an assistant public defender is entitled to a pre-termination hearing, notice of the charges and the facts in support of them, the opportunity to respond to the charges, and the right to have an authorized union representative present at the hearing. Numerous additional steps are spelled out in the collective bargaining agreement and ultimately the matter could become the subject of arbitration. Based upon several collective bargaining agreements that I have reviewed, it appears that most have only general provisions dealing with grievances, whereas the contract applicable to New York Legal Aid lawyers has specific provisions dealing with individual workload grievances and “an office-wide workload grievance” based on a two-thirds vote of staff lawyers. *See* Collective Bargaining Agreement between the Association of Legal Aid Attorneys, UAW 2325 (AFL-CIO) and the Legal Aid Society (NYC) § 4.3.2, Grievances (2007–2009).

⁶ Agreement by and Between the Defender Association [of Seattle] and Service Employees International Union Local 925, January 1, 2010, through December 31, 2012, para. 15.1. Another labor agreement applicable to public defenders, which references professional responsibility rules, applies to defenders in St. Paul, Minnesota: “[T]he employer shall retain rights and authority necessary to operate and direct all the affairs of the department, including, but not limited to, directing the working forceSuch authority shall be subject to the code of professional responsibility governing the practice of law.” Agreement between Ramsey County and Council 5 of the American Federation of State, County and Municipal Employees, AFL-CIO, para. 5.1. (The contract covers the period July 2009 through June 2011.) Obviously, there is some tension in the collective bargaining agreement between management’s authority “to direct all the affairs of the department” and the duty of lawyers to comply with rules of professional conduct. This tension is evident in other collective bargaining agreements as well. For example, the Spokane County Labor Agreement, *supra* note 4, contains the following provisions: “The Spokane County Public Defender and APDs are required to accept all cases appointed to the office, whether by the courts or the approval from Pre-Trial Services.” *Id.* at para. 6.5.

APDs shall be and remain members in good standing of the Washington State Bar Association and shall otherwise at all times comport themselves in conformity with their oath-based obligations and responsibilities, including those imposed by the Rules of Professional Conduct. Nothing in this Agreement shall be construed to abridge the obligations and responsibilities of APDs as lawyers.

Id. at para. 8.6. This last sentence should be sufficient to ensure that the concerns of paragraph 8.6 take precedence over those of paragraph 6.5.

⁷ The grievance was described as follows:

Fourteen defenders in the 3rd Judicial District filed a union grievance [in March 2010] that

Prior to the Minnesota grievance, the only other caseload-related union-management grievance of which I am aware occurred during the 1980s and involved Weldon Brewer, who was employed at the time by the New York Legal Aid Society. Brewer was terminated by the Society, which claimed that he

had grossly neglected and properly failed to represent ...[two] clients ... , failed to follow the orders of and acted in an insubordinate manner toward his supervisors and chose to air before the court a workload dispute he had with the Society in a manner which was unprofessional, as well as detrimental to the interests of clients and his employer. The Association [of Legal Aid Attorneys] protested that decision, contending that Grievant's actions had not violated the collective bargaining agreement ... and were fully consistent with and mandated by the Code of Professional Responsibility.⁸

The dispute was resolved through binding arbitration, following a 25-day hearing, which resulted in a transcript of 3916 pages and a record of more than 5000 pages. The parties also submitted written opinions of experts on issues of professional responsibility. The arbitrator's decision sustained the action of the New York Legal Aid Society.

In contrast to union employees, historically, employers were able to terminate at-will employees for good cause, no cause, or even for a morally bad cause.⁹ This is because

alleges they can no longer provide effective representation for their clients because they simply don't have the time or resources [According to one defender], "[w]e cannot fulfill the fundamental terms of our employment; we are asked to do more than is possible on a given day. I am a three-quarter time defender and I have between 80 and 100 open felony cases, which is three times more than my friends who do criminal defense 100 percent of the time We triage. We pit one client against another for time purposes and it's not because we are not working hard," she said. "I am sure people have been convicted of things that they shouldn't have been and sat in jail longer than they should have."

Patrick Thornton, *Minnesota's 3rd District Public Defenders' Union Grievance Seeks to Force Fewer Clients*, MINNESOTA LAWYER, April 19, 2010, available at <http://www.dolanmedia.com/view.cfm?recID=585659>. See also Janice Gregorson, *Public Defenders Say Workload Puts Licenses at Risk*, THE POST-BULLETIN, April 21, 2010. The grievance in Minnesota is supported by a state audit of the Minnesota Public Defender, which found that "[p]ublic defender workloads are too high, resulting in public defenders spending limited time with clients, difficulties preparing cases, and scheduling problems that hinder the efficient operation of criminal courts." EVALUATION REPORT: PUBLIC DEFENDER SYSTEM, MINNESOTA OFFICE OF THE LEGISLATIVE AUDITOR ix (February 2010), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf>. I was unsuccessful in determining the resolution of the grievance at the time this book was completed.

⁸ In the Matter of the Arbitration between The Association of the Legal Aid Attorneys of the City of New York and The Legal Aid Society, p. 2 (Termination of Weldon Brewer; AAA Case No. 1330 1379 82), April 13, 1985. I was one of several experts who furnished an affidavit in support of Mr. Brewer's conduct.

⁹ See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–520 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915) (employee may be terminated "for good cause, for no cause, or

there was no common law cause of action against an employer for terminating an at-will employee. However, in recent years, courts have limited the authority of employers to terminate employees by creating exceptions to the employment at-will doctrine, i.e., the “public policy,” “implied contract,” and “good faith and fair dealing” exceptions.¹⁰ If one of these exceptions applies, the employer will be subject to civil liability for “wrongful termination,” or “retaliatory discharge,” even though the employee is “at-will.”¹¹ Montana is the only state in the United States that has enacted a comprehensive statute to address wrongful discharge matters in light of the at-will employment doctrine.¹² Also, depending on the terms of their employment, some procedural protections may be available for terminated employees under the due process clause of the Fourteenth Amendment to the Constitution.¹³

even for morally wrong reasons, without being thereby guilty of a legal wrong.”)

¹⁰ See generally Charles J. Muhl, *The Employment-at-will Doctrine: Three Major Exceptions*, MONTHLY LABOR REV. 3 (January 2001) [hereinafter Muhl, *The Employment-at-will Doctrine*], available at <http://www.bls.gov/opub/mlr/2001/01/artifull.pdf>. According to Muhl, as of 2001, forty-three states had adopted the public policy exception; thirty-eight states had adopted the implied contract exception; and eleven states had adopted the covenant of good faith and fair dealing exception. In preparing this chapter, I reference at several points the adoption of these exceptions in accordance with the foregoing numbers. However, the number of states that have adopted these exceptions might have changed since the 2001 list was compiled. Thus, if concerned with one of these exceptions in a given state, a person would be well advised to research the most recent decisions of the state’s highest court, as well as any relevant legislative enactments.

The exceptions to the at-will doctrine discussed in this chapter are not the only protections available to persons wrongfully terminated. There also are a wide variety of statutes that address termination issues. For example, the Civil Rights Act of 1964 protects against termination based on age, race, gender, or national origin. Additionally, many states have adopted employment laws to protect employees from certain types of termination. In many instances the state’s legislation mirrors federal laws such as the Occupational Safety and Health Act or the Civil Rights Act of 1964. See, e.g., Arizona Employment Protection Act § 23-1501 (2007); Georgia Equal Employment for Persons with Disabilities Code § 34-6A-1, § 34-1-2 (2008); New Jersey Conscientious Employee Protection Act, N.J.S.A § 34-19-1 through 14 (2008) (essentially a “whistleblower” protection act); and Alabama Code § 25-5-11.1 (2008) (provides protection from termination for an employee who files a worker compensation claim). In addition, some states will not apply exceptions to the at-will doctrine if there is a statute that could provide the party with some other form of redress. See, e.g., *Northrup v. Farmland Indus. Inc.*, 372 N.W.2d 193 (Iowa 1985) (court found an express public policy prohibiting discharge for “disabilities” but held that a claim for wrongful discharge under the public policy exception was preempted by exclusive remedies provided under Iowa law).

¹¹ It makes no difference whether a court characterizes a claim as one for “wrongful discharge” or “retaliatory discharge.” The correct title will depend on the particular facts of the case. See, e.g., *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App.2d. 184 (1959) (describing the cause of action as one for wrongful discharge); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (describing the cause of action as retaliatory discharge).

¹² See *infra* note 20 and *infra* notes 104–109 and accompanying text.

¹³ See *infra* notes 110–124 and accompanying text. The subject matter dealt with in this chapter is similar to situations in which employers have retaliated against lawyers, who as whistleblowers, have exposed misconduct of other lawyers in the same law firm or against corporate officials when lawyers are serving as in-house counsel. When this occurs, the whistleblower often defends claiming that his or her

B. Employment At-Will

Brief History of the Doctrine

The at-will employment doctrine in the United States arose in the middle of the nineteenth century, just before the dawn of the Industrial Revolution.¹⁴ The United States differs with the majority of other industrialized nations, such as France, Germany, and Great Britain, all of which have laws preventing “unjust” employee termination.¹⁵

A treatise on the master-servant relationship published in 1877 by Professor Horace Gray Wood is widely credited with having led to the adoption of the at-will doctrine.¹⁶ Wood posited that “American courts did not presume a one-year term in employment contracts mum on the subject.”¹⁷ In fact, he believed that it was quite the opposite. Wood wrote that “in the absence of a written contract of employment for a defined duration, an employer can terminate an employee for good cause, bad cause, or no cause at all.”¹⁸ This proposition, Wood argued, was rooted in the equal bargaining power of the parties. The at-will doctrine thus gave both parties the freedom to terminate the employment relationship without restriction.¹⁹

Today, Professor Wood’s approach is known as the at-will employment doctrine and is controlling law in all but one state in the country.²⁰ Given the harshness of the at-will

conduct was an effort to comply with rules of professional conduct. *See, e.g., infra* notes 83–91 and accompanying text. For articles dealing with lawyers as whistleblowers, *see* Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786 (2009); Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043 (2008).

¹⁴ James E. Meadows, *Dancing Around Employment At-Will*, 65 MO. L. REV. 1003, 1007 (2000).

¹⁵ *Id.* at 1003.

¹⁶ Daniel P. O’Donnell, Jr., *Employers Beware: The Missouri Court of Appeals Takes a Bite Out of Employment At-Will Doctrine*, 71 MO. L. REV. 823, 826 (2006) [hereinafter O’Donnell, *Employers Beware*].

¹⁷ Nadkia Limani, *Righting Wrongful Discharge: A Recommendation for the New York Judiciary to Adopt a Public Policy Exception to the Employment At-Will Doctrine*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 309 (2006).

¹⁸ *Id.* at 312.

¹⁹ *Id.* at 313. Wood cited four cases for his proposition, none of which actually supported his theory. *See* Peter Stone Partee, *Reversing the Presumption of Employment At-Will*, 44 VAND. L. REV. 689, 692 (1991) [hereinafter Partee, *Reversing the Presumption*].

²⁰ Montana legislatively abrogated the common law at-will doctrine and replaced it with a statutory framework that serves as the exclusive remedy for wrongful discharge claims in the state. *See infra* notes 104–109 and accompanying text. Arizona has taken almost as large of a step as Montana by enacting the Employment Protection Act (EPA). *See* ARIZ. REV. STAT. § 23-1501 (1995 & Supp. 2007). The EPA does not cover punitive damages and all procedural aspects of wrongful discharge claims, like the Montana law does, but it does set forth the basic contours of the substantive law and clarifies the state’s wrongful discharge laws. An Arizona Supreme Court decision explained:

doctrine for employees, and the false premise on which it rested, namely, that employers and employees have equal bargaining power, courts began during the last century to create exceptions to it.²¹ The three major exceptions are discussed below.²²

Exceptions to the At-Will Doctrine

Public Policy Exception

The most widely adopted exception to the at-will doctrine is the public policy exception,²³ which was first invoked in a 1959 California appellate court

With the 1996 passage of the EPA, the legislature limited plaintiffs to three avenues of relief for claims asserted against employers on the theory of wrongful discharge. The EPA permits such employee claims if: (a) the discharge was in violation of an employment contract, (b) the discharge violated a statute of this state, or (c) the discharge was in retaliation for the employee's assertion of certain rights protected by state law.

Cronin v. Sheldon, 991 P.2d 231, 235 (Ariz. 1999).

²¹ O'Donnell, *Employers Beware*, *supra* note 16, at 827.

²² None of the cases discussed below involved employers who terminated public defenders who later brought suit for wrongful discharge. However, a case that presumably proceeded upon a wrongful discharge theory is discussed in a law review article, which relies in part on material from the report of the California Commission on the Fair Administration of Justice related to public defense. According to the Commission, a lawyer, hired by a California county as its contract defender, was summarily fired when she refused to represent a defendant in a felony case for which she was totally unprepared. The lawyer then sued the contract defender, and "[t]he lawsuit reportedly resulted in a substantial settlement for the plaintiff." Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 304–305 n. 94 (2009).

²³ The following cases are from jurisdictions that have adopted the public policy exception. *See, e.g.*, *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) ("an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state"); *Sheets v. Teddy's Frosted Foods, Inc.* 427 A.2d 385, 389 (Conn. 1980) ("an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment"); *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973) (threat of discharge in response to filing workman's compensation claim contravenes purpose of statute and thus violates public policy); *DeRose v. Putnam Management Corp.*, 496 N.E.2d 428, 431 (Mass. 1986) (public policy exception applies even if the employee's discharge adds no financial advantage to the employer); *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993) (public policy exception protects employees who refuse to participate in or report illegal acts); *Pierce v. Ortho Pharmaceutical*, 417 A.2d 505, 512 (N.J. 1980) ("professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions;" other sources of public policy can be found in legislation, administrative rules, regulations, and court decisions); *Painter v. Graley*, 639 N.E.2d 51, 57 (Ohio 1994) (termination of municipal court employee following her decision to run for partisan public office did not violate public policy); *Reuther v. Fowler & Williams, Inc.* 386 A.2d 119, 120 (Pa. Superior Ct. 1978) (public policy exception protects terminated employee who answers the call for jury service); *Ludwick v. This Minute of Carolina Inc.*, 337 S.E.2d 213, 225 (S.C. 1985) (public policy exception protects employee who complies with subpoena to appear before employment commission); *Payne v. Rozendaal*, 520 A.2d 586, 589 (Vt. 1986) (public policy exception protects

decision—*Petermann v. International Brotherhood of Teamsters*.²⁴ It has now been adopted in some form in forty-three states. Only the following seven states have not approved it: Alabama,²⁵ Florida,²⁶ Georgia,²⁷ Louisiana,²⁸ Maine,²⁹ New York,³⁰ and Rhode Island.³¹ As its name implies, the exception stands for the proposition that an at-will employee may not be fired for a reason that violates a “public policy.” However, there is no uniform definition among courts about the meaning of public policy or acceptable sources of public policy. Accordingly, application of the exception varies from state to state.

Petermann: The Case that Started the Exception

In the *Petermann* case, plaintiff was an employee of the International Brotherhood of Teamsters who was told when hired that he would be employed so as long as his work was satisfactory. Plaintiff was subpoenaed to testify before a committee of the California legislature and claimed that, in advance of his testimony, his supervisor “instructed him to make certain false and untrue statements”³² Plaintiff further alleged that he refused to comply with his supervisor’s instruction, instead gave truthful and honest testimony, and was fired the next day because he had failed to commit perjury. A claim for wrongful termination followed in which plaintiff sought his accrued

employee terminated based on age discrimination); *Harless v. First National Bank*, 246 S.E.2d 270, 276 (W. Va. 1978) (public policy exception protects employee discharged because of efforts to bring employer into compliance with consumer credit protection laws.) *See also* cases cited in Mark D. Wagoner, Jr., *The Public Policy Exception to the Employment At Will Doctrine in Ohio: A Need for a Legislative Approach*, 57 OHIO ST. L. J. 1799, 1811 n.35 (1996).

²⁴ 344 P.2d 25 (Cal. App. 2d Dist., 1959).

²⁵ *Hall v. Infirmary Health Sys.*, 2007 U.S. Dist. LEXIS 18104, 18114 (S.D. Ala. 2007) (“Alabama Supreme Court has steadfastly refused to create a public policy exception to the at-will doctrine.”).

²⁶ *Hartley v. Ocean Reef Club Inc.*, 476 So.2d 1327 (Fla. Ct. App. 1985) (creation of a public policy exception should be left to the legislature), *Erskine v. Boeing Co.*, 2002 U.S. Dist. LEXIS 21819, 21834 (M.D. Fla. 2002) (“Florida does not recognize a general ‘public policy’ exception to at-will employment.”).

²⁷ *Eckhardt v. Yerkes Reg’l Primate Ctr.*, 561 S.E.2d 164 (Ga. Ct. App. 2002) (any public policy exception to the at-will doctrine will be left to the legislative branch to create).

²⁸ *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 546 (La. 2002) (“there are no broad policy considerations creating exceptions to employment at will.”).

²⁹ *Taliento v. Portland West Neighborhood Planning Council*, 705 A.2d 696, 699 (Me. 1997) (“the only exception to the employer’s common law right to discharge an employee at will is a contract that expressly restricts such a right.”).

³⁰ *Horn v. N.Y. Times*, 790 N.E.2d 753, 759 (N.Y. 2003) (New York courts “have consistently declined to create a common-law tort of wrongful or abusive discharge” and “we decline to do so now.”).

³¹ *Pacheo v. Raytheon Co.* 623 A.2d 464, 465 (R.I. 1993) (“we now unequivocally state that in Rhode Island there is no cause of action for wrongful discharge.”).

³² *Petermann*, *supra* note 24, 344 P.2d at 25.

salary. Plaintiff's case was dismissed in the trial court, and an appeal followed in which the issue was whether plaintiff's complaint stated a cause of action.

The court conceded that plaintiff was an at-will employee because no fixed term of employment was agreed upon, which meant that normally either party could terminate the relationship for any reason. But the court went on to state that "the right to discharge an employee under such a contract may be limited by ... considerations of public policy."³³ Although the court recognized that the term public policy "is inherently not subject to precise definition,"³⁴ it had little difficulty concluding that perjury and the solicitation of perjury violates public policy.³⁵

Illustrative Cases

One of the broadest applications of the public policy exception is contained in the 1981 decision of the Illinois Supreme Court in *Palmateer v. International Harvester Company*.³⁶ Plaintiff, Palmateer, an at-will employee of International Harvester, brought an action for retaliatory discharge, claiming that he was fired for supplying information to law-enforcement authorities about another employee's possible involvement in a criminal law violation and agreeing to assist in the investigation and trial of the employee.

After noting that Illinois recognizes a public policy exception to the at-will employment doctrine, the court discussed the meaning of public policy and its sources. While conceding that "there is no precise definition of the term,"³⁷ the court declared that

³³ *Id.* at 27.

³⁴ *Id.*

³⁵ The court in *Petermann* explained:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. The threat of criminal prosecution would, in many cases, be a sufficient deterrent upon both the employer and employee, the former for soliciting and the latter for committing perjury. However, in order to fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law ...

Id. at 28. Defendant argued that plaintiff had not exhausted his remedies under the union contract, which precluded his resort to the courts. However, the court held that the union contract was not controlling since it applied only in circumstances in which an employee union member was seeking to redress an adverse ruling or decision under the union contract, whereas "plaintiff's discharge was not a ruling or decision adverse to him as a [union] 'member,' but only terminated his status as an employee." *Id.*

³⁶ 421 N.E.2d 876 (Ill. 1981).

³⁷ *Id.* at 878.

“public policy concerns what is right and just and what affects the citizens of the State collectively.”³⁸ As for the sources of public policy, the court stated that it “is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions.”³⁹

As for plaintiff’s termination, the court held that plaintiff stated a cause of action for retaliatory discharge:

There is no public policy more basic, nothing more implicit in the concept of ordered liberty ... than the enforcement of a State’s criminal code There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens Public policy favors Palmateer’s conduct in volunteering information to the law-enforcement agency. Once the possibility of crime was reported, Palmateer was under a statutory duty to further assist officials when requested to do so Public policy thus also favors Palmateer’s agreement to assist in the investigation and prosecution of the suspected crime.⁴⁰

But not all courts have agreed with the broad exception declared in *Palmateer*. In *Sabine Pilot Service v. Hauck*,⁴¹ decided in 1985, the Texas Supreme Court recognized a narrow public policy exception similar to that announced two years earlier by the Wisconsin Supreme Court.⁴² In the Texas case, Plaintiff, an employee of Sabine Pilot Services, was responsible for pumping the bilges of boats on which he worked. Believing that it was illegal for him to pump the bilges directly into the water around the boat as he was instructed to do, plaintiff contacted the United States Coast Guard to determine the legality of the practice. When he learned that it was in fact illegal for him to pump the bilges directly into the open water, he refused to do so and was fired shortly afterwards. While plaintiff contended that he was wrongfully terminated for his refusal to pump the bilges illegally, Sabine claimed that he was terminated because “he refused to swab the deck, man a radio watch and other derelictions of duty.”⁴³

The Texas Supreme Court stated that “the sole issue for our determination is whether an allegation by an employee that he was discharged for refusing to perform an illegal act states a cause of action.”⁴⁴ After acknowledging that Texas had long been a strict

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 879–880.

⁴¹ 687 S.W. 2d 733 (Tex. 1985).

⁴² See *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983) (only the state’s constitution or statutes reflect public policy for purposes of a wrongful discharge action).

⁴³ *Id.* at 734

⁴⁴ *Id.*

supporter of the at-will employment doctrine, the court noted that a number of states had modified the doctrine and concluded as follows:

Upon careful consideration of the changes in American society and in the employer/employee relationship ... we hold that the situation which led to ... [the at-will employment doctrine] has changed in certain respects. We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine *That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act.* We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.⁴⁵

The court thereafter affirmed judgment for the plaintiff. The strict interpretation of the public policy exception has not been expanded in Texas, and at least one other state has adopted a similarly narrow approach.⁴⁶

Public Policy Exception Based on Rules of Professional Conduct

Several court decisions have accepted ethical rules pertaining to the professions, including rules of professional conduct applicable to lawyers, as expressions of public policy.⁴⁷ Although none has involved public defenders, cases for wrongful termination or retaliatory discharge have been brought by in-house corporate lawyers who were fired by their employers. The lawyers in these cases acted in ways that they believed were required by professional conduct rules. In fact, litigation between former in-house counsel and corporate employers has occurred with sufficient frequency that in 2001 the ABA Standing Committee on Ethics and Professional Responsibility issued

⁴⁵ *Id.* at 735 (emphasis added).

⁴⁶ See *Dancer v. Bryce Corp.*, 2006 U.S. Dist. Lexis 16955, 16964 (N.D. Miss. 2006) (“the Mississippi Supreme Court has created a narrow public policy exception allowing an employee fired for refusing to follow an employer’s directive to do illegal activity or for exposing illegal activity in the workplace to bring a wrongful termination action”).

⁴⁷ See, e.g., *Chapman v. Adia Services, Inc.*, 688 N.E.2d 604, 609 (Ohio Ct. App. 1997) (Ohio Code of Professional Responsibility expresses public policy); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (N.J. 1980) (public policy may be expressed in a professional code of ethics); *Kalman v. Grand Union Co.*, 443 A.2d 728, 730 (N.J. Super. Ct. App. Div. 1982) (code of ethics related to profession of pharmacy may express public policy); *GTE Products Corp. v. Stewart*, 653 N.E.2d 161, 167 n. 10 (Mass. 1995) (explicit commands in lawyers’ ethics code are a recognized source of public policy); *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (“a professional code of ethics may contain an expression of public policy”). See also *Thompto v. Coborn*, 871 F.Supp. 1097, 1119–1121 (N.D. Iowa 1994) (recognizes rules of ethics as embodying strong public policy favoring access of persons to professional legal services).

a formal opinion on the subject.⁴⁸ The opinion summarized the law in this area as follows:

The absolute right to terminate an in-house lawyer under any circumstances has been limited ... by a number of courts in recent years Thus, some courts have permitted the retaliatory discharge claim by the former in-house lawyer. These courts find that there are compelling reasons of public policy that make it appropriate to impose legal consequences for dismissing an in-house lawyer. Specifically, they conclude that the public has an interest in insuring that lawyers abide by their ethical obligations.

Courts also have recognized that state-adopted codes of ethics for lawyers as a reflection of public policy.⁴⁹

To illustrate, in a Tennessee case,⁵⁰ plaintiff, in-house counsel for a company, was terminated for reporting that the employer's general counsel was engaged in the unauthorized practice of law. After acknowledging that the public policy exception had been adopted in the state, the Tennessee Supreme Court held that plaintiff "may bring a common-law action for retaliatory discharge resulting from counsel's compliance with a provision of the code of professional responsibility that represents a clear and definitive statement of public policy."⁵¹

One of the most frequently cited cases in this area is *General Dynamics Corp. v. Superior Court*,⁵² decided by the California Supreme Court in 1994. The plaintiff in this case, an attorney for General Dynamics, claimed that he was fired because he reported to company officials "widespread drug use among the General Dynamics work force, a refusal to investigate the mysterious 'bugging' of the office of the company's chief of

⁴⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001). Because in-house counsel represents the corporation, there is an understandable concern that in the event of a suit for wrongful termination the corporation's former lawyer might disclose confidential information about the company. The committee addressed this concern: "The Model Rules do not prohibit a lawyer from suing her former client and employer for retaliatory discharge. In pursuing such a claim, however, the lawyer must take care not to disclose client information beyond that information the lawyer reasonably believes is necessary to establish her claim." If a public defender were to sue his or her former agency for wrongful termination arising from a dispute over the size of the lawyer's caseload, there would seem to be little risk that confidential information would need to be disclosed. Unlike in-house counsel, the public defender does not have an attorney-client relationship with the defender program, but instead with the indigent clients on whose behalf defense services are provided.

⁴⁹ *Id.* at 2 n. 2. Although a minority view, the Illinois Supreme Court has rejected wrongful termination suits by former in-house lawyers because of concern for the undesirable effect of such litigation on the attorney-client relationship. See *Balla v. Gambro*, 584 N.E.2d 104, 108-109 (Ill. 1991).

⁵⁰ *Crews v. Buckman Labs*, 78 S.W.3d 852 (Tenn. 2002).

⁵¹ *Id.* at 855.

⁵² 876 P.2d 487 (Cal. 1994).

security, and the displeasure of company officials over certain legal advice”⁵³ that he provided to management. In its decision supporting plaintiff’s position, the court’s analysis is just as relevant for a public defender fired for protesting an excessive case-load as for an in-house lawyer terminated for disclosing corporate misconduct:

Perhaps the defining feature of professionals as a class is the extent to which they embody a dual allegiance. On the one hand, an attorney’s highest duty is to the welfare and interests of the client. This obligation is channeled, however, by a limiting and specifically *professional* qualification: attorneys are required to conduct themselves *as such*, meaning that they are bound at all events not to transgress a handful of professional ethical norms that distinguish their work from that of the nonattorney.⁵⁴

[A]ttorneys should be accorded a retaliatory discharge remedy in those instances in which *mandatory ethical norms* embodied in the Rules of Professional Conduct *collide with illegitimate demands of the employer* and the attorney insists on *adhering to his or her clear professional duty*. It is, after all, the office of the retaliatory discharge tort to vindicate fundamental public policies by encouraging employees to act in ways that advance them. By providing the employee with a remedy in tort damages for resisting socially damaging organizational conduct, the courts mitigate the otherwise considerable economic and cultural pressures on the individual employee to silently conform.⁵⁵

In summary, “public policy” is the most widely adopted exception to the employment at-will doctrine, and courts have shown a willingness to find expressions of public policy in rules of professional responsibility governing lawyers.⁵⁶ Although not all courts have had occasion to rule on professional conduct rules as expressions of public policy, there do not appear to be any decisions in which courts have refused to do so. However, there still appear to be seven jurisdictions that reject a public policy

⁵³ *Id.* at 490.

⁵⁴ *Id.* at 497—498.

⁵⁵ *Id.* at 501.

⁵⁶ In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), an assistant prosecutor in Los Angeles wrote a memorandum to his superiors explaining that he believed a certain case should be dismissed as a result of misrepresentations in a search warrant affidavit. Later, he claimed his memorandum resulted in a series of retaliatory employment actions and sued the District Attorney’s office claiming that the actions taken against him violated his First Amendment rights in writing to his supervisors. The Court held that the First Amendment does not protect a government employee from discipline based on speech arising out of the employee’s official duties. However, the Court also noted that “[c]ases involving government attorneys implicate additional safeguards in the form of, for example, rules of [professional] conduct” *Id.* at 425.

exception regardless of its basis, believing instead that exceptions to the law in this area should derive from legislative action, not from judicial decisions.⁵⁷

Implied Contract Exception

The second most common exception to the employment at-will doctrine is the “implied contract exception,” which as of 2001 had been adopted in thirty-eight of the fifty States.⁵⁸ Only the following twelve states, as of 2001, had not adopted the exception in some form: Delaware;⁵⁹ Florida;⁶⁰ Georgia;⁶¹ Indiana;⁶² Louisiana;⁶³

⁵⁷ See *supra* notes 25–31 and accompanying text.

⁵⁸ See *supra* note 10. Most of the states that have adopted the implied contract exception are represented in the following list of cases: *Hoffman-LaRouche Inc. v. Campbell*, 512 So.2d 725 (Ala. 1987); *Eales v. Tanana Valley Medical Group, Inc.*, 663 P.2d 958 (Alaska 1983); *Gladden v. Arkansas Children Hosp.*, 728 S.W.2d 501 (Ark. 1987); *Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. 1981); *Salimi v. Farmer’s Insurance Group*, 684 P.2d 264 (Colo. 1984); *Finley v. Aetna Life & Casualty*, 520 A.2d 208 (Conn. 1985); *Bason v. American Univ.*, 414 A.2d 522 (D.C. 1980); *Kinoshita v. Canadian Pacific Airlines*, 724 P.2d 110 (Haw. 1986); *Watson v. Idaho Falls Consolidated Hosps.*, 720 P.2d 632 (Id. 1986); *McBride v. City of Sioux City*, 444 N.W.2d 85 (Iowa 1989); *Allegrì v. Providence-St. Margaret Health Ctr.*, 684 P.2d 1031 (Kan. 1984); *Anil Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Staggs v. Blue Cross of Maryland*, 486 A.2d 798 (Md. 1985); *Pine River State Bank v. Mettillie*, 333 N.W.2d 622 (Minn. 1983); *Robinson v. Board of Trustees East Cent. Junior College*, 477 So.2d 1352 (Miss. 1985); *Morris v. Lutheran Medical Ctr.*, 340 N.W.2d 388 (Neb. 1983); *Southwest Gas Corp. v. Ahmad*, 668 P.2d 261 (Nev. 1983); *Panto v. Moore Business Forms*, 547 A.2d 260 (N. H. 1988); *Forrester v. Parker*, 606 P.2d 191 (N.M. 1980); *Weiner v. McGraw Hill*, 443 N.E.2d 441 (N.Y. 1987); *Hammond v. North Dakota State Personnel Bd.*, 345 N.W.2d 359 (N.D. 1984); *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150 (Ohio 1985); *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. 1976); *Yartzoff v. Democratic Herald Publications*, 576 P.2d 356 (Or. 1978); *Small v. Springs Indus.*, 357 S.E.2d 452 (S.C. 1987); *Osterkamp v. Alkota Mfg.*, 332 N.W. 2d 275 (S.D. 1983); *Hamby v. Genesco Inc.*, 627 S.W.2d 373 (Tenn. Ct. App. 1981); *Piatracelli v. Southern Utah State College*, 636 P.2d 1063 (Utah 1981); *Benoit v. Ethan Allen Inc.*, 514 A.2d 716 (Vt. 1986); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984); *Cook v. Heck’s Inc.*, 342 S.E.2d 453 (W. Va. 1986); *Ferraro v. Koelsch*, 368 N.W.2d 666 (Wis. 1985); *Mobil Coal Producing Inc. v. Parks*, 704 P.2d 702 (Wyo. 1985).

⁵⁹ *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996) (Delaware recognizes exceptions to the at-will doctrine based on the implied covenant of good faith and fair dealings, public policy, an employment misrepresentation upon which the employee relies to her detriment, and an employer depriving the employee of clearly identifiable compensation).

⁶⁰ *Bryant v. Shands Teaching Hospital & Clinics, Inc.*, 479 So.2d 165, 168 (Fla. Dist. Ct. App. 1985) (at-will doctrine “is well entrenched in the jurisdiction of this state, and cannot be modified on any basis but a clear statutory abrogation of the rule”).

⁶¹ *Balmer v. Elan Corp.*, 599 S.E.2d 158, 162 (Ga. Ct. App. 2004) (Georgia courts have refused to acknowledge any exceptions to the at-will doctrine not contained in its state code).

⁶² *Coutee v. Lafayette Neighborhood Housing Services*, 792 N.E.2d 907 (Ind. Ct. App. 2003) (Indiana recognizes only three exceptions to the at-will doctrine, none of which are for an implied contract rule).

⁶³ *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 546 (La. 2002) (aside from state and federal statutory exceptions, there are no broad policy considerations creating exceptions to employment at will).

Missouri;⁶⁴ Montana;⁶⁵ North Carolina;⁶⁶ Pennsylvania;⁶⁷ Rhode Island;⁶⁸ Texas;⁶⁹ and Virginia.⁷⁰

The exception is applicable when a court finds that an implied contract has been formed based on oral or written representations made by the employer to the employee either during the hiring process or during employment. The exception allows an employee to show the existence of “an implied promise of continued employment established by oral representations, course of dealing, personal manuals, or memoranda.”⁷¹ Thus, the exception “recognizes that statements or conduct by the employer that imply some form of job security for otherwise at-will employees may rise to the level of contractually binding obligations” that take the employee out of the at-will classification and afford protection of a specified duration or a requirement that termination be “for cause” or based upon some other standard.⁷²

Toussaint v. Blue Cross & Blue Shield of Michigan

An often-cited case for application of the implied contract exception is *Toussaint v. Blue Cross & Blue Shield of Michigan*.⁷³ *Toussaint* was a consolidation of two cases that were factually similar. In both, the parties’ employment relationships were for an unspecified period of time. However, both parties inquired about job security when they were hired, and both were promised indefinite employment. Plaintiff Toussaint testified that he was told that he would have continued employment “as long as I did

⁶⁴ *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. 1988) (no contract was formed between plaintiff and defendant on the basis of employee handbook). *See also* *Enyeart v. Shelter Mut. Ins. Co.*, 784 S.W.2d 205 (Mo. App. 1989).

⁶⁵ Montana has abrogated the common law rule of the at-will doctrine and its exceptions, and in its place has adopted the Montana Wrongful Discharge from Employment Act. *See infra* notes 104–109 and accompanying text.

⁶⁶ *Katsifos v. Pulte Home Corp.*, 2004 N.C. App. LEXIS 330, 335 (N.C. Ct. App. 2004) (North Carolina law is clear that unilaterally promulgated employment manuals or policies do not become part of employment contract unless expressly included in it).

⁶⁷ *Reynolds v. Murphy Ford, Inc.*, 2007 Phila. Ct. Com. Pl. LEXIS 146, 151 (2007) (cause of action does not exist for termination of an at-will employee unless an exception applies for a violation of public policy); *Richardson v. Charles Cole Memorial Hospital*, 320 Pa. Super. 106 (Pa. Super. Ct. 1983) (provisions in employee handbook about duration of employment and termination are not binding since they were not bargained for and were at best gratuitous).

⁶⁸ *Dudzik v. Leeson Corp.*, 473 A.2d 762 (R.I. 1984).

⁶⁹ *Simmons Airlines v. Lagrotte*, 50 S.W.3d 748, 752 (Tex. Ct. App. 2001) (“the *Sabine Pilot* exception is the only common-law exception recognized in Texas.”).

⁷⁰ *Rubin v. Maloney*, 2007 Va. Cir. LEXIS 244 (2007) (Virginia recognizes only a narrow exception to the at-will doctrine for violation of an established public policy).

⁷¹ Margaret M. Koesel et al., *Will the Real Legislature Please Stand Up? A Response to “Kulch v. Structural Fibers, Inc.: Clarifying the Public Policy Exception,”* 46 CLEV. ST. L. REV. 19, 24 (1998).

⁷² *Partee, Reversing the Presumption*, *supra* note 19, at 697.

⁷³ 292 N.W.2d 880 (Mich. 1980).

my job.”⁷⁴ Plaintiff Ebling testified that he was told that so long as he was “doing his job” he would have employment.⁷⁵ Both parties challenged their terminations, arguing that they were not at-will employees and could only be fired for cause.

In the view of the Michigan Supreme Court, although the contracts were for an indefinite term, this did not necessarily mean that they were “terminable at-will,”⁷⁶ because the employer can still decide to “enter into a legally enforceable agreement to terminate the employment only for cause.”⁷⁷ The court further explained its support for plaintiffs:

When a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause (good or just cause). The result is that the employee, if discharged without good or just cause, may maintain an action for wrongful discharge.⁷⁸

The court also relied upon written materials supplied to plaintiff Toussaint. During negotiations and upon being hired, Plaintiff Toussaint was handed a “Blue Cross Supervisory Manual and Guidelines” packet that expressly stated that employees could be terminated “for just cause only.”⁷⁹ In regard to this manual, the court explained:

Blue Cross had established a company policy to discharge for just cause only, pursuant to certain procedures, had made that policy known to Toussaint, and thereby had committed itself to discharge him only for just cause in compliance with the procedures. There were, thus, on this separate basis alone, special circumstances sufficient to overcome the presumptive construction that the contract was terminable at will.

We hold that employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement

⁷⁴ *Id.* at 884.

⁷⁵ *Id.*

⁷⁶ *Id.* at 890.

⁷⁷ *Id.*

⁷⁸ *Id.* at 890.

⁷⁹ *Id.* at 891.

in pre-employment interviews and the employee does not learn of its existence until after his hiring.⁸⁰

In the wake of the *Toussaint* decision, courts often have held that employment contracts, which provide that an employee will not be discharged except for cause, are enforceable even though the term of the employment contract is “indefinite.”⁸¹ In addition, the basis for termination may become part of the employment contract by express agreement, either written or oral, or as a result of an employee’s expectations grounded in an employer’s written policies or employment manuals.⁸²

Implied Contract Exception Based On Rules of Professional Conduct

At least one court has applied the implied contract exception based on rules of professional conduct. In *Weider v. Skala*,⁸³ the New York Court of Appeals dealt with a claim for wrongful termination brought by a law firm’s former associate. While employed by the law firm, plaintiff asked the firm to represent him in the purchase of a condominium. The firm agreed and assigned a fellow associate (given the alias of L.L. in the court’s opinion) to handle the matter. After several months it became apparent to plaintiff that L.L. had made several false and fraudulent statements while representing plaintiff. When plaintiff told two of the firm’s senior partners about the matter, “[t]hey conceded that the firm was aware ‘that [L.L.] was a pathological liar and that [L.L.] had previously lied to [members of the firm] regarding the status of other pending legal matters.’”⁸⁴ In response, plaintiff insisted that a complaint be made to the state bar’s disciplinary authority in compliance with the code of professional conduct.⁸⁵ Although the firm’s partners resisted plaintiff’s request and threatened to fire him if he reported the misconduct, ultimately the firm reported the associate’s misconduct.

⁸⁰ *Id.* at 892.

⁸¹ *See, e.g., D’Angelo v. Gardner*, 819 P.2d 206, 211 (Nev. 1991):

Employment contracts are ordinarily and presumably contracts which are terminable at will; however, an employer may expressly or impliedly agree with an employee that employment is to be for an indefinite term and may be terminated only for cause or only in accordance with established policies or procedures. We have called this a contract of “continued employment,” a contract which an employee can enforce in accordance with its terms.

⁸² *See, e.g., Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (employee stated valid claim for wrongful discharge based on provisions contained in company’s employee handbook).

⁸³ 609 N.E.2d 105 (N.Y. 1992).

⁸⁴ *Id.* at 106.

⁸⁵ At the time, the New York Code of Professional Conduct stated as follows:

A lawyer possessing knowledge, not protected as a confidence or secret ... that raises a substantial question as to another lawyer’s honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Id. at n. 4.

Several months later, however, plaintiff was fired soon after he completed his work on certain papers he was preparing for litigation on the law firm's behalf.

Plaintiff charged in his lawsuit that he was wrongfully discharged as a result of insisting that L.L.'s conduct be reported. His claim for wrongful termination was based on the public policy exception to the at-will employment doctrine or, alternatively, based on a breach of the employment relationship (i.e. the implied contract exception).

The court rejected plaintiff's claim based on the public policy exception, stating that "while the arguments are persuasive and the circumstances here compelling, we have consistently held that 'significant alteration of employment relationships, such as the plaintiff urges, is best left to the Legislature.'"⁸⁶ However, the court reached a different conclusion respecting plaintiff's "legal claim for breach of contract."⁸⁷ The court explained its decision regarding the law firm's former associate in language equally applicable to public defenders burdened with excessive caseloads:

[P]laintiff's performance of professional services for the firm's clients as a duly admitted member of the Bar was at the very core and, indeed, the only purpose of his association with defendants. Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations It is in this distinctive relationship between a law firm and a lawyer hired as an associate that plaintiff finds the implied-in-law obligation on which he founds his claim.

We agree with plaintiff that in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm—the lawful and ethical practice of law.⁸⁸

Thus, by insisting that plaintiff disregard . . . [the duty to report professional misconduct] defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the

⁸⁶ *Id.* at 110. See also *supra* note 30, noting New York's rejection of the tort of wrongful termination.

⁸⁷ *Id.* at 107.

⁸⁸ *Id.* at 108.

position of having to choose between continued employment and his own potential suspension and disbarment.⁸⁹

Intrinsic to this [employment] relationship ... was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.⁹⁰

The *Weider* decision furnishes strong support for a defender who is terminated due to challenging his or her caseload. The obligation to furnish competent and diligent representation pursuant to professional conduct rules is central to every attorney-client relationship, whether the lawyer is serving indigent clients as a public defender or is hired to represent private persons. For an employer to insist that a lawyer refrain from challenging a genuinely excessive caseload in court would, just as in the *Weider* case, amount "to nothing less than a frustration of the only legitimate purpose of the employment relationship." The implied contract exception, moreover, is potentially quite valuable in those few jurisdictions like New York that do not recognize the public policy exception to the at-will employment doctrine.⁹¹

Implied Covenant of Good Faith and Fair Dealings Exception

The implied covenant of good faith and fair dealings exception (hereinafter "good faith exception") has been adopted in at least the following eight states: Alabama,⁹² Alaska,⁹³

⁸⁹ *Id.* at 109.

⁹⁰ *Id.* at 109–110.

⁹¹ See *supra* note 25–31. To the same effect as *Weider*, see *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 588 (Del. Ch. 1994) (rules of professional conduct "must be deemed to be an implicit term of every lawyer's contract of ... employment").

⁹² *Hoffman-La Roche Inc., v. Campbell*, 512 So.2d 725, 738 (Ala. 1987) (Alabama recognizes that "every contract does imply an obligation of good faith and fair dealings").

⁹³ *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983) (agreeing with reasoning in other jurisdictions and holding that employment contracts contain an implied covenant of good faith and fair dealings).

Delaware,⁹⁴ Idaho,⁹⁵ Massachusetts,⁹⁶ Nevada,⁹⁷ Utah,⁹⁸ and Wyoming.⁹⁹ The exception is predicated on the existence of an at-will contract between employee and employer.¹⁰⁰ Essentially, courts imply certain contractual protections for the employee that are not expressly contained in the agreement of the parties.¹⁰¹ The exception has been interpreted to mean either that the employer's termination decisions are subject to a "just cause" standard or that an employee termination decision cannot be made in bad faith or motivated by malice.¹⁰² Obviously, a public defender who is fired due to protesting an excessive caseload could argue that his or her termination was a violation of the good faith exception, in addition to claiming violations of the public policy exception and implied contract exceptions, if applicable.¹⁰³

⁹⁴ *Merrill v. Corthall-American, Inc.*, 606 A.2d 96, 102 (Del. 1992) ("every employment contract made under the laws of this State, consonant with general principles of contract law, includes an implied covenant of good faith and fair dealing").

⁹⁵ *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Id. 1989) (agrees with analysis in other jurisdictions and adopts implied in law covenant of good faith and fair dealings in employment contracts).

⁹⁶ *Fortune v. National Cash Register*, 364 N.E.2d 1251 (Mass. 1977) (covenant of good faith and fair dealings that exists in all other contract matters applies to employment contracts).

⁹⁷ *Kmart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (covenant of good faith can apply to employment contracts on some occasions).

⁹⁸ *Berube v. Fashion Centre*, 771 P.2d 1033 (Utah 1989) (recognizes a covenant of good faith and fair dealings that extends to employment contracts).

⁹⁹ *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 220 (Wyo. 1994) ("all employment contracts contain an implied covenant of good faith and fair dealings").

¹⁰⁰ One writer has explained:

[It] rests on the notion that an underlying premise of the at-will employment relationship is the covenant made by both parties that neither will perform any act which might limit the other's ability to reap the benefits of the relationship. A minority of states have adopted this exception, although most courts and commentators have rejected it due to its vagueness.

Nancy Baumgarten, *Sometimes the Road Less Traveled is Less Traveled for a Reason*, 35 GA. L. REV. 1021, 1030 (2001).

¹⁰¹ See Susan Dana, *The Covenant of Good Faith and Fair Dealings: A Concerted Effort to Clarify the Imprecision of its Applicability in Employment Law*, 5 TRANSACTIONS 291, 296 (2004). This is similar to what happens in other areas of contract law in which courts imply certain agreements and protections. It is a basic concept of contract law that most contracts contain an implied covenant of good faith and fair dealings. Thus, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933). See also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealings in its performance and its enforcement"); U.C.C. § 1-304 (1977) ("Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement"); U.C.C. § 1-201(19) (1997) (defines "Good Faith" as "honest in fact and the observance of reasonable commercial standards of fair dealing").

¹⁰² Muhl, *The Employment at-will-Doctrine*, *supra* note 10, at 10.

¹⁰³ For additional information about the good faith exception, see *Cleary v. American Airlines, Inc.*, 111 Cal. App.3d 443 (1980), *overruled by* *Guz v. Bechtel National, Inc.*, 8 P.3d 1089 (Cal. 2000); *Kmart Corp. v. Ponsock*, 732 P.2d 1364 (Nev.) (1987); two of the most frequently cited cases in this area are:

C. Montana Wrongful Discharge from Employment Act

Montana is currently the only state in the country that does not have the at-will doctrine as its default employment rule. In its place, the Montana legislature in 1987 enacted the Montana Wrongful Discharge from Employment Act (MWDEA). Because the MWDEA is the exclusive remedy for wrongful termination claims in Montana, all such claims in the state must comply with the state's statute.¹⁰⁴ In addition, unlike the common law, the statute creates a minimum standard of "good cause" for all employment terminations once an employee's probationary period has been satisfied. The statute also codifies the public policy exception and much of the implied contract exception:

A discharge is wrongful only if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for *good cause* and the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own written policy.¹⁰⁵

By adopting the MWDEA, Montana's legislature did exactly what several courts insist is the function of the legislature, i.e., to determine the exceptions to the at-will employment doctrine.¹⁰⁶ Moreover, rather than leaving the task of defining "public policy" to the courts, the statute spells it out: "Public Policy means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute or administrative rule."¹⁰⁷

Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (at-will employee permitted to sue for breach of contract when she was dismissed after refusing to date foreman) and Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (at-will employment contract includes an implied covenant of good faith and a cause of action exists when employer dismissed employee to avoid paying a bonus).

¹⁰⁴ See MONT. CODE ANN. § 39-2-902 (2009) ("Except as provided in § 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment."). MONT. CODE ANN. § 39-2-912 states that the statute does not apply to discharge of an employee "covered by a written collective bargaining agreement or a written contract of employment for a specific term."

¹⁰⁵ MONT. CODE ANN. § 39-2-904 (2009). "Good cause" and "public policy" are defined in the statute. See MONT. CODE ANN. § 39-2-903 (2009). The MWDEA also provides limits on available remedies in a wrongful discharge matter. An employee is limited to lost wages and fringe benefits for a period not to exceed four (4) years. Punitive damages may only be awarded if allowed by law and "established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee . . ." See MONT. CODE ANN. § 39-2-905 (2007). The constitutionality of the statute was upheld in Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989).

¹⁰⁶ See, e.g., Hartley v. Ocean Reef Club Inc., 476 So.2d 1327 (Fla. Ct. App. 1985) (creation of a public policy exception should be left to the legislature); Eckhardt v. Yerkes Reg'l Primate Ctr., 561 S.E.2d 164 (Ga. Ct. App. 2002) (any public policy exception to the at-will doctrine will be left to the legislative branch to create).

¹⁰⁷ MONT. CODE ANN. § 39-2-903 (2009).

While there do not appear to be any cases decided by Montana courts involving public defenders and the MWDEA, a public defender discharged for challenging an excessive caseload presumably would be able to make a claim under the public policy exception of the Montana statute.¹⁰⁸ The MWDEA provides a remedy when an employee is terminated in “retaliation for the employee’s refusal to violate public policy.” Also, there is at least one court decision in which the state’s rules of professional conduct have been recognized as public policy pronouncements.¹⁰⁹

D. Due Process of Law

In some instances, a public defender terminated for protesting an excessive caseload contrary to an employer’s wishes may have certain procedural rights under the Fourteenth Amendment, which protects against state action that deprives a person of life, liberty, or property without due process of law.¹¹⁰ Of these, only a claim based on a deprivation of property is applicable to a person discharged from public employment. The leading case on property deprivation related to employment in violation of procedural due process is the Supreme Court’s decision in *Cleveland Board of Education v. Loudermill*.¹¹¹

Loudermill was hired by the Cleveland Board of Education as a security guard. On his job application, he denied that he had ever been convicted of a felony. Eleven months later, as part of a routine examination of his employment record, the Board discovered that he had been convicted of grand larceny, and Loudermill was dismissed from employment because of “dishonesty in filling out the employment application.”¹¹² Under the applicable Ohio statute, Loudermill was given no opportunity to respond to this charge of dishonesty or to challenge his dismissal before termination was final.

¹⁰⁸ In 2005, Montana adopted a new statewide system of public defense headed by a public defender commission. See MONT. CODE ANN. §§ 47-1-101–47-1-216; § 2-15-1028 (2009). For a report about Montana’s indigent defense agency, see AMERICAN UNIVERSITY, BJA CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, ASSESSMENT OF THE INITIAL PERIOD OF OPERATIONS OF THE MONTANA STATEWIDE PUBLIC DEFENSE SYSTEM (2009). This report contains numerous recommendations for improvements in the Montana program, including some related to caseloads. Both the American University report and the Montana program’s March 2011 summary of actions taken in response to the report are available at <http://publicdefender.mt.gov/AUeval.asp>.

¹⁰⁹ See Marra, Wenz & Johnson v. Drummond, 2002 WL 732089 (Dist. Mont. April 3, 2002).

¹¹⁰ There are numerous substantive rights protected by the due process clause as well. See, e.g., Rochin v. California, 342 U.S. 165 (1952) (the right to bodily integrity); Griswold v. Connecticut, 381 U.S. 479 (1965) (the right to marital privacy). However, there is not a fundamental right to government employment as a public defender. Accordingly, a public defender’s claim under the Constitution is necessarily limited to a procedural argument under the Fourteenth Amendment.

¹¹¹ 470 U.S. 532 (1985).

¹¹² *Id.* at 535.

Also, pursuant to state law, Loudermill was a “classified civil servant,” who could be terminated only “for cause” and was entitled to an administrative review if discharged.¹¹³ Loudermill filed an appeal with the Cleveland Civil Service Commission and argued that he answered the employment application honestly because he believed, mistakenly, that his larceny conviction was a misdemeanor offense rather than a felony.¹¹⁴ The full Cleveland Civil Service Commission heard oral arguments in the case and upheld his dismissal.

Instead of appealing the Civil Service Commission’s finding, Loudermill filed a complaint in federal court, alleging that the Ohio statutory scheme was unconstitutional because it deprived employees of the opportunity to respond to charges *prior* to an order of dismissal, thereby depriving persons of property without due process of law.

In resolving Loudermill’s appeal, the Supreme Court reasoned that “his federal constitutional claim depends on ... [his] having had a property right in continued employment.”¹¹⁵ Further, as the Court explained, Loudermill most certainly did, because Ohio law created such an interest. Respondents were “classified civil service employees,” ... entitled to retain their positions “during good behavior and efficient service,” who could not be dismissed “except ... for ... misfeasance, malfeasance, or nonfeasance in office.”¹¹⁶

In light of Loudermill’s protected property interest in continued public employment, the Court addressed the process due before deprivation of that interest was constitutionally permissible. Its answer was straightforward: the employee must be given advance notice of the reason for termination and an opportunity to be heard before the termination takes effect:

An essential principle of due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case.”¹¹⁷

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 538.

¹¹⁶ *Id.* at 538–539. The Court’s conclusion respecting property rights in employment was based on its earlier decision in *Board of Regents v. Roth*, 408 U.S. 564, 577–578 (1972). There, a professor was employed on contract through June 30, 1969. He “surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.”

¹¹⁷ *Id.* at 542.

the avoidance of administrative burdens, and the risk of an erroneous termination.¹¹⁸

The foregoing considerations indicate that the pretermination “hearing,” though necessary, need not be elaborate.¹¹⁹

The Court further explained that the employee must be furnished “the opportunity to present reasons, either in person or in writing, why proposed action should not be taken.”¹²⁰ And, in addition, the employee must be notified orally or in writing “of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.”¹²¹

E. Summing Up: Due Process, Excessive Caseloads, and Exceptions to Employment At-Will

So what does due process of law mean for public defenders who conclude that they have excessive caseloads, decide to file motions to withdraw, and are fired when they do so? The first question to consider is whether the public defender has a protected property interest in continued employment. In the *Loudermill* decision discussed in the preceding section, the employee had such an interest under Ohio law because of civil service protection and thus could be terminated only for just cause. If a public defender is an employee at-will,¹²² the right to notice and hearing under *Loudermill* is not apt to apply.¹²³ However, one of the exceptions to the employment at-will doctrine likely will be available if dismissal is based on a public defender’s challenge to a genuinely excessive caseload.

¹¹⁸ *Id.* at 542–543.

¹¹⁹ *Id.* at 545.

¹²⁰ *Id.* at 546.

¹²¹ *Id.* See also *Otero v. Bridgeport Housing Authority*, 297 F.3d 142, 152 (2d Cir. 2002) (“Mere notice of the charge ... is not an explanation of the evidence and does not necessarily suffice to provide due process.”).

¹²² As noted at the beginning of this chapter, if an employee does not have a fixed term of employment, has not signed a contract for employment that sets forth criteria and circumstances related to termination, and is not covered either by a union collective bargaining agreement or civil service rules, the relationship is most likely employment at-will. Accordingly, it will be subject to termination at the will of either party unless an exception to the employment at-will doctrine is applicable. See also *supra* note 2 and accompanying text.

¹²³ See, e.g., *Jungels v. Pierce*, 638 F. Supp. 317 (N.D. Ill. 1986): “Generally when an employee can be discharged only ‘for cause,’ he has a protected property interest in his job On the other hand, ‘at will’ employment does not create a protected property interest The employer’s own rules and/or mutually explicit understandings may also support a protected property interest.” *Id.* at 319–320. See also *Board of Regents v. Roth*, 408 U.S. 593 (1972) and *Perry v. Sinderman*, 408 U.S. 593 (1972).

On the other hand, if the public defender has, as *Loudermill* did, a property interest in continued “public employment,” dismissal cannot occur (1) absent compliance with the procedural due process protections set forth in the *Loudermill* decision and (2) unless good cause is present to justify the termination decision. Thus, the defender must be afforded the opportunity to present reasons why termination should not occur and to learn of the “evidence” that would justify his or her termination. Further, as explained in *Loudermill*, the employee must be able “to present his side of the story” before a final decision on termination is made.

Conceivably, if a “*Loudermill* hearing” were provided, as required, management of the public defense program might well decide to reconsider its decision due to concern about whether they could prevail on the merits. “Good cause” for termination is not likely to be found unless management can successfully argue, in accordance with rules of professional conduct, that they have made a reasonable judgment about the size of the public defender’s caseload and that termination is warranted because the defender is seeking to lighten his caseload without justification.¹²⁴ While such a scenario is certainly possible, given the prevalence of excessive caseloads in so many public defense programs throughout the country the reality is likely to be quite different.

¹²⁴ See *supra* notes 18–20 and accompanying text, Chapter 2, in which there is a discussion of ABA Model Rules R 5.2 (b). Essentially, the rule provides that the decision of the supervisor is controlling if it is a “reasonable resolution” of an issue of professional responsibility.

CHAPTER 6

Determining Costs and Staffing Needs

Chapter 2 discussed standards related to indigent defense representation and caseloads. Standards, as well as ethics opinions, recognize that whether or not a lawyer's workload is excessive requires an individualized determination. Obviously, not all felonies and misdemeanors require the same amount of a lawyer's time. The time demands of a lawyer's workload are influenced by a wide variety of factors, including the complexity of the cases, available support services, the experience and ability of the lawyer, non-case-related duties, and a myriad of other factors. However, governments responsible for the funding of representation need to be able to predict the future expenses and staffing needs of defense programs. And the programs need a way to explain to their funding sources (with a reasonable degree of certainty) the financial support they require to provide representation consistent with professional conduct rules and the Sixth Amendment. To respond to these goals, a number of jurisdictions have arranged for "weighted caseload studies" to be conducted. This chapter explains the methodology of such studies and discusses their validity. It also suggests alternative approaches for determining appropriate caseload levels and in justifying the number of staff needed to provide competent and effective defense services.

A. Weighted Caseload Studies

Overview

Historically, the vast majority of weighted caseload studies of indigent defense programs were conducted by The Spangenberg Group, which for a brief period beginning in 2009 became The Spangenberg Project [hereinafter "Spangenberg"] at George Mason University. However, the project ended in 2010 and no longer exists.¹ The only other organization that has conducted weighted caseload studies of indigent defense programs is the National Center for State Courts [hereinafter "NCSC"], which has done three of them.² All of the NCSC's studies have dealt with statewide public

¹ Several of the weighted caseload studies conducted by Spangenberg Group are listed in *Justice Denied*, *supra* note 2, Chapter 1, at 67 n. 106. After release of this report, the Spangenberg Project at George Mason University completed two additional weighted caseload studies. One of these concerned Las Vegas and Reno, Nevada. See THE SPANGENBERG PROJECT AND THE CENTER FOR JUSTICE LAW, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, ASSESSMENT OF THE WASHOE AND CLARK COUNTY, NEVADA PUBLIC DEFENDER OFFICES (2009). The other study pertained to King County, Washington. See *infra* note 45.

² A study of the public defender office in Lancaster County, Nebraska, conducted by a University of Nebraska professor, is discussed at *infra* note 31 and notes 56–69 and accompanying text.

defense agencies—the Maryland Office of the Public Defender,³ the New Mexico Public Defender Department,⁴ and the Virginia Indigent Defense Commission.⁵

The goal of a weighted caseload study is to determine the amount of time, on average, that defense lawyers need to provide effective and competent representation to their clients. When a study is undertaken, researchers initially determine the number of work hours per year that defense lawyers have available (e.g., 1800 hours). In addition, the amount of time defense lawyers spend on their different kinds of cases is collected and converted into “case weights.” Case weights represent the average amount of time lawyers devote to handling particular kinds of cases, such as murders, nonviolent felonies, and misdemeanors. Through this process, the cases of the defense program are “weighted.”

To illustrate, if lawyers, on average, devote 20 hours to disposing of Class 2 felony cases and have available, on average, 1800 work hours per year, then lawyers, on average, who handle only Class 2 felonies should be able to handle 90 such cases per year ($90 \text{ cases} \times 20 \text{ hours} = 1800 \text{ hours}$). If the defense program anticipates that, during the following year, it will be appointed to represent 540 Class 2 felony cases, it will know that the time of six lawyers will be required ($540 \div 90 = 6$).

But because weighted caseload studies are rarely, if ever, conducted of defense programs in which the lawyers have sufficient time to spend on their cases or have

³ See NATIONAL CENTER FOR STATE COURTS, MARYLAND WORKLOAD AND STAFF ASSESSMENT SURVEY (2005) [hereinafter NCSC Maryland], *available at* http://www.ncsconline.org/WC/Publications/Res_WorkLd_MDAtty&StaffWkLdAsos5Pub.pdf.

⁴ See NATIONAL CENTER FOR STATE COURTS, A WORKLOAD ASSESSMENT STUDY FOR THE NEW MEXICO TRIAL COURT JUDICIARY, NEW MEXICO DISTRICT ATTORNEYS' OFFICES AND NEW MEXICO PUBLIC DEFENDER DEPARTMENT (2007) [hereinafter NCSC NEW MEXICO], *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1084>. As the name of the study indicates, in addition to the state's public defender program, the study also covered the workloads of the state's judges and prosecutors. Most workload assessments concerning prosecution and staff needs have been conducted by the American Prosecutors Research Institute (APRI), which is a part of the National District Attorneys Association:

APRI's Office of Research and Evaluation has conducted more than 75 workload assessments nationally and internationally, ranging from assessments of a single office to statewide assessments and a national effort to determine if caseload standards were feasible. Examples of previous clients include the states of Alabama, Delaware, Georgia, Massachusetts, New Mexico, Rhode Island, and Tennessee; the Ministry of the Attorney General in British Columbia, Canada; and numerous counties in the United States including King County, Washington; Pima County, Arizona; Lincoln County, Nebraska; Lane County, Oregon; Jackson County, Oregon; York, Pennsylvania; and Stanislaus County, California.

Website of the National District Attorneys Association, *available at* http://www.ndaa.org/apri/programs/caseload_workload/index.html.

⁵ See NATIONAL CENTER FOR STATE COURTS, VIRGINIA INDIGENT DEFENSE COMMISSION ATTORNEY AND SUPPORT STAFF WORKLOAD ASSESSMENT (2010), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=189>.

adequate support staff, a “qualitative adjustment” to the number of hours that different kinds of cases require will almost always be necessary. If, for example, the adjustment determines that Class 2 felonies should actually require 30 hours of a lawyer’s time, on average, the projected staffing need of the defense program changes. Instead of requiring the services of six defense lawyers, the program will know that it will require three additional lawyers ($540 \div 60 = 9$), because a single lawyer, on average, will only be able to handle 60 Class 2 felonies per year ($60 \text{ cases} \times 30 = 1800$).

Methodology of Weighted Caseload Studies

This section discusses the methodology of weighted caseload studies, initially using for illustrative purposes the NCSC’s study of New Mexico. Afterwards, the methodology that Spangenberg used is discussed to compare the approaches of the two organizations.⁶

National Center for State Courts

The New Mexico Public Defender Department is a statewide defender program, which during 2006–2007 employed 169 attorneys and also contracted with more than 100 private lawyers to provide defense services.⁷ During the first stage of the study, the NCSC established “work study groups” consisting of public defender lawyers, staff, and private contract lawyers to oversee “the development of ... workload assessment methodology, ... to ... determine the relevant workload factors and tasks associated with effective representation in each kind of case, and appraise the results of each phase of the study.”⁸ These groups also reviewed and finalized all project results.⁹

NCSC staff next determined the number of days per year that lawyers had available to devote to their cases: “Working closely with the work study groups, we deducted time for weekends, holidays, personal days, vacation/sick leave, and continuing legal education training. After deducting these constants from 365 days it was determined that ... *attorneys ... have an average of 233 days available each year to perform case-related activities.*”¹⁰ They further determined that, during each day, the attorneys, on average, had available 6.25 hours per day to spend working on their cases.¹¹ Ultimately, these

⁶ Weighted caseload studies normally include an assessment of whether both the number of lawyers *and staff* are sufficient, and the same methodology is used in making both estimates. This chapter discusses such studies only in connection with determining whether or not the number of available lawyers is sufficient.

⁷ NCSC NEW MEXICO, *supra* note 4, at 72.

⁸ *Id.* at 73

⁹ *Id.*

¹⁰ *Id.* at 75.

¹¹ The estimate was based on a nine-hour work day, with one hour for lunch. From the remaining 8

calculations yielded 87,375 minutes per year, on average, for each attorney to work on his or her cases (233 days × 6.25 hours per day × 60 minutes per hour = 87,375 minutes).¹²

In cooperation with the work study groups, the NCSC staff decided to collect the amounts of time devoted to eleven different types of cases.¹³ Data were collected through a Web-based program that asked the state's public defender lawyers to "report the time they spend on various activities throughout the day, including both case-related and non-case related activities."¹⁴ More than 95% of the state's public defenders participated over a six-week period. Before the data collection began, NCSC staff held training sessions with persons responsible for explaining to lawyers "how to properly track and record time during the data collection period."¹⁵ These sessions were videotaped and distributed to district public defender offices throughout the state and to contract attorneys, who also were invited to record the time they spent on contract cases. Based on the widespread participation in the time study, which included time spent on all of the case types handled by the defense program, the NCSC concluded there was "a valid and reliable snapshot from which to develop case weights."¹⁶

The report describes the methodology used to develop preliminary case weights for the eleven different kinds of case types identified by the work study groups. These were calculated by totaling "all time recorded for each case type and dividing by the number of open cases for each case type in FY 2005."¹⁷ The report illustrates this calculation, as follows:

For example, during the time study ... attorneys in district offices reported a total of 3,371,430 weighted minutes of case-related time devoted to non-violent felony cases. Dividing the time by the number of FY 2005 open¹⁸ non-violent felony cases ... yields a preliminary case weight of 410

hours, the researchers deducted 1.75 hours devoted to non-case-related activities, yielding 6.25 hours available for work on cases. *Id.* at 77.

¹² *Id.* The report expresses the available time for work on cases in terms of minutes, not hours. The number of available minutes—87,375—constitutes 1456.25 hours (87,375 minutes ÷ 60 minutes).

¹³ The cases were Murder, Violent Felony, Non-Violent Felony, DWI, Misdemeanor, Juvenile, Probation Violations, Drug Court, Competency/Mental Health, Extradition, and Metro/Magistrate Appeals. *Id.* at 74.

¹⁴ *Id.* at 78.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 79.

¹⁸ The word "open," as used in this sentence, is not defined in the report. It apparently refers to the number of nonviolent felony cases "opened" during the fiscal year. The NCSC report concerning the Maryland public defender program explained:

We calculated the initial case weights by summing all time recorded for each case type, and then dividing by the number of cases *opened* for each case type in FY 2003. This result gave

minutes. This indicates that on average, ... attorneys are currently spending almost 7 hours on each non-violent felony case from the time the case is opened to the time it is disposed. It is important to emphasize that the preliminary weights represent current practice and the amount of time attorneys ... are spending on the handling of cases. The preliminary weights do not capture the time that may be necessary for attorneys and staff to perform essential tasks and functions effectively—the time they *should* be spending. The process of moving from “what is” to “what ought to be” is documented below”¹⁹

In addition, the data make it possible to determine the maximum number of cases an attorney can represent over the course of a year if the attorney handles only one type of case. This can be done by dividing the number of minutes that an attorney has available to work on case-related activities (87,375 minutes) by the number of minutes spent on average on each of the eleven case types. For example, the time study revealed that lawyers spent on average 295 minutes on juvenile cases, which “results in a caseload of 296 juvenile cases per attorney”²⁰ (87,375 minutes ÷ 295 minutes per juvenile case = 296.18). Similar calculations can be made for the other ten categories of cases that were part of the time study, and these results can be compared with other caseload standards to the extent that the same categories were used in the other caseload standards. For instance, lawyers spent, on average, 167 minutes on misdemeanor cases; this figure yields an annual caseload per lawyer of 523 misdemeanors per annum compared to the maximum 400 misdemeanor cases endorsed by the National Advisory Commission on Criminal Justice Standards and Goals²¹ and other groups.²²

The final stage of the study involved a “quality adjustment process,” which consisted of two parts.²³ First, in an effort to identify barriers to the provision of quality legal representation, a Web-based “sufficiency of time survey” was sent to all public defenders. The survey, completed by 88% of the lawyers, “collected information across six functional areas (e.g., pre-trial activities and preparation, client contact, legal research) covering 51 key tasks fundamental to protecting the constitutional rights of the accused.”²⁴ For each of the separate areas listed in the survey, the lawyers were asked to indicate whether they had sufficient time to perform the activity. For example, on

us the average amount of time, attorneys and staff, currently spend handling each particular type of case.

NCSC MARYLAND, *supra* note 3, at 21 (emphasis added).

¹⁹ NCSC NEW MEXICO, *supra* note 4, at 79.

²⁰ *Id.* at 80.

²¹ See *supra* note 91, Chapter 2, and accompanying text.

²² See, e.g., *supra* note 105, Chapter 2, and accompanying text.

²³ NCSC NEW MEXICO, *supra* note 4, at 83.

²⁴ *Id.* at 83–84.

the issue of pretrial release, defenders were asked whether they had adequate time to prepare for bond or detention hearings and provided the following range of options: “Almost Never, Seldom, Occasionally, Frequently, Almost Always.”²⁵

After all data were gathered and available for review, “seasoned experts from representative ... [public defender] offices across the state were convened ... to consider the results from the time study,”²⁶ as well as the various areas of concern identified by the “time sufficiency study.” The experts also were invited to draw upon their personal experiences. For the different categories of cases included in the study, “[t]he attorney focus groups reviewed 90 distinct events [related to attorney performance] where adjustments were possible Of these 90 decision points, quality adjustments were made to 21 events.”²⁷ The report illustrates this with the following example:

[D]uring the time study attorneys reported that they spend on average 303 minutes on every DWI case. Of this, 187 minutes is spent on pre-trial/preparation. Based on discussions with the attorney focus groups, it was determined that additional pre-trial/preparation time is needed: for brainstorming and discussing DWI cases with colleagues, for conducting investigations and discovery, to visit crime scenes, and to review tapes and interviews. As figure 3.11 shows, the 187 minutes was increased to 225 minutes.²⁸

In each instance in which a quality adjustment was made to a preliminary case weight, “each focus group was asked to provide a rationale and justify any increase in attorney ... time.”²⁹ Upon completion of this step, the quality adjustments recommended by the focus groups were referred to the work study groups for their review and final approval of “quality adjusted workload standards.” These standards represent the number of minutes required to handle the eleven different kinds of cases that comprised the study. Adjustments in the number of minutes required for quality representation was increased for eight of the cases and slightly reduced for three.³⁰ These adjustments in the number of required minutes demonstrated that the number of lawyers in the New Mexico public defender program was not sufficient and that staff size should be increased by 40.7 FTE attorneys statewide, i.e., from 169 attorneys to 209 attorneys.³¹

²⁵ *Id.* at 84.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 85.

²⁹ *Id.* at 86.

³⁰ *Id.*

³¹ *Id.* at 88. By using a methodology similar to that of the National Center for State Courts, Professor Elizabeth Neeley of the University of Nebraska Public Policy Center conducted a workload assessment of the Lancaster County, Nebraska, public defender office. However, because the defender program has had its lawyers record their time over a period of many years, she was able to use the time

In determining quality adjustments, the NCSC used a Delphi method, although its report does not discuss this particular methodology: “The Delphi method is based on a structured process for collecting and distilling knowledge from a group of experts by means of a series of questionnaires interspersed with controlled opinion feedback. Delphi is used to support judgmental or heuristic decision-making, or, more colloquially, creative or informed decision-making.”³² The technique is recommended when a problem does not lend itself to precise measurement and can benefit from collective judgments.³³ This would seem to be precisely the situation when a defense program seeks to determine how much additional time, on average, its lawyers need to spend on a whole range of activities involving different kinds of cases.

The Spangenberg Group

The Spangenberg Group used methodology similar to that of the NCSC in conducting its numerous weighted caseload studies. Both organizations relied upon time studies and have recognized that the reasons for “quality adjustments” need to be documented. But there are several differences in the approach that Spangenberg formerly used and the one that the NCSC uses now.

records maintained by the office and thus avoid having to administer a time study for purposes of her study. Professor Neeley’s methodology included a “time sufficiency survey” based on the instrument developed by the National Center for State Courts. The appendix to her report includes the survey form that was used. See ELIZABETH NEELEY, LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT (2008) [hereinafter NEELEY, LANCASTER COUNTY], *available at* <http://ppc.nebraska.edu/userfiles/file/Documents/projects/Public%20Defender/Public%20Defender%20Workload%20Assessment.pdf>. The Lancaster County Public Defender is discussed further at *infra* notes 53–69 and accompanying text.

³² MICHAEL ADLER AND ERIO ZIGLIO, *GAZING INTO THE ORACLE: THE DELPHI METHOD AND ITS APPLICATION TO SOCIAL POLICY AND PUBLIC HEALTH* 3 (2002). An online business dictionary offers this definition of the Delphi method:

Collaborative estimating or forecasting technique that combines independent analysis with maximum use of feedback, for building consensus among experts who interact anonymously. The topic under discussion is circulated (in a series of rounds) among participating experts who comment on it and modify the opinion(s) reached up to that point ... and so on until some degree of mutual agreement is reached. Also called Delphi forecasting.

BusinessDictionary.com, *available at* <http://www.businessdictionary.com/definition/delphi-method.html>. An additional definition is contained in another online website:

A group communication structure used to facilitate communication on a specific task. The method usually involves anonymity of responses, feedback to the group as a whole of individual and/or collective views and the opportunity for any respondent to modify an earlier judgment. The method is usually conducted asynchronously via paper and mail but can be executed within a computerized conferencing environment. At the essence of the method is the question of how best to tailor the communication process to suit the situation. The Delphi method was originally developed at the RAND Corporation

PRINCIPIA CYBERNETICA WEB, *available at* http://pespmc1.vub.ac.be/ASC/Delphi_metho.html.

³³ ADLER AND ZIGLIO, *supra* note 32, at 3.

In a memorandum on “Case Weighting Methodology,” Spangenberg emphasized the importance of an “Initial Assessment” of the defense program, in which “current public defender caseloads [are assessed], as well as the policies and practices to see if attorneys are providing adequate representation.”³⁴ Among other things, according to Spangenberg, researchers needed to know whether attorneys met with their clients as necessary and adequately explained to defendants the collateral consequences of pleading guilty before a guilty plea was recommended.³⁵ As explained in the memorandum, if “adequate representation is not being provided, there is a risk that caseload standards based on a case weighting study may institutionalize substandard performance.”³⁶

Spangenberg’s emphasis on ascertaining “current caseloads,” as well as an initial assessment to determine the quality of representation, makes sense.³⁷ Determining whether or not caseloads are excessive is necessarily a matter of judgment, as is recognized in both the ABA’s ethics opinion on caseloads³⁸ and the ABA’s Eight Guidelines.³⁹ The judgment is informed by learning what defense lawyers are *not* doing on behalf of their clients and also by knowing the number of *current* cases for which a lawyer is responsible. If, for example, researchers learn during interviews or from computerized reports that lawyers routinely simultaneously represent 100 defendants in felony cases, they will know immediately that the caseloads are unreasonably high and that delivering competent and effective representation to all clients is almost certainly impossible.⁴⁰

³⁴ The Spangenberg Group, Case Weighting Methodology 1 (undated memorandum) (on file with author) [hereinafter “Spangenberg Methodology”].

³⁵ *Id.*

³⁶ *Id.*

³⁷ The weighted caseload studies conducted by the NCSC have not included initial assessments of the kind proposed by Spangenberg. For the NCSC studies, *see supra* notes 2–5.

³⁸ *See supra* notes 49–50, Chapter 2, and accompanying text.

³⁹ *See* ABA EIGHT GUIDELINES, *supra* note 76, Chapter 2, Commentary to Guideline 4.

⁴⁰ *See infra* Chapter 8, text accompanying notes 37–38 and 89–99, in which felony caseloads of defense programs that control their caseloads are discussed. The current or pending felony caseloads of the lawyers in these programs are typically in the range of thirty to thirty-five cases. Sometimes lawyers do not really know how many cases they have. This can occur in systems of horizontal representation of defendants. Several years ago, I served as an expert witness in a case and in advance of testifying asked an assistant public defender who was handling misdemeanor cases about the size of his current caseload. He replied that he really did not know. He knew the upcoming dates on which he was scheduled to go to court, and he knew that he was responsible for all of the clients scheduled to return to court on those upcoming dates. But the files for the cases were kept elsewhere in the office, and he had never counted them. Further, he explained that he would not see the files or be aware of how many there were until a few days before he had to go to court to appear on behalf of his clients. In advance of going to court, however, he planned to look at the files of the cases and interview as many of the clients as possible. On another occasion, while conducting an interview in the office of a contract lawyer who was handling misdemeanor cases, I asked about the size of the lawyer’s current caseload. He replied, “I have no idea.” He then opened several drawers of a filing cabinet and invited me to count the number of his thin manila folders, each of which represented a single case. While I declined his invitation to do so, clearly the size of the lawyer’s pending caseload was well over 100

The initial assessment is also relevant in justifying additional amounts of time that lawyers later claim are needed to represent clients adequately in a “time sufficiency study.” In the unlikely event that lawyers report that they do not need additional time to represent their clients adequately, whereas the researchers conclude that defense representation is deficient, additional study will be necessary to determine reasons for the discrepancy.

Spangenberg also used a different method to determine case weights for different kinds of cases. As noted earlier, the NCSC determines during a six-week period the total of number of case-related minutes spent on each of the kinds of cases for which data is collected and divides those minutes into the number of those kinds of cases opened during the fiscal year.⁴¹ In contrast, Spangenberg focused on “attorney-time-per-disposition,”⁴² during which “attorneys keep track of their time for a period of 10 or more weeks [T]he attorneys not only record the number of hours they spend on a particular Case Type, but also record each case disposition and disposition type (e.g., withdrawal, dismissal, plea, trial, etc.) These dispositions are compared to an independent source of disposition data, such as the office’s or court’s case electronic management systems.”⁴³

Summing Up Weighted Caseload Studies

In a proposal to conduct weighted caseload studies in Nevada’s two largest counties, Spangenberg explained the rationale for their use:

Based upon more than two decades of work in the field of public defender caseload/workload measures, Mr. Spangenberg and The Spangenberg Group feel that any reliable caseload study must be empirically-based in order to assure reliability both for public defender management and the funding source. There are two acceptable methods to achieve these results: the Delphi Method, which is not empirical, and the Time Record-Based Case-Weighting Method. The most reliable method, the one that TSG has used exclusively in the last few years when conducting case-weighting studies, is the case-weighting method using contemporaneous time records, which is the one chosen for the proposed . . . study.⁴⁴

cases, a proposition that the lawyer readily confirmed.

⁴¹ See *supra* notes 19–22 and accompanying text.

⁴² THE SPANGENBERG GROUP, PROPOSAL TO CONDUCT A WEIGHTED CASELOAD STUDY OF THE WASHOE AND CLARK COUNTY PUBLIC DEFENDER OFFICES 13 (2008) (on file with author) [hereinafter “SPANGENBERG NEVADA PROPOSAL”].

⁴³ See Spangenberg Methodology, *supra* note 34, at 2.

⁴⁴ SPANGENBERG NEVADA PROPOSAL, *supra* note 42, at 12.

In determining average caseloads per lawyer of various kinds of cases, an empirical time-based study is clearly preferable to the sole use of a Delphi method.⁴⁵ However, in making quality adjustments to preliminary case weights derived from the time-based study, some type of a Delphi method is essential to assess individual lawyer guesses about amounts of additional time needed to perform various tasks, such as preparing for pretrial release hearings, trials, sentencing, etc. Through analysis and discussion, the most experienced lawyers in the defense program along with senior management should be able to assess the estimates of individual lawyers respecting additional amounts of time that are needed.⁴⁶

⁴⁵ Occasionally a pure Delphi method of some sort has been used to establish caseload standards. For example, Montana established the Office of the State Public Defender, effective July 1, 2006. *See* MONT. CODE ANN. §§ 47-1-101–47-1-216 (2009). In an effort to avoid excessive caseloads for its staff, the new program adopted caseload standards. However, the standards were not the product of a time survey. A report of the Montana program is critical of the way in which the public defender proceeded:

In order to fairly distribute the cases accepted, Agency staff developed a ... system of case units assigned to each case according to case types which was designed to reflect the relative work entailed in handling the particular type of case While this attempt to weight cases in terms of the level of effort required for representation is admirable, the approach used has numerous deficiencies What is the foundation for determining the weights? Most case weighting systems have been developed in other jurisdictions have been designed based on an analysis of the actual time entailed in handling different types of cases. Not only was this analysis not conducted in Montana but the information that would be helpful in validating the case weights developed is not maintained. What is the basis for determining that a dependent or neglect case takes 1.5 times the effort of a felony case? Or that two misdemeanor cases equal a felony case in terms of time and effort? ... Why was only a general “felony” category used when all other categories are relatively discrete and narrowly contained

The present caseload standards therefore do not appear to have any support or foundation.

BJA Criminal Courts Technical Assistance Project: TA Report No. 4-072, Assessment of the Initial Period of Operations of the Montana Statewide Public Defender System 40–42 (October 2009).

There also other jurisdictions that have “weighted” or “credited” some cases as requiring more time than others. To illustrate, in Seattle, which relies substantially on four different indigent defense agencies to provide legal services pursuant to contracts with King County, Washington, a modified felony case-weighting system has been used. Lawyers handling felonies are responsible for 150 felony credits-per-attorney, but some felonies are counted more or less than others; for instance, non-capital homicides count for two credits, sex offense cases count for five, whereas probation review hearings count as a one-third credit. *See* THE SPANGENBERG PROJECT AT GEORGE MASON UNIVERSITY, KING COUNTY CASE-WEIGHTING STUDY, FINAL REPORT, 19–20 April 30, 2010 (on file with author). Although the Seattle system, like Montana’s, was not developed pursuant to a case-weighting study, it does have the salutary effect of ameliorating the harshness of requiring 150 felonies per year per lawyer regardless of the kind of felony involved. An analogous system is used in Massachusetts in determining the maximum annual number of cases to which private lawyers can be appointed. However, like the systems in Montana and Seattle, the Massachusetts method of weighting cases was not derived from a case-weighting study. *See infra* note 48 and accompanying text, Chapter 8.

⁴⁶ *See supra* note 32 and accompanying text, which contains definitions of the Delphi method and suggests ways that its use can be structured. Time studies, together with adjustments, can also be used to determine the appropriate caseloads for defense lawyers who do only appellate work. The State Appellate Defender Office of Michigan (SADO) has used a case-weighting system derived from a

The only apparent alternative to using a Delphi method that includes the judgments of the senior leadership of defense programs would be to make quality adjustments based solely on the estimates of the individual lawyers who handle the cases about amounts of additional time believed to be necessary. However, such an approach would discount completely any value to be derived from the judgments of senior management and leaders of the program, and it would place total reliance on the guesswork of individual lawyers about amounts of additional time deemed necessary to provide adequate representation. Moreover, individual lawyers might be reluctant to admit that they should have spent more time on their cases, regardless of whether their data is submitted anonymously. There is also some risk that defenders might not appreciate that they *should* have spent more time on their cases, simply because they have not done so in the past and believe that what they have been doing is perfectly fine.

In addition, if defenders claimed they needed additional time for various activities, researchers would have to depend on the defenders to accurately estimate the amounts of additional time required for various client-related tasks. But such estimates are not easy. To illustrate, suppose that a defender realizes that additional time should have been devoted to investigating a number of his or her cases. The defender would then have to guess as to how much of his or her additional time the investigations (either conducted by the defender personally or by an investigator) would have required. If an investigator were used, the defender necessarily would have met with the investigator or compiled instructions as to what needed to be done, reviewed the investigator's report, decided whether additional investigation was necessary, etc. To further illustrate, suppose that an investigation uncovered witnesses the defender was not aware of and that those witnesses in turn led to other information or defense theories of the case that required more of the lawyer's time. Because of the complexity in estimating

time study as the basis for accepting and assigning appellate cases to its staff and managing workload:

To create a case-weighting system, SADO first determined through extensive time studies and years of adjustments that an attorney could reasonably be expected to handle 26.4 trial appeals per year, as long as those trials had a record length between 151–800 pages. This was a case unit “1” in raw number of appeals and a weighted case of ‘1’ for weighted workload numbers. SADO considers this type of case as a “standard work unit” and all other cases are weighted in comparison to this standard unit. As SADO receives appointments, the cases are entered into a database which records the type of cases received along with the record length and all other pertinent information All attorneys are expected to handle 26.4 standard units per year, but because some cases are weighted more or less than others, the raw number of cases handled will vary Workload capacity for the office is determined by multiplying the number of attorneys in rotation for each month by the standard workload production level per attorney each month by 12 months for the entire year. It is not as simple as just multiplying the number of attorneys on staff by the standard workload level of 26.4 because some attorneys may be out of rotation for a period of time due to medical leaves, training, etc.

Michigan Appellate Defender Office, Workload / Caseload Controls and Weighted Case Assignment System 3 (undated memorandum) (on file with author).

additional amounts of time, both the defenders providing the direct representation and the most experienced senior persons in the defense program should participate in formulating quality adjustment recommendations.

This discussion is not meant as an argument against conducting weighted caseload studies. It is, however, intended to suggest that quality adjustments to case weights derived from a time study are inherently difficult to make. Consequently, the method by which quality adjustments are made needs to be carefully considered in advance. Finally, it would be helpful to know upfront whether the defense program's funding authority is prepared to take seriously the recommendations of a weighted caseload study. If there is a willingness to heed the study's recommendations, the effort should be well worth the time and expenses invested.

B. Alternative Proposal: Experimental Design

Although the foregoing discussion suggests considerable merit to weighted caseload studies, the accuracy of estimates about the number of necessary staff can be questioned based upon quality adjustments derived from the Delphi method. This section suggests another way to project future staffing needs of public defense programs while also assessing the impact of the defense representation provided. To the best of my knowledge, the proposed alternative is one that has never before been implemented, namely, the establishment of an "experimental" program involving the caseloads of a small group of defense lawyers.

The experiment would have the following characteristics:

- A small group of lawyers—the "experimental group"—would be part of a larger public defense program.
- The caseloads of the experimental group would be carefully controlled, and all necessary steps would be taken to ensure that the lawyers were able to provide high quality defense services.
- Accordingly, the lawyers would be well trained, thoroughly supervised, and all necessary support services would be made available.
- The defense lawyers in the rest of the defense program would continue to provide representation as they always had, and they would constitute the "control group" for purposes of the experiment.
- To ensure that the cases assigned to the two groups of lawyers were equivalent to one another, the experimental and control groups of lawyers would each receive their cases through a process of random assignment.

Why consider an experiment of the kind proposed? The answer is bound up in the reliability of the data likely to be generated.⁴⁷ If during the experiment, a time study is administered to the lawyers in both the experimental and control groups, and if lawyers in the experimental group are devoting considerably more time to a wide variety of defense tasks than are lawyers in the control group, it is reasonable to rely upon the differences in the amounts of time reported. To illustrate, assume that lawyers in the control group are devoting, on average, only 30 minutes to preparing for pretrial release hearings but that lawyers in the experimental group are spending, on average, 120 minutes getting ready for such proceedings. The ninety-minute time difference is not simply an *estimate* of the amount of time required to provide competent, quality defense services, it is the *actual* amount of time that is necessary for that particular defense activity. Comparing the differences in time spent on types of cases by lawyers in the experimental and control groups should result in reliable projections of additional staffing needs of the defense program.

Moreover, an experiment of the kind suggested has another potential advantage—the opportunity not only to compare differences in the amounts of time spent on different kinds of cases and defense activities among experimental and control group lawyers but also to compare outcomes. Suppose, for example, that the lawyers in the experimental group achieve a much higher rate of pretrial release for their clients than do the lawyers in the control group. Or suppose that data related to dispositions indicates that defendants in the experimental group receive shorter sentences. Conceivably, the cost savings involved in such findings might actually be more than the cost of enlarging the size of the defense program. It should also be possible, for example, to measure satisfaction between clients represented by experimental and control group lawyers and to determine whether more motions are filed by lawyers in the experimental group vis-à-vis the control group. In contrast, outcome comparisons are not possible with weighted

⁴⁷ RESEARCH METHODS KNOWLEDGE BASE (2006) is “a comprehensive web-based textbook that addresses all of the topics in a typical introductory undergraduate or graduate course in social science research methods.” Its author is Professor William M.K. Trochin of the Cornell University Department of Policy Analysis and Management, *available at* <http://www.socialresearchmethods.net/kb/>.

Experimental designs are often touted as the most “rigorous” of research designs or, as the “gold standard” against which all other designs are judged. In one sense, they probably are. If you can implement an experimental design well (and that is a big “if” indeed), then the experiment is probably the strongest design with respect to internal validity.

Id., *available at* <http://www.socialresearchmethods.net/kb/desexper.php>.

Internal validity is the approximate truth about inferences regarding cause-effect or causal relationships. Thus, internal validity is only relevant in studies that try to establish a causal relationship. It's not relevant in most observational or descriptive studies The key question in internal validity is whether observed changes can be attributed to your program or intervention (i.e., the cause) and **not** to other possible causes (sometimes described as “alternative explanations” for the outcome).

Id., *available at* <http://www.socialresearchmethods.net/kb/intval.php>.

caseload studies of the kinds discussed earlier, because all of the defense lawyers are laboring under the same or similar caseloads.

Admittedly, implementing an experiment of the type proposed, whatever its advantages, would not be easy. It is likely feasible only in a relatively large defense program, which can afford to free up the requisite personnel for a sufficient period of time to establish the experimental group. This group, moreover, would have to include not only the lawyers designated to provide the defense services but also the necessary supervisors and support staff. Accordingly, if the experiment were to succeed, ideally, staff investigators and social workers would be assigned to work with the experimental group of lawyers. The cooperation of the courts also would likely be needed to implement a system of random assignment of cases to lawyers in the experimental and control groups. Despite these obstacles, the potential rewards of an experimental program warrant its serious consideration in jurisdictions capable of making it work.

C. Alternative Proposal: Tracking Public Defender Time

Alternatively, public defense programs could track the time and the kind of work that their lawyers devote to their cases, as well as to non-case-related activities. Assigned counsel who provide defense services are paid for all or most of the hours they devote to cases, and lawyers in private practice track their time when they charge clients by the hour. Both groups of lawyers need to justify their compensation to governments or to clients and to explain the type of work performed. Also, within private law firms, time records serve certain management functions. However, time-keeping among public defense agencies appears to be unusual, although there is a public defender office that has tracked its time since 1980, as described later in some detail.⁴⁸ And there are at least two statewide defender programs that do so.⁴⁹

Law Firm Practice

In order to acquaint myself with current procedures of private law firms in tracking the time of their lawyers and in supervising associates, I interviewed partners in several large law firms in Indianapolis.⁵⁰ The description that follows explains the practices of

⁴⁸ See *infra* notes 53–69 and accompanying text.

⁴⁹ See *infra* note 66 for the two statewide defense programs. Recently, several companies that market commercial case management systems have developed software packages for public defender agencies that include time-tracking capability.

⁵⁰ My first employment after graduating law school was working as an associate engaged in civil litigation in a private law firm. I recall that I did not like keeping track of my time because it was often difficult to reconstruct how I spent my day, especially if I did not make contemporaneous notes of my activities. Nevertheless, I maintained time records because it was part of the job, and in due course I

one of these firms, and I believe certain facets of the firm's time and caseload management system could prove beneficial if implemented in a public defense program. Because I do not have permission to use the name of the law firm, I refer to it here as the ABC law firm.

For each partner and associate in ABC, the firm has a target of 1850 billing hours per annum, as well as 700 hours for nonclient related activity (e.g., firm meetings, seminar attendance, bar association activities, community service, personnel matters, and firm administration).⁵¹ Each month, the partners in the firm receive a report of the number of hours billed per month by each of the associates. This report includes the cumulative total of hours billed for the year and shows whether or not the associate is above or below his or her target number of hours since the year began. If the number of billing hours is deemed too low, the associate's supervisor, who is always a firm partner, will meet with the associate to determine if there is a problem. Although these monthly reports are not circulated among associates, the partner with whom I spoke believed that doing so could be an effective way to bring peer pressure to bear on the firm's associates.

The ABC firm recognizes that the firm's cases are unique and require different amounts of time. The firm, therefore, does not collect any information on the number of cases on which an associate is working or deals with over the course of a year; it believes that such numbers are of no real value. On the other hand, the firm has a strong interest in knowing whether its associates are overburdened with work or, alternatively, whether they are able to accept new assignments. Thus, the firm requires a workload report form on which associates regularly self-report one of the following four categories: "should NOT take on additional assignments;" "could take on additional assignments in an emergency;" "could take on additional assignments;" and "need additional assignments now." The category selected is later discussed during an in-person meeting with the associate's supervisor.

The recording of how associates spend their time on client files can also reflect important information about the law firm's mix of associates and other staff. For example, several years ago, when the partner with whom I spoke was in a smaller law firm that used a similar time-keeping system, the firm determined from its timesheets that its lawyers were spending far too much time on tasks that could be performed more cheaply by non-lawyers. Accordingly, additional paralegal staff was hired.

undoubtedly improved my time-keeping. Although I was not concerned then with the bills sent to clients, I felt the need to record *all* of my time lest it appear to the partners in the firm that I was not working hard enough. Among public defenders, there surely would be a similar lack of enthusiasm in keeping track of their time, but a grudging willingness to do so, because a lack of complete reports would suggest a lack of effort and time devoted to representing clients.

⁵¹ The firm's annual operating budget is based substantially on each lawyer's projected number of hours multiplied by each lawyer's hourly billing rate.

All of the foregoing practices could be implemented by a public defense program. However, a computerized system to track the time and activities of public defenders would need to be purchased and fine-tuned for the program, lawyers would need instruction in how to use the new system, and the reluctance of lawyers to commit to the new system would need to be overcome. Would such efforts be worth the necessary time and expense? The following are possible advantages of a time-keeping system:

- First and foremost, the defense program would be able to demonstrate to its funding authority just how hard its lawyers are working, because data would be available on the number of hours that public defenders work per month, per annum, etc. In the same way that a private law firm justifies its cost to a private client, a public defense program needs ways to demonstrate to funders the level of effort expended by its staff and to justify why additional financial support is needed.
- The defense program likely would be able to generate data on just how much time public defenders are required to spend in court, thereby showing just how little time they have available out of court to prepare their cases.
- Conceivably, the data would show the amount of time wasted in court waiting for cases to be heard and thereby demonstrate the need to reform the manner in which cases of defenders are scheduled.
- The data also would be able to show the activities of public defenders on behalf of clients and the outcomes that lawyers are either able or unable to achieve on behalf of their clients. For example, the data might reveal the number of instances in which lawyers successfully obtained pretrial release of clients from which cost savings to the justice system could be extrapolated. Conversely, the data might show the number of cases in which investigations were not conducted due to either a lack of adequate time or resources.
- Those in charge of the public defense program would have available to them data on just exactly what the program's lawyers are doing on their cases (e.g., seeking pretrial release, filing motions, preparing reports for sentencing), and they would be able to assess the level of effort of their lawyers in terms of both time and activities.
- If a public defense program moved to withdraw from cases or filed some other legal action respecting its caseload, a rich source of data would be available of a kind that has not been present in cases in which legal challenges have been filed in the past. Most importantly, in prior litigation there has been no quantitative data on the amounts of time that public defenders work and the amounts of time they devote (or are unable to devote) to various client activities. Instead, the evidence

introduced has focused on the numbers and types of cases simultaneously represented by public defenders and over the course of a year, buttressed by anecdotal stories.⁵²

- If the private law firm's self-reporting system were used by the public defender program, there likely would be compelling data demonstrating that the program's lawyers had repeatedly reported over a period of months, if not years, that they were overworked and should not be assigned additional cases.
- Finally, if a public defender office with a time-keeping system wanted to conduct a case-weighting study, the time data necessary to do such an analysis would be readily available, as it was for the public defender program discussed below.

Lancaster County Public Defender, Lincoln, Nebraska

Beginning in 1980, as part of an experimental project of the National Legal Aid & Defender Association, the Lancaster County Public Defender (LCPD) implemented a system of tracking the time that its lawyers spent on various kinds of cases.⁵³ For many years, the system was a manual one. At the front of each case file, public defenders kept a "case log sheet" in which they entered a narrative of the work they performed on the client's behalf, the day that the work was performed, and the amount of time spent on the activity.⁵⁴ In 2009, the office converted to a computerized "case log" record-keeping system.⁵⁵ Based upon its time records, at the end of each year the office is able to generate substantial data, including the amount of time that individual attorneys spend on different types of cases (e.g., misdemeanors, various kinds of felonies) and the cumulative amount of time that all of the agency's attorneys spend on these different kinds of cases.

⁵² In the next chapter dealing with litigation, I discuss several cases in which defender programs challenged their caseloads in court proceedings; however, no time records were available in any of the cases. *See, e.g., infra* notes 15–19 and accompanying text, Chapter 7.

⁵³ At the time, Dennis R. Keefe had just begun as the elected public defender of Lancaster County. He continues to serve as the public defender in 2011.

⁵⁴ Public defenders record their time in hours and minutes, broken down by tenths of hours; therefore, the smallest unit of time for record keeping is 1/10 of an hour or six minutes. E-mail from Dennis R. Keefe to Norman Lefstein (Nov. 2, 2009, 10:06 a.m.) (on file with author).

⁵⁵ Under the agency's manual system, from 1980 through 2008, the time of the lawyers was entered under one of the following codes: CT=Court; DE=Client Contact; NG=Negotiations and other prosecutor contacts; RS=Research (both legal and non legal); WT=Wait and Travel Time; and FF=Fact Finding. Pursuant to the agency's computerized time system, these codes for recording time are no longer required. *Id.* and e-mail from Dennis R. Keefe to Norman Lefstein (Oct. 30, 2009, 2:13 p.m.) (on file with author). A mainframe MIS system was instituted in 1986, time spent on cases was entered into the system when cases were completed, and the data were used to construct internal workload standards.

As noted earlier, the time records of the agency's lawyers greatly facilitated a case-weighting study conducted for the office by a university researcher.⁵⁶ The study concluded that an additional 3.5 lawyers were necessary to handle the agency's current criminal and juvenile caseloads.⁵⁷ "Recommended Annual Caseload Guidelines Per Attorney" also was proposed in the study.⁵⁸ In felony cases, the caseload standard for attorneys was listed at 127,⁵⁹ which apparently was intended as the average annual number of new appointments that attorneys should receive. However, the report states that "the Lancaster County Public Defender will utilize discretion (relying on caseload statistics) to make any necessary adjustments to individual attorney caseloads. For example, caseloads would be adjusted if an attorney were appointed to a serious felony case such as a homicide."⁶⁰

During the course of the study, the LCPD established an advisory committee to review the study's methodology and recommendations. The committee included judges from each of the county's courts, and this body apparently served the agency well. Upon completion of the study and based upon its recommended caseload standards, during the last three months of 2008, the LCPD successfully withdrew from the following numbers of cases: 17 felonies, 118 city misdemeanor cases, and 55 juvenile cases.⁶¹ These withdrawals involved several of the county's courts and were achieved without court hearings in which evidence was required to be presented.⁶² On prior occasions, the LCPD also has been permitted to withdraw from cases in similar fashion,⁶³ which is seemingly due to the trust that the county's judges have in the agency's leadership and the availability of private assigned counsel or contract lawyers to take the cases.⁶⁴

⁵⁶ See *supra* note 31.

⁵⁷ NEELEY, LANCASTER COUNTY, *supra* note 31, at 17.

⁵⁸ *Id.* at 12 and 17.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ REPORT OF THE LANCASTER COUNTY PUBLIC DEFENDER 9 (2008).

⁶² E-mail from Dennis R. Keefe to Norman Lefstein (Nov. 2, 2009, 9:52 a.m.) (on file with author).

⁶³ E-mail from Dennis R. Keefe to Norman Lefstein (Nov. 2, 2009, 10:26 a.m.) (on file with author). The document authorizing the agency to withdraw from cases, prepared by the LCPD and signed by various judges, reads as follows:

The Lancaster County Public Defender's Office hereby moves this Court, pursuant to Neb. Rev. Stat. § 29-3904, for an Order appointing other counsel for the reason that the acceptance of this case by the Public Defender would cause that office to exceed established caseload standards, thereby putting at risk the client's right to the effective assistance of counsel and the assigned attorney's obligations under the Nebraska Rules of Professional Conduct.

The Court hereby finds that good cause exists and the motion should be sustained. IT IS THEREFORE ORDERED that the Office of the Lancaster County Public Defender is given leave to withdraw"

Id.

⁶⁴ The annual report of the LCPD explains the possible ways of dealing with the cases from which it has

A state statute, which permits withdrawal from representation based on a showing of “good cause,” has been helpful as well, as the LCPD has successfully argued that case overload presents a “good cause” justification.⁶⁵

Because time records are almost never required to be kept by lawyers in state public defense programs,⁶⁶ I asked the head of the LCPD just how he has managed to persuade his defenders to maintain time records for thirty years. He acknowledged that in the beginning there was “resistance from the attorneys,” probably because it was deemed a waste of time, an attempt to determine how hard lawyers were working, and to measure the quality of the representation provided.⁶⁷ He also described an event that reversed the tide of attorney opposition:

One senior attorney, called to testify at a post conviction hearing on effective assistance of counsel in those early days, went from a strong opponent to a strong proponent of the new system because he did not have good notes from his old file. The fall of his resistance was a milestone. Once you get everyone to agree that it is only professional to keep notes on what you do on a case (for the benefit of both the client and the attorney), the

been permitted to withdraw: “The Lancaster County Board of Commissioners must choose among several options The options involve adding staff to the public defenders office, entering into contracts for some of the dockets; or continuing with the appointment and payment of private assigned counsel on a case by case basis.” REPORT OF THE LANCASTER COUNTY PUBLIC DEFENDER 9 (2008).

⁶⁵ R. REV. NEB. STAT. § 29-3904 (2008) provides as follows:

Nothing . . . shall prevent any judge from appointing counsel other than the public defender or other substitute counsel when the public defender or counsel initially appointed might otherwise be required to represent conflicting interests or for other good cause shown, from not appointing any counsel for any indigent felony defendant who expressly waives his or her right to such counsel at any stage of felony proceedings, or from appointing the public defender or other counsel as may be required or permitted by other applicable law.

⁶⁶ An exception to the general rule is West Virginia, in which full-time lawyers employed by Public Defender Corporations provide defense services in certain judicial circuits of the state and are required to report their time. The website of Public Defender Services shows the amounts of time spent by each public defender lawyer, broken down by “in court,” “out of court,” and “administrative” time. Total amount of time spent by all of the state’s public defenders, broken down by various types of cases, also is reported. For example, for FY 2009, the public defenders devoted 51,736 hours to in court work, 128,910 hours to out-of-court work, and 67,087 hours to administrative work. *See ANNUAL REPORT, FISCAL YEAR 2008–2009, WEST VIRGINIA PUBLIC DEFENDER SERVICES*, at 91–106, *available at* <http://www.wvpds.org/>. In addition, the Office of the State Public Defender in Montana requires its lawyers to keep daily track of their time on both cases and administrative work. Time records also are required to be reviewed weekly by Regional Deputy Public Defenders and/or Managing Attorneys. An attorney who fails to track his or her time is subject to receiving a formal disciplinary letter with a plan for corrective action. *See* Justware Case Management Program, Policy No. 215, Sept. 30, 2010, *available at* <http://publicdefender.mt.gov/forms/pdf/215-JustWare.pdf>.

⁶⁷ E-mail from Dennis R. Keefe to Norman Lefstein (Oct. 30, 2009, 2:39 p.m.) (on file with author).

amount of time it takes to include a quick record in tenths of hours of the activity required is minimal (even more so with electronic systems).⁶⁸

After completion of the 2008 case-weighting study, the office reassessed whether its public defenders should continue to keep time records. Support for doing so, however, remains strong, especially among senior attorneys who oppose doing away with it. My inquiry of the agency's chief public defender prompted a conversation between him and his chief deputy:

My chief deputy ... believes that keeping good notes in a case is very good practice for any lawyer because it provides discipline and organization. Making good notes requires you not only to think about what has been done in the case but also what needs to be done. Marking the amount of time that the activity required is a very easy part of keeping good notes. He is concerned that without the time keeping requirement, some attorneys would get sloppy in what they record and don't record. He also said he supports continuing to track time because it provides us with evidence that formed the basis of our standards and has positively impacted our workload and allowed us to better equalize the distribution of work within the office.⁶⁹

D. Blinded by Numbers

Just as I was finishing this chapter, I came across a news article that captured my worst fears respecting caseload numbers whether derived from a weighted caseload study or other means. An article from a Nevada newspaper reported that the state's public defender had asked a judge "to allow one of her attorneys to decline an appointment." But the judge responded that "we need caseload standards before I can allow you to refuse a case."⁷⁰ Obviously, the judge failed to appreciate that caseload standards are not to be applied automatically. *They are simply guides to what may be a reasonable caseload, on average, for public defender programs and individual lawyers, but they should never be the "sole factor" in determining whether a lawyer's caseload is excessive.* As noted earlier, the ABA's ethics opinion dealing with excessive workloads emphasizes this point.⁷¹

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Alan Maimon, *Public Defender Caseload: State Panel Debates Limit; Members Want Action But Clash on the Details*, LAS VEGAS REVIEW-JOURNAL, September 9, 2009, available at <http://www.lvrj.com/news/58001197.html>.

⁷¹ See *supra* note 49 and accompanying text, Chapter 2.

In addition, the judge's statement was, at best, an excuse to avoid having to deal with the caseload issue. Even if standards had been adopted, because they are typically expressed in terms of the number of cases that a lawyer can handle, on average, over the course of a twelve-month period, they are not dispositive of whether a lawyer is overloaded with cases at a particular time. Whether a lawyer has an excessive caseload depends on the defense lawyer's caseload when the lawyer is appointed to one or more additional cases. Theoretically, even if a lawyer had exceeded the maximum caseload standard during the prior twelve months, he or she might still have an insufficient caseload when requesting not to be appointed. Conversely, a lawyer can be overwhelmed with cases, even though he or she is nowhere near being appointed to the average number of cases expected to be handled during a twelve-month period. Obviously, the distinction between a caseload standard for a twelve-month period and a lawyer's current caseload needs to be understood by those who manage public defense programs, those who fund them, and most certainly by judges.

CHAPTER 7

Reducing Excessive Caseloads Through Litigation

The ABA's ethics opinion¹ and the ABA's Eight Guidelines² recognize that when no other remedies are available, lawyers have a duty to seek relief from the courts when faced with excessive caseloads. Although caseloads are far too high throughout much of the country,³ few court challenges have been filed seeking redress. But some cases have been brought since the ABA's ethics opinion was issued in 2006, and this chapter focuses primarily on these lawsuits.⁴ In Chapter 9, I reference these lawsuits again as I suggest some other approaches to litigation that have not previously been tried.⁵

In several states, defense programs have asked they not be appointed to new cases and/or that courts permit withdrawal from representation. In two jurisdictions, lawsuits challenging caseloads were begun in unusual ways—in one state, as a declaratory judgment action⁶ and in another as a petition seeking a writ of prohibition.⁷ Also, in two states systemic lawsuits were begun seeking various kinds of indigent defense reform, including reductions in lawyer caseloads.⁸ At the end of this chapter, the possibility of litigation by the federal government to reform indigent defense in state courts is discussed.

A. Litigation Seeking to Stop New Appointments and/or Withdraw

Since 2006, public defender offices in at least four jurisdictions have filed motions in trial courts seeking relief from excessive caseloads.⁹ Because I was an expert witness for the defense and testified in all of the cases, I had a close-up of view of what happened

¹ See *supra* notes 36–54 and accompanying text, Chapter 2.

² See *supra* notes 76–83 and accompanying text, Chapter 2.

³ See *supra* notes 13–24 and accompanying text, Chapter 1.

⁴ For an in depth analysis of litigation aimed at reforming the delivery of indigent defense services, including challenges to caseloads, see JUSTICE DENIED, *supra* note 2, Chapter 1, at 103–146 (“How to Achieve Reform: The Use of Litigation to Promote Systemic Change in Indigent Defense”). Numerous law review articles also discuss indigent defense lawsuits, sometimes specifically dealing with excessive caseloads, but more often pertaining to systemic litigation. See, e.g., Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMPLE POL. & CIV. RTS. L. REV. 443 (2010); Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002).

⁵ See *infra* notes 88–128 and accompanying text, Chapter 9.

⁶ See *infra* notes 68–84 and accompanying text.

⁷ See *infra* notes 85–103 and accompanying text.

⁸ See *infra* notes 104–131 and accompanying text.

⁹ Conceivably, motions to stop appointments and/or to withdraw from cases have been filed by defense lawyers or programs in other jurisdictions. But if this has occurred, the cases have escaped the media's

in the trial courts and have followed the post-hearing developments in the three jurisdictions in which trial court rulings were appealed. In chronological order, the four jurisdictions are New Orleans (Orleans Parish), Louisiana; Kingman (Mohave County), Arizona; Knoxville (Knox County), Tennessee; and Miami (Dade County), Florida.

New Orleans (Orleans Parish), Louisiana

In Chapter 4, I referred to the 1993 decision in *State v. Peart*,¹⁰ in which the Louisiana Supreme Court ruled on the motion of a New Orleans public defender who claimed that he was unable to furnish constitutionally effective defense services due to his caseload. In *Peart*, based upon evidence presented in the trial court, the Louisiana Supreme Court held there was a rebuttable presumption of ineffectiveness in the public defender's representation of his clients and remanded the case for the trial judge to make individualized determinations respecting whether each defendant was receiving constitutionally effective services.¹¹ At the time, the public defender had 70 active felony cases, although the court noted that the office was disposing of an exceedingly large number of cases over the course of a year and had very limited investigative and other support services.¹²

In 2006, the Orleans Public Defender (OPD) filed a motion seeking caseload relief on behalf of Powell Miller, a public defender assigned to felony cases.¹³ Miller (and the other public defenders in New Orleans at the time) had even higher caseloads than the lawyer who sought relief when *Peart* was decided almost fifteen years earlier. During a hearing before trial court Judge Arthur Hunter, Jr. in March 2007, Miller testified that his active caseload consisted of 167 cases involving 164 different clients.¹⁴ Of this number, Mr. Miller explained that in 10 cases defendants were facing life imprisonment; 11 cases involved defendants facing 50 years or more imprisonment; 12 cases involved defendants facing 20 years or more imprisonment; 39 cases involved defendants facing

attention. Since well before the ABA's ethics opinion in 2006, I have monitored indigent defense developments from around the country through several news clipping services and have not read of other such cases. Nor have other persons knowledgeable about indigent defense nationwide and with whom I have frequent contact called such legal actions to my attention.

¹⁰ 621 So.2d 780 (La. 1993).

¹¹ 621 So.2d at 791–792.

¹² *Id.* at 784.

¹³ Like the other felony lawyers employed by the OPD, the public defender represented only clients whose cases were assigned to a single felony court judge's courtroom. Accordingly, the trial court judge was acquainted with the lawyer and presumably well aware of his caseload prior to hearing his motion for caseload relief.

¹⁴ *Louisiana v. Edwards*, No. 463-200, slip op. at 9 (Orleans Criminal District Court, Section K, March 30, 2007).

10 or more years imprisonment; and 30 cases involved defendants facing 5 or more years imprisonment.¹⁵

Mr. Miller's direct examination included the following colloquy:

Q: Now, I'm going to ask you to look at the list of clients that you created for the court, which ... we've filed in the motion I'm just going to ask you about some of these clients and the representation you're providing for them; and I don't want you to reveal any confidential information Charles, Andreas, can, you just basically, tell me his charge, his multiple bill status, and his sentencing exposure?

A: He's charged with possession of cocaine. He's either a double or triple facing up to ten years.

Q: Did you conduct an initial interview with him within 72 hours of appointment?

A: No.

Q: Have you investigated his case?

A: No.

Q: Have you looked for relevant records?

A: No.

Q: Have you identified witnesses?

A: No

[Numerous additional questions detailed a wide variety of actions that the lawyer had failed to take on behalf of his client. For example, Miller was asked if he had filed any discovery motions; filed any other pretrial motions; visited the scene of the crime; considered defects in the charging process; focused on whether any expert witnesses were needed; discussed a plea with the client; considered mitigation evidence that could be presented at sentencing in the event of a guilty plea; etc. After these kinds of questions, Miller was asked the following:]

Q: Why haven't you done any of these things?

A: I haven't had time.¹⁶

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 2–3.

Similar types of questions were asked about other defendants represented by Mr. Miller, and similar responses were given. Mr. Miller also spoke about some of his cases in more general terms, reiterating the various ways in which he was furnishing inadequate defense services. My testimony during the hearing complemented Mr. Miller's, as I summarized the myriad ways in which Mr. Miller, in my opinion, was failing to represent his clients effectively as required by the Sixth Amendment and in compliance with professional conduct rules. Thus, I referred to Miller's failure to conduct early and thorough client interviews, to seek pretrial release of incarcerated clients, to determine appropriate motions to file, to conduct appropriate discovery of the prosecution's case, to determine the mental health status of his clients, to investigate cases, and to prepare adequately for trials.¹⁷ In addition, two Louisiana defense practitioners, "with extensive experience representing indigent defendants and private clients"¹⁸ testified that both Mr. Miller and the OPD had excessive caseloads, in their opinion, and that the representation being provided by Mr. Miller violated both the Sixth Amendment and Louisiana rules of professional responsibility.¹⁹ Although a deputy prosecutor was present during the hearing and occasionally asked a few questions, his cross-examination was largely perfunctory and, as a result, in his "Findings of Fact and Order," Judge Hunter characterized the case presented by the OPD as "un-contradicted."

Judge Hunter's order concluded that the representation being provided was neither effective nor in compliance with ethical rules. To bolster his argument on the latter point, Judge Hunter quoted extensively from the ABA's ethics opinion issued the previous year. Judge Hunter blamed the woeful state of indigent defense in New Orleans on the Louisiana legislature, "which has allowed this legal hell to exist, fester, and boil over."²⁰ The judge also wrote that he not only regarded indigent defense in New Orleans as "unconstitutional" but "totally lacking the basic professional standards of legal representation and a mockery of what a criminal justice system should be in a western civilized nation."²¹

In his order, Judge Hunter authorized public defender Miller to withdraw from the cases of the forty-two clients for whom relief had been sought and also declared that he would no longer appoint the OPD to represent indigent defendants in his court. In addition, he ordered the release from custody of the forty-two defendants from whose cases public defender Miller was permitted to withdraw; and, further, he ordered that the prosecution of the cases be halted "until further notice."²²

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9

¹⁹ *Id.*

²⁰ *Id.* at 11.

²¹ *Id.*

²² *Id.* at 11–12. It was clear from Judge Hunter's order that he intended to explore whether it was feasible to appoint private lawyers to handle the cases to which the public defender would no longer be

However, shortly afterwards the Orleans Parish prosecutor obtained a stay of Judge Hunter's order from a Louisiana Court of Appeals. Subsequently, the appellate court reversed Judge Hunter's order, concluding that the judge had failed "to hold individualized hearings for ... defendants as mandated" by the *Peart* decision, and that he also should have appointed substitute counsel for defendants that he was prepared to release from custody.²³ As summarized in the National Right to Counsel's report, "[u]ltimately, the litigation did not achieve its desired result. While the trial court appointed some private attorneys to handle some of the defender's case overload, the public defender at the center of the litigation and other public defenders assigned to other criminal courtrooms in Orleans Parish continue to carry extremely high caseloads."²⁴ Also, as noted in Chapter 4, an official of the OPD acknowledged in 2010 that the caseloads of OPD lawyers are still much higher than they should be.²⁵

Kingman (Mohave County), Arizona

In 2007, the Public Defender of Mohave County, Arizona, whose office is in Kingman, filed a motion to withdraw from a number of felony cases to which the office recently had been appointed.²⁶ The cases were pending before several different trial court judges

appointed and to compensate these lawyers. Accordingly, the judge ordered that the president of the Louisiana Bar Association furnish a list to the court of lawyers practicing law in Orleans and five other nearby parishes. He also ordered the OPD to provide a financial accounting to determine whether the agency could afford to compensate lawyers appointed by the court to represent indigent defendants. *Id.* at 11.

²³ Louisiana v. Edwards, No. 2007-K-0639 (La. Court of Appeal, Fourth Dist., August 16, 2007).

²⁴ JUSTICE DENIED, *supra* note 2, Chapter 1, at 123.

²⁵ See *supra* note 58 and accompanying text, Chapter 4.

²⁶ Arizona v. Lopez, Number 2007-1544 (Mohave County Superior Court, filed December 17, 2007). The litigation in Mohave County took place against the backdrop of two Arizona Supreme Court decisions concerned with indigent defense services in the state. In *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), the Arizona Supreme Court struck down as violations of due process and the right to counsel Mohave County's bid system for awarding contracts to lawyers to provide defense representation. Citing the caseload numbers of the NAC (see *supra* note 91 and accompanying text, Chapter 2), as well as their personal experience as practicing lawyers, the court's justices concluded "that the caseload of defendant's attorney was excessive, if not crushing." *Id.* at 1380. In *Zarabia v. Bradshaw*, 912 P.2d 5 (Ariz. 1996), the Arizona Supreme Court dealt with the system of defense representation in Yuma County. In doing so, the court referred to its prior decision in the *Smith* case, which it explained had done the following:

[It] established presumptive case load ceilings for criminal defense counsel In that case, we pointed out the ethical obligation of defense counsel to manage their professional responsibilities so as to ensure that they are able to provide adequate representation to every client It is sufficient for the present to say that ... [defense counsel] has raised colorable questions concerning her ability to provide adequate representation, and her request for a hiatus in appointments should not have been summarily denied.

Id. at 8. The court in *Zarabia* also found unacceptable Yuma County's system of appointing counsel on a random rotational basis, as well as the extent of compensation paid to assigned counsel. Both the

but were consolidated for hearing before a single judge. To assist in presenting his case, the chief public defender arranged for pro bono legal representation to be furnished by a prominent Phoenix law firm,²⁷ which filed a prehearing memorandum in support of the defender's withdrawal motion and attached nearly 200 pages of exhibits, including statistical data on caseloads and legal authorities. Also included was my affidavit, in which I opined "that the nine active attorneys currently employed by the Office must all have inordinately excessive caseloads ... that exceed all maximum caseload standards ever devised for use in public defense work."²⁸

My opinion of the public defender's caseload was based on the public defender's data, which demonstrated that for the most recent year the assistant defenders had a weighted caseload equivalent of 267 felony cases each, thus far exceeding the 150 felony caseload maximum of the NAC standards.²⁹ My affidavit also included the active caseloads of each lawyer in the office, some of which were exceedingly high. For example, one lawyer had 188 cases and another had 141; still another lawyer had 32 direct appeals, 23 post-conviction relief cases and another ten post-conviction relief cases in which no claims for relief had yet been filed.

As in the New Orleans case, following an evidentiary hearing, the trial court judge ruled in favor of the public defender, permitting the office to withdraw from 39 cases and further declaring that the court would grant future motions to withdraw "until the court is convinced that the reasons for doing so no longer exist."³⁰ While the court's language was less colorful than the words of Judge Hunter in the New Orleans case, the conclusion was similar:

The evidence presented at the hearing leaves the court with no doubt whatsoever that the attorneys in the Public Defender's Office cannot continue representing the Defendants in these cases in light of their already existing caseloads. They cannot reallocate resources to address the needs of these new clients without shirking their ethical duties toward and denying effective counsel to their present clients. Requiring or even allowing the Public Defender's Office to remain as appointed counsel in these cases

Smith and *Zarabia* decisions are discussed in Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 286–289 (2010). The *Smith* case also is discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 129.

²⁷ The firm was Osborn Maledon of Phoenix.

²⁸ Affidavit of Norman Lefstein, *Arizona v. Lopez*, Number 2007-1544, at 13, November 2007.

²⁹ For discussion of the NAC standards, see *supra* notes 99–104 and accompanying text, Chapter 2.

³⁰ *Arizona v. Lopez*, *supra* note 26, slip op. at 13 ("IT IS ORDERED that the policy of ... this Court will be not to require future motions to withdraw to be accompanied by hundreds of pages of exhibits, transcripts of the evidentiary hearing or extensive legal citation but to grant motions and sign appropriate Orders based upon the briefest possible reference to this Order, not to exceed one sentence in length.").

would likely compromise them from an ethical standpoint and deprive the Defendants in these cases of their rights to effective representation.³¹

The court forthrightly stated that it “cannot concern itself with the financial or funding implications of its ruling on the motions to withdraw.”³² While conceding that it “does not live in an Ivory tower removed from the realities of county government,”³³ the court concluded that it is up to the county to figure out the “logistics of identifying, appointing and paying attorneys outside the Public Defender’s Office to handle any cases in which defendants are left without counsel”³⁴

The aftermath of the trial court’s order was different than it was in New Orleans and in the Tennessee and Florida cases, which are discussed below. The Mohave County prosecutor did not appeal the trial court judge’s decision, and the county appropriated additional funds to cover its responsibility to provide defense representation.³⁵

Knoxville (Knox County), Tennessee

In March 2008, the elected public defender in Knoxville filed a “Sworn Petition to Suspend Appointment of the District Public Defender to Defendants in the Knox County General Sessions Court, Misdemeanor Division.”³⁶ A hearing on the public defender’s motion was held in June 2008 before all five of the county’s misdemeanor judges, during which eight witnesses testified, including the public defender, several of his assistants, and experts. In addition, thirty affidavits were filed with the court, containing data respecting assistant public defender caseloads in misdemeanor and felony cases and the opinions of experts. Information about felony caseloads was deemed

³¹ *Id.* at 12–13.

³² *Id.* at 11.

³³ *Id.*

³⁴ *Id.*

³⁵ E-mail from Dana Hlavac, Deputy County Manager for Criminal Justice Services, Mohave County, Arizona (formerly Mohave County Public Defender who filed the motion in the Mohave County case) to Norman Lefstein (September 13, 2010, 12:58 p.m. EST) (on file with author) (“[E]ven prior to the written order, the Board of Supervisors directed staff ... to carry out the order of the Court. In doing so they essentially opened up the contingency fund to cover whatever additional funds were required to continue processing the appointment of counsel in conflict and overflow cases. Overflow cases were those cases which could not be handled internally by the staffed office due to caseload issues related to staffing numbers and experience/training. These were the cases which formed the heart of the litigation and the court’s ruling. By the end of the fiscal year this had amounted to roughly an additional \$161,214 dollars in funding. To date the issue has not arisen again, and despite changing our structure in handling contract assignments all parties understand that there is simply no choice in funding this issue. While steps have been taken to better account and track expenditures, costs are always under scrutiny, but ultimately always funded.”).

³⁶ *In re* Petition of Knox County Public Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, filed March 26, 2008.

essential in order to show that public defenders assigned to felony courts also had excessive caseloads and could not accept misdemeanor assignments. The public defender was represented pro bono by a well-respected Tennessee law firm, which devoted a significant amount of time to the case.³⁷

During his testimony at the hearing, the public defender explained the difficulty confronting his office in providing defense services in misdemeanor cases:

[S]o there's [no time] ... to do any on-scene investigations. There's [no time] ... to do any contacting of [police] officers There's ... [no] time to interview any witnesses. You just go into court you fly by the seat of your pants to see what you can accomplish The caseloads that currently exist in my office, in my view, prohibit my lawyers from fulfilling their ethical obligations and duties that they owe to their client And, consequently, the constitutional right of the accused to have a lawyer who is meeting his or her ethical responsibility to that client is not being fulfilled, and it's because of caseload, it's not as a result of the commitment or effort on the part of the lawyers.³⁸

Additional evidence presented to the five judges included the following:

- In describing her caseload as “unbearable,”³⁹ an experienced member of the public defender’s staff assigned to felony cases, compared her situation to working on a conveyor belt in which she was unable to keep up. She explained that she went to court, on average, four days a week, lacked sufficient time to interview clients, seldom interviewed fact witnesses, and did very little legal research. With “most of [her] clients,” she said that she was not complying with the Tennessee Rules of Professional Conduct, constitutional standards for effectiveness of counsel, nor the ABA Defense Function Standards.⁴⁰
- The caseloads of the public defenders at the time of the June 2008 hearing were astonishing. For example, one public defender stated in an affidavit that she

³⁷ The law firm was Chambliss, Bahner & Stophel of Chattanooga.

³⁸ *In re* Petition of Knox County Public Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, March 26, 2008, Transcript of Record, 27–31 (June 10, 2008). For copies of pleadings, petitions and related documents pertaining to this litigation, see website of the Public Defender for the Sixth Judicial District, Knoxville, TN, *available at* <http://www.pdknox.org/caseloads>. The website also contains petitions filed in 2008 by the public defender seeking caseload relief in three Knox County Criminal Court Divisions, which handle felony cases. These petitions resulted in an informal agreement between the Criminal Court judges and public defender, in which the judges agreed not to appoint the public defender to new felony cases during a five-month period. E-mail from Mark Stephens, District Public Defender, Knox County, Tennessee, to Norman Lefstein (September 7, 2010, 6:28 p.m. EST) (on file with author).

³⁹ *Id.* at 89 (testimony of Christy Murray).

⁴⁰ *Id.* at 90–92.

was “the defendant’s attorney in approximately 297 cases. Approximately 101 of those cases are felonies. Approximately 186 of those cases are misdemeanors. Approximately 10 of those cases are probation violations.”⁴¹

- Testimony was presented by a senior partner in a private law firm, who previously served as a United States Attorney and United States Magistrate. This lawyer also was certified as a Criminal Trial Specialist by the Tennessee Commission on Continuing Legal Education and Specialization and a member of the Tennessee Bar Association’s Standing Committee on Ethics and Professional Responsibility. In his affidavit, the lawyer stated “that it would be impossible for me [under the Tennessee Rules of Professional Conduct] to represent a similar number of clients in the required effective manner.”⁴² In addition, he explained that his ability to provide “effective representation would be further exacerbated by the fact that the Public Defender is not able to employ a ‘vertical representation’ of clients but rather must rely upon a ‘horizontal representation.’”⁴³
- In my affidavit and testimony, I offered opinions similar to what I said in the Mohave County case, concluding that the public defender’s office was “ethically bound to decline to accept new appointments until its caseloads are sufficiently manageable and the Office’s lawyers are able to furnish competent representation to all of its clients.”⁴⁴

None of the witnesses who testified in support of the public defender’s motion were cross-examined, because the local prosecutor did not participate in the hearing. However, just before the hearing was scheduled to begin, the Attorney General of Tennessee filed a motion seeking either to intervene in the case and/or to appear on behalf of the Tennessee Office of Administrative Courts. A senior lawyer from the Attorney General’s office attended the hearing and, with the court’s permission, offered

⁴¹ Affidavit of Marie Steinbrenner, February 27, 2008.

⁴² Affidavit of W. Thomas Dillard at 4, February 28, 2008.

⁴³ *Id.* The ABA has long rejected “horizontal representation” in which different lawyers from a defense program represent the same client at various stages of a case. Instead, the ABA recommends that the same lawyer represent the accused “at every stage of the proceedings” ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-6.2. The commentary to this provision explains the disadvantages of horizontal representation:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been “processed by the system.” This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage representation practices.

Id. at 83.

⁴⁴ Affidavit of Norman Lefstein, at 13–14, June 17, 2008.

arguments in opposition to the public defender's motion, claiming that the defender's motion, if granted, would cost the state approximately \$2.5 million annually and that the testimony at the hearing did not satisfy Tennessee Supreme Court Rule 13.⁴⁵

Despite the uncontroverted evidence presented during the hearing in June 2008, the five judges of the Court of General Sessions ruled neither promptly nor favorably for the public defender. In February 2009, after a delay of more than eight months, the judges issued a two and one-half page order denying the public defender all relief:

From the review of pleadings and evidence presented and the record as a whole, we find that the attorneys in the Public Defender's Office carry caseloads that exceed national criminal justice standards and goals. This court does not conclude that the case load is a [sic] such a level as to violate the right to competent counsel under either the United States Constitution or the Constitution of Tennessee.⁴⁶

Besides ignoring the testimony and other evidence submitted by the public defender, the judges' order also reflects obvious confusion about the concept of "competence," which is a requirement of the Tennessee's Rules of Professional Conduct, not of the Sixth Amendment or Tennessee's Constitution.

Pursuant to a writ of certiorari, the order was reviewed by the single judge of the Chancery Court for Knox County, which is also a Tennessee trial court. In July 2010, that court, too, denied all relief to the public defender.⁴⁷ In its opinion, the Chancery Court judge followed the lead of a Florida appellate court, holding that there could not be a determination in the aggregate of excessive caseloads for an entire public defender's office; instead, such a decision must be determined with respect to each individual lawyer.⁴⁸ In addition, pursuant to Tennessee Supreme Court Rule 13, the court ruled that the public defender failed to show by clear and convincing evidence that effective representation under the Sixth Amendment, which requires a showing

⁴⁵ *In re* Petition of Knox County Public Defender, *supra* note 36, Transcript of Record, 152–159. *See also* TENN. SUP. CT. R. 13 (e)(4)(D) ("The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.").

⁴⁶ *In re* Petition of Knox County Public Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, Order, at 2, February 20, 2009. Presumably the judges' were referring to the NAC standards discussed previously. *See supra* notes 99–104 and accompanying text, Chapter 2. This single sentence in the court's brief order is its only attempt to deal with the evidence of exceedingly high caseloads of which they had been apprised. On the last page of its order, the judges' declared that their "mission ... [was] to seek to monitor case load numbers"

⁴⁷ *In re* Petition of Knox County Public Defender, Chancery Court for Knox County, Tennessee, Memorandum Opinion, July 16, 2010.

⁴⁸ For the decision of the Florida appellate court, *see infra* notes 56–58 and accompanying text.

of prejudice to the client, was not being provided.⁴⁹ In December 2010, the Public Defender of Knox County withdrew his appeal of the Chancery's Court's decision.⁵⁰

⁴⁹ The Chancery Court's interpretation of Tennessee Supreme Court Rule 13, *see supra* note 45, requires the defense to establish pretrial that the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), will be violated if the public defender is required to proceed. In addition to imposing an exceedingly difficult standard to meet, this interpretation seemingly precludes the defense from arguing that its request to withdraw is based upon rules of ethics. *See, e.g.*, Tenn. Rules of Prof'l Conduct, R. 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in a violation of the Rules of Professional Conduct ..."). The *Strickland* standard is discussed earlier. *See supra* notes 41–81 and accompanying text, Chapter 3.

⁵⁰ The public defender has explained that the appeal was withdrawn primarily because the caseloads of his lawyers in the Court of General Sessions are now much lower than when the lawsuit was filed. Nevertheless, he acknowledges that his lawyers in both felony and misdemeanor cases still have caseloads that exceed the per annum maximum numbers recommended by the National Advisory Commission on Criminal Justice Standards and Goals. (For these numbers, *see supra* note 91 and accompanying text, Chapter 2.) On the other hand, he points out that although he "lost" his case in the Court of General Sessions, since the lawsuit was filed the judges have substantially accommodated his informal requests for caseload relief and have sometimes halted new appointments for a period of time or temporarily reduced assignments to his staff. E-mail from Mark Stephens, District Public Defender, Knox County, Tennessee, to Norman Lefstein (December 11, 2010, 8:42 a.m. EST) (on file with author). The e-mail also explains that caseloads are substantially lower now than in the past as a result of a new policy in which large numbers of defendants plead guilty without ever talking to a lawyer. This has happened because judges encourage defendants to talk to the prosecutor before appointing a lawyer, and defendants are offered a "deal" to plead guilty, typically being able to avoid jail time or, in the event they already are locked up, being able to obtain immediate release. As noted in a 2009 report on America's lower courts, this practice is common throughout the United States. *See MINOR CRIMES*, *supra* note 17, Chapter 1, at 16–17. The report also notes the serious potential adverse consequences to a defendant who pleads guilty to a misdemeanor without the advice of counsel:

In the years since the *Argersinger* decision [in 1972], the collateral consequences that can result from any conviction, including a misdemeanor conviction, have expanded significantly. These consequences can be quite grave. The defendant can be deported, denied employment, or denied access to a wide array of professional licenses. A person convicted of a misdemeanor may be ineligible for student loans and even expelled from school. Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family. Fines, costs and other fees associated with convictions can also be staggering ...

Id. at 12–13. Colorado even has statute that precludes the appointment of counsel in misdemeanor cases until after the prosecutor has had an opportunity to discuss a negotiated plea with the defendant. *See* COLO. REV. STAT. § 16-7-301 (4) (2005). In December 2009, two organizations in Colorado filed a legal challenge in federal court to the statute's constitutionality based upon the Supreme Court's decisions in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (Sixth Amendment right to counsel attaches at a criminal defendant's initial appearance before a judicial officer when he learns of charges against him and liberty is subject to restriction); and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel). *See* David Carroll, *Gideon Alert: Lawsuit Challenges Colorado Law Refusing Appointment of Counsel Until after Clients Meet with DA*, December 12, 2010, available at http://www.nlada.net/jsri/gideon-blog/co_complaintfiledinmisdrait12-2010_gideonalert. A decision favorable to the defense in the Colorado litigation will likely call into question the constitutionality of the widespread practice in Tennessee and other states in

Miami (Dade County), Florida

In both 2008 and 2009, the elected Public Defender in Miami filed motions with trial court judges seeking to reduce the caseloads of his lawyers. After hearings in both cases, trial court judges were persuaded by the Public Defender's evidence. However, favorable rulings of the judges were stayed and ultimately reversed by Florida's Third District Court of Appeal.⁵¹ Now, more than three years after it was begun, the first case is pending before the Florida Supreme Court, which has agreed to hear the matter.⁵² Because of the potential importance of the case to indigent defense, the American Bar Association has approved the filing of an amicus brief in the Florida Supreme Court in support of the Public Defender.⁵³

Because the Florida Supreme Court presumably should resolve the Miami litigation soon, I provide below only a brief summary of what has occurred in the two cases in the lower courts:

- For two days at the end of July 2008, a trial judge in Miami heard testimony related to the Public Defender's "Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases." Citing excessive caseloads due to budget cuts and increased numbers of assignments, the Public Defender asked that his office temporarily be excused from assignments before Miami's 21 felony court judges. On September 3, 2008, a trial judge concluded that partial relief was warranted and ordered that until the felony caseloads of assistant public defenders were under control, the Public Defender not be appointed additional class "C" felony cases.⁵⁴

which defendants are urged to speak with prosecutors prior to the defendant having waived counsel or counsel being appointed on the defendant's behalf. This practice also implicates standards for prosecution and rules of professional conduct. *See, e.g.*, ABA PROSECUTION FUNCTION, *supra* note 70, Chapter 1, at Std. 3-3.10 (a) ("A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining or in arranging for the pretrial release of the accused."). *See also* ABA Model Rules R. 3.8 (c) and 4.3.

⁵¹ State v. Bowens, 39 So. 3d 479, 481 (Fla. Dist. Ct. App. 2010); Florida v. Public Defender, Eleventh Judicial Circuit, 12 So. 3d 798 (Fla. Dist. Ct. App. 2009).

⁵² Public Defender, Eleventh Judicial Circuit of Florida v. State, 2010 WL 2025545 (Fla.). As of July 2011, the Florida Supreme Court had not yet acted on the Public Defender's motion to consolidate its two cases for appellate review. Throughout both cases, the Public Defender has benefited from pro bono representation furnished by the Miami office of Hogan Lovells, which has devoted hundreds of hours to the litigation.

⁵³ Although the ABA's brief has been written, it has not been filed since the Florida Supreme Court has not yet established a briefing schedule. The brief outlines the ABA's various policies concerned with excessive caseloads and argues that requiring proof of ethical violations and injury to clients before awarding relief from excessive caseloads requires lawyers to breach their ethical duties.

⁵⁴ *In re* Reassignment and Consolidation of Public Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases, Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, Criminal Division, No. 08-1, Administrative Order No. 08-14 (Sept. 3,

As the judge explained in his opinion, “the testimonial, documentary, and opinion evidence shows that ... [the Public Defender’s] caseloads are excessive by any reasonable standard. As a result, ... [public defender] attorneys are able to provide, at best, minimally competent representation in their assigned cases. Further, it is clear that future appointments to noncapital felony cases will create a conflict of interest in the cases presently handled”⁵⁵

- In May 2009, a Florida appellate court reversed the decision of the Miami trial judge,⁵⁶ holding that (1) the state’s attorney had standing to oppose defense motions respecting its caseloads; (2) a conflict in criminal cases cannot be “based solely upon inadequacy of funding or excess workload of the public defender ... ;”⁵⁷ but rather (3) a public defender who claims that a conflict exists must establish that individual clients are prejudiced by the public defender’s representation, which cannot be “proven in the aggregate, simply based upon caseload averages and anecdotal information.”⁵⁸ The court also noted that, although the Public Defender had received increased funding in recent years, not all of the authorized new positions were filled but instead some funds were used to give salary increases.
- Because the court required individualized proof of prejudice as the basis for withdrawal, the Public Defender filed a motion on behalf of an assistant public defender requesting permission to withdraw from a single case. Once again, an evidentiary hearing was held, and the Public Defender was successful in the trial court, as a judge concluded that the defender “has met his burden of demonstrating adequate, individualized proof of prejudice to ... [the client] as a result of his ineffective representation.”⁵⁹ The evidence in the case included a “stipulation that in a recent

2008).

⁵⁵ *Id.* at 6.

⁵⁶ *Florida v. Public Defender*, Eleventh Judicial Circuit, 12 So. 3d 798 (Fla. Dist. Ct. App. 2009).

⁵⁷ *Id.* at 804.

⁵⁸ *Id.* at 803.

⁵⁹ *State of Fla. v. Antoine Bowens*, No. F09-019364, Order Denying Public Defender’s Motion to Declare Section 27.5303(1)(d) Unconstitutional and Granting Public Defender’s Motion to Withdraw, October 29, 2009. This conclusion was based upon the following findings:

In the instant case, the evidence and testimony presented demonstrates the requisite prejudice ... as a result of ... ineffective representation. The uncontroverted evidence and testimony of Kolsky [the public defender] shows that he has been able to do virtually nothing in preparation of Bowens’ [the client’s] defense. Kolsky has not obtained a list of defense witnesses from Bowen, nor has he taken depositions. He has not visited the scene of the alleged crime, looked for defense witnesses, or interviewed them. He has not prepared a mitigation package nor has he filed any motions. Additionally, Kolsky had to request a continuance of the trial date at the calendar call of Defendant Bowens held on October 22, 2009, which resulted in waiver of the defendant’s right to a speedy trial.

Id., slip op. at 9–10.

year an assistant public defender handled “a total of 736 felony cases, in addition to 235 pleas at arraignment.”⁶⁰

- And, once again, a Florida appellate court reversed the decision of the trial judge, stating that “there was no evidence of actual or imminent prejudice to ... [the defendant’s] constitutional rights.”⁶¹ In the opinion of the appellate court, the Public Defender failed to make “any showing of individualized prejudice or conflict *separate from* that which arises out of an excessive caseload.”⁶²

B. Other Important Litigation⁶³

The Kentucky, Missouri, Michigan, and New York cases discussed below were filed in trial courts. In each case, the defense claimed that the representation provided to the indigent accused was deficient due in whole, or in part, to excessive caseloads. Although a judge dismissed the Kentucky case and no appeal was taken, the three other cases are still pending. The Missouri case began in 2010 and may be decided in 2011; but the Michigan and New York cases were filed in 2007 and have not yet had a hearing on the merits. Because systemic challenges take so long to resolve, other options, such as an original action in the state’s highest court coupled with a request for the appointment of a special master to conduct fact finding, should be considered. This is what was done several years ago in a Massachusetts case challenging the adequacy of fees paid to assigned counsel.⁶⁴ As the pro bono lawyer who handled the case explains,

⁶⁰ *Id.* at 2–3.

⁶¹ State v. Bowens, 39 So.3d 479, 481 (Fla. Dist. Ct. App. 2010).

⁶² *Id.* The extensive pleadings, briefs, and the record in the two cases is on the website of the Miami Dade County Public Defender, *available at* http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm.

⁶³ Any list of recent significant litigation pertaining to excessive caseloads should also include a decision discussed earlier—*In re Edward S.*, *supra* note 47, Chapter 3, in which a California appellate court held that a lawyer’s failure to move to withdraw, when confronted with an excessive caseload, can be a basis for finding deficient representation under the *Strickland* standard of ineffective assistance of counsel. See *supra* notes 47–59 and accompanying text, Chapter 3.

⁶⁴ Arianna S. *ex rel.* Weber v. Massachusetts, No. SJ 2004-0282 (Mass. filed June 28, 2004). The lawsuit is described on the website of the National Association of Criminal Defense Lawyers:

Holland & Knight, acting as pro bono counsel, filed a lawsuit on behalf of current and future indigent defendants in the state alleging that the appointed counsel rates led to systemic denials of the right to counsel. The lawsuit ... asked the Court to utilize its superintending power of the court system to, among other things, appoint a special master to determine appropriate rates and direct the Commonwealth to increase compensation accordingly. In support of their position, the plaintiffs proffered a study from The Spangenberg Group, which had undertaken a comprehensive review of the Massachusetts system and concluded that the low fees ... contributed to system-wide deficiencies. The suit was supported by local and statewide bar associations, as well as a number of legal organizations, which wrote

“nearly half of the states have constitutional provisions which either provide their supreme courts with original jurisdiction to ‘superintend’ the justice system or permit the issuance of all writs necessary to the complete exercise of their jurisdiction.”⁶⁵ However, the lawyer cautions that these kinds of cases ultimately involve a “confrontation between judicial and legislative power” involving the use of a “court’s capital.”⁶⁶ Thus, it is important to build “support for the court’s exercise of its superintendence power in the bar, the legislature, and public and editorial opinion.”⁶⁷

Kentucky—Declaratory Judgment

In Chapter 1, I discussed a 2005 report of the Kentucky Department of Public Advocacy (DPA), in which the head of the state’s public defender agency acknowledged that he, as well as the agency’s leadership team and its oversight commission, were likely “responsible for ethical breaches [of staff lawyers] caused by excessive caseloads.”⁶⁸ In May 2008, confronted with a reduced budget for the following fiscal year, the head of the DPA, with the support of its oversight commission, sent letters to trial court judges throughout Kentucky, informing them that effective July 1, 2008, the agency would reduce its services in order to achieve “ethical caseloads” for its lawyers.⁶⁹ The letter cited the ABA’s ethics opinion on excessive workloads⁷⁰ and the ABA Ten Principles of a Public Defense Delivery System,⁷¹ among other authorities. It also explained that due to its reduced budget, 30–40 trial lawyer positions would have to remain vacant during the ensuing fiscal year and the caseloads of staff lawyers, which

amicus curiae briefs. The Supreme Judicial Court then stayed this lawsuit after an interim rate raise and the formation of a State Commission to study indigent defense issues

National Association of Criminal Defense Lawyers, *The Reform Efforts in Massachusetts*, available at <http://www.nacdl.org/public.nsf/defenseupdates/mass010>.

⁶⁵ Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 767 (2010). In a footnote, twenty-three states are listed as having the authority to exercise original jurisdiction in the manner suggested, i.e., Alabama, Arkansas, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 767 n. 106. The judiciary’s power of general superintendence, as well as its inherent authority and equity powers, to oversee and supervise lower courts is discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 134–136.

⁶⁶ Hanlon, *supra* note 65, at 768.

⁶⁷ *Id.*

⁶⁸ See *supra* notes 40–48 and accompanying text, Chapter 1.

⁶⁹ Press Release, The Department of Public Advocacy Notifies Local Judges of Service Reduction (May 28, 2008) (on file with author).

⁷⁰ See *supra* notes 36–54 and accompanying text, Chapter 2.

⁷¹ See *supra* notes 70–73 and accompanying text, Chapter 2.

now averaged “436 new cases per year per lawyer ... would soar near or above 500 cases per lawyer, far above the national standards.”⁷²

The notice sent to the state’s trial court judges was followed at the end of June 2008 with a declaratory judgment action filed by the heads of the DPA and the Louisville and Jefferson County Public Defender Corporation against various legislative and executive branch defendants.⁷³ The lawsuit asked a Kentucky Circuit Court to declare that DPA’s budget for 2008–2009 was insufficient to provide “indigent criminal defendants with the effective assistance of competent counsel;”⁷⁴ that the plaintiffs “have the authority and legal right, as well as the professional responsibility, to implement ... service reduction plans” and “to legally decline to accept appointments to represent indigent criminal defendants when, in their objectively reasonable judgment, their respective caseloads render them unable to competently, diligently and effectively” do so.⁷⁵ In addition, the complaint asked the court to declare that private lawyers appointed to cases that public defenders could not represent be compensated by the State of Kentucky and, if that were not done, that Kentucky’s trial courts dismiss all criminal charges.⁷⁶

Defendants moved to dismiss the complaint based upon principles of separation of powers, standing, and ripeness for adjudication.⁷⁷ While most of the defendants’ arguments were rejected, the trial court agreed that plaintiffs’ claims were “not ripe for adjudication,” because it was unclear whether “the DPA will actually run out of funds and become unable to serve its clients”⁷⁸ Although the trial court therefore dis-

⁷² *Id.* at 3. “National standards” was a reference to the NAC recommendations. *See supra* note 91 and accompanying text, Chapter 2. In addition, the press release noted that DPA full-time lawyers handle approximately 145,000 cases annually; that private lawyers represent 3,000–4,000 cases, usually those involving codefendants in which DPA has a conflict of interest; and that DPA funds to compensate private lawyers for these cases was grossly inadequate since for felony cases only \$300 to \$500 per case was available.

⁷³ *Lewis v. Hollenbach*, Civil Action No. 08-Cl-1094 (Franklin Circuit Court, filed June 30, 2008). Indigent defense in Kentucky, except for the city of Louisville and Jefferson County, is provided by the DPA. An additional plaintiff in the declaratory judgment action was a private criminal defense lawyer who handled conflict cases and proceeded on behalf of all indigent defendants across the state in need of counsel outside the full-time, organized defender offices as a result of potential conflicts of interest. The defendants sued were the State’s Treasurer, Secretary of Finance and Administration, President of the State Senate, and the Speaker of the State House of Representatives.

⁷⁴ *Id.* at 22.

⁷⁵ *Id.*

⁷⁶ *Id.* at 23.

⁷⁷ *Lewis v. Hollenbach*, Civil Action No. 08-Cl-1094, slip op. at 2 (Franklin Cir. Ct., Mar. 10, 2009). In addition, the legislative branch defendants claimed that they had immunity from plaintiffs’ lawsuit. This argument was rejected by the trial court, which ruled that it is “the provenance of the courts to determine the constitutionality of actions of the Executive and Legislative Branches of Commonwealth” *Id.* at 3.

⁷⁸ *Id.* at 6.

missed the lawsuit, the case nevertheless led to additional appropriations for indigent defense.

In April 2009, just over a month after the lawsuit was dismissed, the Kentucky Governor's office announced an additional \$2 million allocation for indigent defense for the remainder of the fiscal year.⁷⁹ The Governor's office explained that it was "committed to finding funding to address the budget needs of both the prosecutors and the DPA next fiscal year."⁸⁰ In fulfillment of this pledge, in June 2009, during a special session of the legislature called to reduce state spending, additional funds for the ensuing fiscal year were appropriated for the DPA and prosecutors.⁸¹ While high caseloads continue to be common among Kentucky public defenders, the caseloads almost surely would be worse had there been no lawsuit.

While the lawsuit was pending, a state audit of DPA's attorney caseloads was undertaken that confirmed the agency was actually representing the voluminous numbers of clients that it claimed.⁸² This undoubtedly contributed to the Governor's willingness to support additional funds for indigent defense. The state audit also fostered the establishment of a Criminal Justice Roundtable sponsored by the Kentucky Bar Association and led by its president.⁸³ In December 2009, the members of this advisory group, which consisted of judges, prosecutors, defense lawyers, and law professors, sent to the Governor and General Assembly a series of findings and recommendations aimed at securing "[a]dequate funding for the courts, prosecutors, and public defenders so the criminal justice system in Kentucky can properly protect constitutional rights, guarantee public safety, and ensure that the courts render valid and reliable results in a timely and fair manner."⁸⁴

⁷⁹ E-mail from Daniel T. Goyette, Chief Public Defender and Executive Director of Louisville and Jefferson County Public Defender Corporation, and Edward C. Monahan, Kentucky Public Advocate, Department of Public Advocacy, to Norman Lefstein (Oct. 13, 2010, 9:23 a.m.) (on file with author).

⁸⁰ Press Release, Funds Allocated to Help Public Defenders Continue Services This Year (April 16, 2009), *available at* <http://www.governor.ky.gov/pressrelease.htm?PostingGUID=%7B580E1C14-D54A-459D-87BD-830B66334317%7D>.

⁸¹ E-mail, *supra* note 79. The sum provided for the DPA was approximately \$1.7 million.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Press Release, Kentucky Bar Association Roundtable Seeks Adequate Funding for Criminal Justice System (December 4, 2009) (on file with author). The findings and recommendations of the Criminal Justice Roundtable are *available at* http://dpa.ky.gov/NR/rdonlyres/5F1F627A-EF50-46BD-9C11-36C6E-186CAB7/0/KBACriminalJusticeRoundtableFindingsandRecommendationsFinalApproved_3_.pdf.

Missouri—Caseload Rules and Supervisory Authority

The Missouri Supreme Court’s 2009 decision in *State ex rel. Missouri Public Defender Commission v. Pratte*⁸⁵ demonstrates how a state public defender’s rule-making authority *can* lead to agency control of its workload. However, the extent to which this actually will occur in Missouri is not yet known.⁸⁶ The decision also reflects the Missouri Supreme Court’s willingness to confront the excessive caseload problem of its state public defender program since the court seemingly could have avoided the issue.

The case began when the Missouri State Public Defender Commission (MSPDC) filed three applications for writs of prohibition aimed at overturning actions of Missouri circuit court judges who appointed assistant public defenders to provide representation. Although the Missouri Supreme Court rejected two of the three applications,⁸⁷ the MSPDC nevertheless obtained a favorable ruling, as the state’s high court, in the exercise of its “supervisory authority,” approved an approach aimed at authorizing the Missouri State Public Defender (MSPD) to control the workloads of its public defenders.⁸⁸

The MSPDC is authorized in its statute to “[m]ake any rules needed for the administration of the state public defender system.”⁸⁹ Pursuant to this authority, the Commission adopted weighted caseload standards,⁹⁰ which are similar to those of the National Advisory Commission on Criminal Justice Standards and Goals.⁹¹ The

⁸⁵ 298 S.W.3d 870 (2009) (en banc). Earlier I quoted the court’s lament about the inadequacies of financial resources available to the state’s public defense program. See *supra* note 71, Chapter 1, and accompanying text.

⁸⁶ See *infra* notes 99–103 and accompanying text.

⁸⁷ One of the unsuccessful petitions for a writ of prohibition is discussed at *infra* note 96 and accompanying text. A second petition rejected by the Missouri Supreme Court dealt with a circuit court judge’s appointment of an assistant public defender to represent a person who had once had private retained counsel. Although this appointment violated a rule approved by the Commission precluding the appointment of public defenders to cases in which private lawyers previously were retained to represent the accused, the Missouri Supreme Court held that the restriction violated state law. A third petition for a writ of prohibition was successful. In this case, a circuit court judge appointed an assistant public defender to provide representation in the lawyer’s private capacity as a member of the bar. The Supreme Court held that such an appointment was not possible, because all lawyers employed by the MSPD are full-time staff members and thus ineligible for appointments in their private capacity as members of the bar.

⁸⁸ Referring to historical and factual background contained in its opinion, the Supreme Court stated that “this information is helpful in the Court’s exercise of its ‘supervisory authority’ and ‘superintending control’ of proceedings in the circuit courts, as authorized by ... the Missouri Constitution.” *Id.* at 873 n. 1.

⁸⁹ *Id.* at 882. This language is contained in MO. REV. STAT. § 600.017 (10) (2003).

⁹⁰ For discussion of weighted caseloads, see *infra* notes 6–46 and accompanying text, Chapter 6.

⁹¹ For discussion of the standards of the National Advisory Commission on Criminal Justice Standards and Goals (NAC), see *supra* note 91 and accompanying text, Chapter 2. The standards adopted by the

Commission's standards further provide that "[i]f the number of hours needed to handle the caseload [in a district public defender office] is greater than the number of available attorney hours, the district is placed on 'limited availability' status" ⁹² If the director of the MSPD determines that a district defender office "has exceeded the maximum caseload standard for a period of three (3) consecutive calendar months, the director may limit the office's availability to accept additional cases by filing a certification of limited availability with the presiding judge of each circuit or chief judge of each appellate court affected." ⁹³ The rule also states that this notification "shall be accompanied by statistical verification that the district office has exceeded its maximum allowable caseload" for the required three months. ⁹⁴ Afterwards, the district defender office is required to file with the court "a final list of category of cases that will no longer be accepted by that district office until the office is reinstated to full availability." ⁹⁵

Relying upon the foregoing regulation, a district office of the MSPD advised judges that its public defenders were unavailable for appointments to probation revocation cases. Notwithstanding the Commission's rule and notification, a trial court judge appointed a public defender to represent a defendant charged with violating probation. Faced with an appointment contrary to its rule, the MSPDC sought a writ of prohibition in the Missouri Supreme Court to prevent the trial court from enforcing its appointment order. However, the state's high court sided with the trial court and rejected the relief sought by the Commission. The Supreme Court explained that persons accused of violating probation have a Sixth Amendment right to counsel, and such cases are within the category of cases in which the MSPD is required by state law to provide defense services. Thus, "[t]he Commission did not have authority ... [under its rule making power] to eliminate a category of indigent defendants whom ... [Missouri law] requires the public defender to represent." ⁹⁶

The Missouri Supreme Court could have ended its decision with this conclusion, but it did not. Instead, the court informed the Commission that if its caseload limits for district offices are exceeded for three months, the solution for the MSPD is "to make the office unavailable for *any* appointments until the caseload falls below the commission's standard." ⁹⁷ In other words, the MSPD cannot declare *categories of cases off limits* for a district office, yet it can declare that *no cases* will be accepted by a district office during

MSPDC authorize lawyers to handle fewer cases annually than the numbers approved by the NAC. The NAC standards and the modifications to those standards adopted by the MSPDC are set forth in the appendix to the Missouri Supreme Court's opinion. *Pratte, supra* note 85, at 890–891.

⁹² *Id.* at 879.

⁹³ 18 Mo. Code of State Regulations 10-4.010(2)(A) (2010).

⁹⁴ *Id.* at 2(D).

⁹⁵ *Id.* at 2(E).

⁹⁶ *Pratte, supra* note 85, at 885.

⁹⁷ *Id.* at 887 (emphasis added).

its period of unavailability. But why is such an approach permissible given that the rejection of *all* cases necessarily excludes *all* categories of cases? The Missouri Supreme Court's only answer to this question was to refer to two of its prior decisions, in which it held that categories of cases could not be declared off limits by the MSPD.⁹⁸

Before a district office declares that it is unavailable to accept new appointments, the court made clear that it expected "the public defender, prosecutors and presiding judge [to] confer" so that "they may agree on measures to reduce the demand for public defender services,"⁹⁹ such as prosecutors agreeing "to limit cases in which the state seeks incarceration"¹⁰⁰ and "determining cases or categories of cases in which private attorneys are to be appointed."¹⁰¹ This last measure led to the court's expression of concern about the adequacy of funds to compensate private lawyers in the wake of its decision:

Lawyers, as members of a public profession, accept the duty to perform public service without compensation. But there are many criminal cases that are sufficiently difficult or complex that an appointment to provide representation without compensation may be oppressive or confiscatory, especially if the burden of providing such representation falls on the relatively few lawyers who appear fully qualified to defend difficult criminal cases. The prerogative of the state, through its courts or otherwise, to dictate how an individual lawyer's professional obligation is to be discharged may be limited by principles that apply to regulatory takings and other deprivations of property without due process of law.

The troubling question of paying lawyers is not presented directly in these writ proceedings, but the issue lurks behind the application of the only coercive remedy the trial judges of this state currently possess—the appointment of counsel who would be required to work without pay.¹⁰²

The reach of the Missouri Supreme court's decision in *Pratte* is currently being tested. Relying on *Pratte*, a district office has declared that it is unavailable to accept *any* cases due to case overload for three consecutive months. Nevertheless a circuit court judge appointed a public defender to a person charged with several felony offenses. In

⁹⁸ In cases decided in 1986 and 1990, the Missouri Supreme Court held that the MSPD could not reject postconviction cases or appointments to defend city ordinance violations. *Id.* at 884, 887.

⁹⁹ *Id.* at 887.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 889. The weight of authority in the United States is against requiring lawyers to serve without compensation in indigent criminal cases. Cases dealing with this subject are summarized in JUSTICE DENIED, *supra* note 2, Chapter 1, at 104–109. "As the above cases illustrate, courts have often been receptive to requests of attorneys, finding certain appointment schemes discriminatory and severe restrictions on compensation to be unconstitutional." *Id.* at 108.

response, the MSPDC once again has filed a petition for a writ of prohibition in the Missouri Supreme Court, asking that the trial court judge's order be set aside because it was issued in violation of the Supreme Court's decision. The Supreme Court has agreed to hear the petition and thus the defendant's case is on hold pending resolution of the MSPDC challenge to the trial court's appointment.¹⁰³

Michigan and New York—Systemic Litigation

In commentary, the ABA's Eight Guidelines address various approaches for dealing with excessive workloads. The blackletter of the Guidelines specifically mention filing motions to halt new appointments or permitting lawyers to withdraw from cases, although other blackletter recommendations are unrelated to litigation.¹⁰⁴ However, the Guidelines' commentary concedes that "conceivably the filing of a separate civil action will be necessary."¹⁰⁵ While not explained, this statement is undoubtedly a reference to systemic challenges to indigent defense systems, which invariably include challenges to excessive workloads. As the report of the National Right to Counsel Committee noted, sometimes these kinds of lawsuits have succeeded:

In pretrial litigation, the most often cited systemic defect is that defense counsel are so overburdened with cases that it is impossible for any attorney, no matter how qualified and experienced, to represent effectively any client, thereby denying current and future indigent defendants the right to the effective assistance of counsel. This approach has been used successfully both at trial and on appeal, and courts also have found that defenders have an inherent conflict of interest when excessive caseloads force them to choose between clients. Still other courts have ruled that inadequate funding by the state or insufficient compensation for attorneys has denied or will lead to the denial of indigent defendants' rights to effective assistance of counsel. Additionally, federal courts have found that delays in the

¹⁰³ See Kathryn Wall, *Suspect's Case on Hold, Caught in Public Defender Case Overload*, THE SPRINGFIELD NEWS-LEADER, September 6, 2010. To assist in deciding the case, the Missouri Supreme Court appointed a trial court judge to serve as a special master to conduct an evidentiary hearing on the issues involved in the case "and to report [to the Missouri Supreme Court] the evidence taken, together with his findings of fact and conclusions of law" State *ex rel.* Missouri Public Defender Commission v. The Honorable John S. Waters and the Honorable Mark Orr, Commission to Take Testimony, No. SC91150, October 14, 2010. The special master concluded that "[t]he MSPD . . . [caseload standards] is not inaccurate, but there is serious question as to whether it is sufficiently inaccurate to justify the imposition of the negative consequences on the rest of the criminal justice system." Report of the Special Master, MSPD v. Hon. John Waters and Hon. Mark Orr, SC91150, February 9, 2011.

¹⁰⁴ For discussion of the Guidelines, see *infra* notes 76–83, Chapter 2.

¹⁰⁵ ABA EIGHT GUIDELINES, *supra* note 76, Chapter 2, at 11.

appellate process due to disproportionately high caseloads are a denial of due process and may continue to lead to due process violations.¹⁰⁶

Michigan and New York are two of the most dysfunctional indigent defense systems in the country.¹⁰⁷ In 2007, in both states systemic lawsuits challenging the delivery of indigent defense services were begun, and in both states the lawsuits are, finally, pending evidentiary hearings in trial courts. The cases illustrate the uncertain fate of such litigation and the length of time that systemic lawsuits sometimes require.

Hurrell-Harring v. State of New York was begun in November 2007, when the New York Civil Liberties Union and private lawyers filed a class-action complaint against the State of New York.¹⁰⁸ Attached to the complaint was the report of the New York State Commission on the Future of Indigent Defense Services,¹⁰⁹ which describes the numerous and serious deficiencies that exist in the delivery of indigent defense services throughout New York.

Although its focus is on five New York counties, the complaint alleges that “the failings in those counties and the types of harms suffered by the named plaintiffs are by no means limited or unique to the named Counties. The State’s failure to provide funding or oversight to any of New York’s counties has caused similar problems throughout the state.”¹¹⁰ Specifically, the complaint claims that among the state’s indigent defense deficiencies are the following:

¹⁰⁶ JUSTICE DENIED, *supra* note 2, Chapter I, at III.

¹⁰⁷ At the trial level in both Michigan and New York, counties pay for indigent defense services, and in both states the funding is inadequate. The filing of the two systemic cases challenging indigent defense in the two states coincided with critical reports of the representation systems in each. *See* NAT’L LEGAL AID & DEFENDER ASSO’C, EVALUATION OF TRIAL LEVEL-INDIGENT DEFENSE SYSTEMS IN MICHIGAN: A RACE TO THE BOTTOM (2008); FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, NEW YORK STATE COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES (2006). Both the New York and Michigan cases were filed as class-action lawsuits. Additional class-action suits dealing with indigent defense are presently pending in Georgia and Washington State. In Georgia, the lawsuit challenges the lengthy delays that frequently occur before appellate counsel is appointed for defendants seeking to appeal their convictions. *See* Southern Center for Human Rights (Press Release), *Judge Orders Georgia to Provide Lawyers for Inmates Seeking Appeals*, Feb. 23, 2010. In Washington, the litigation deals specifically with caseloads, as plaintiffs contend that misdemeanor caseloads of defenders in two of the state’s cities are excessive, thereby depriving defendants of effective assistance of counsel. *See* Martha Nell, *Class Action Says Too-High Public Defender Caseload in Muni Court Denies Right to Counsel*, ABA JOURNAL LAW NEWS NOW, June 21, 2011. Still another pending class-action lawsuit filed in Louisiana is discussed at *infra* note 116.

¹⁰⁸ *Hurrell-Harring v. State of New York*, Index No. 8866-07 (Sup. Ct. N.Y., Albany Div., filed April 28, 2008). The citation is to the 103-page Amended Class Action Complaint that superseded the original complaint filed in 2007. Court documents in the case are available at <http://www.nyclu.org/node/1807>.

¹⁰⁹ *See supra* note 107.

¹¹⁰ *Hurrell-Harring*, *supra* note 108, at 5.

restrictive client eligibility standards; no written hiring and performance standards; or meaningful systems for attorney supervision and monitoring; lack of adequate attorney training; a lack of resources for support staff; appropriate investigations and expert witnesses; no attorney caseload or workload standards; and absence of consistent representation of each client by one lawyer; a lack of independence from the judiciary, the prosecutorial function, and political authorities; and inadequate resources and compensation for public defense services providers ...¹¹¹

As a consequence of these defects, the complaint alleges that “indigent criminal defendants in the Counties and across the state face a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel.”¹¹²

A separate section of the complaint deals with excessive caseloads and workloads. It claims that virtually all public defenders in New York have too many cases; that the problem is made worse because defenders’ also have retained clients; and that there are no limits on the number of cases that private lawyers serving as assigned counsel may represent and that these lawyers also have retained clients.¹¹³ Further, as a consequence of caseload pressures, the complaint alleges that only a small percentage of cases are ever actually tried in New York and that “[e]xcessive caseloads and workloads place enormous pressure on public defense attorneys to secure plea agreements and avoid going to trial, even when this decision may not be in the best interests of their clients.”¹¹⁴

The complaint alleges a cause of action pursuant to New York’s Constitution and laws, the federal Constitution’s Sixth and Fourteenth Amendments, and Title 42, § 1983, of the United States Code.¹¹⁵ The complaint’s prayer for relief seeks “a permanent injunction requiring defendants to provide a system of public defense consistent with the Constitution and laws of the State of New York and the United States Constitution.”¹¹⁶

¹¹¹ *Id.* at 4.

¹¹² *Id.* at 5.

¹¹³ *Id.* at 88–89.

¹¹⁴ *Id.* at 89.

¹¹⁵ For the text of § 1983 and discussion of the statute, see *supra* note 82 and accompanying text, Chapter 3.

¹¹⁶ *Hurrell-Harring*, *supra* note 108, at 103. For discussion of earlier systemic lawsuits from jurisdictions other than Michigan and New York, see JUSTICE DENIED, *supra* note 2, Chapter 1, at 113–117. Sometimes class-action lawsuits of the kind brought in Michigan and New York do not result in a prompt evidentiary hearing, but nevertheless serve to stimulate reform efforts. This is seemingly what has happened with a lawsuit filed in 2004 challenging the indigent defense system in Calcasieu Parish, Louisiana. The lawsuit is still pending, although there has never been an evidentiary hearing in the case. However, the case has withstood a motion to dismiss, and I am advised by sources in Louisiana that pendency of the lawsuit has played an important role in securing additional funding for indigent defense in Calcasieu Parish. A second amended complaint in the case of John Anderson v. State of Louisiana, No. C545852 (19th Judicial Dist. Ct., Parish of East Baton Rouge), was filed on March 13, 2010. The original complaint in the case is reviewed on the website of the

Although a motion to dismiss the complaint was rejected in the trial court, the State of New York prevailed when the case was appealed to New York's appellate division. By a vote of 3:2, the appeals court held that the complaint was not justiciable, i.e., not suitable for resolution by the judiciary as opposed to the executive or legislative branches of government.¹¹⁷ In addition, because there was no claim that any defendants had been prejudiced, as required by *Strickland v. Washington*,¹¹⁸ plaintiffs' claim "is simply a general complaint about the quality of defense services offered to indigent criminal defendants in this state. Reduced to its essential terms, plaintiffs complaint seeks to establish that 'deficiencies' exist ... but ... fails to show how these ... 'deficiencies' had served to affect the outcome of any particular case."¹¹⁹

However, in a 4:3 decision, the New York Court of Appeals reversed and remanded to the trial court for a hearing on the merits, which is where the case stands now.¹²⁰ The majority's reasoning is summarized in the following passage:

The basic, unadorned question presented by ... [plaintiffs' complaint] is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial. Indeed, in cases of outright denial of the right to counsel prejudice is presumed. *Strickland* itself, of course, recognizes the critical distinction between a claim for ineffective assistance and one alleging simply that the right to the assistance of counsel has been denied and specifically acknowledges that the latter kind of claim may be disposed of without inquiring as to prejudice.¹²¹

The majority conceded that, in the end, it might turn out that the real issue in the case is whether effective representation is being provided to defendants in New York State, in which case the issues would not be subject to resolution in a civil action. But the majority read the complaint as setting forth a "constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*."¹²² This is a tribute to the complaint that launched the case, which the majority characterized as "detailed, multi-tiered ... meticulously setting forth the factual bases of the

National Association of Criminal Defense Lawyers, *available at* <http://www.nacdl.org/public.nsf/DefenseUpdates/Calcasieu001>.

¹¹⁷ *Hurrell-Harring v. State of New York*, 883 N.Y.S.2d 349 (N.Y. Sup. Ct., App. Div. 2009).

¹¹⁸ For discussion of the *Strickland* decision, see *supra* notes 41–81 and accompanying text, Chapter 3.

¹¹⁹ *Hurrell-Harring*, *supra* note 117, at 352.

¹²⁰ *Hurrell-Harring v. State of New York*, 930 N.E.2d 217 (N.Y. Ct. App. 2010).

¹²¹ *Id.* at 225.

¹²² *Id.*

individual claims and the manner in which they are linked to and illustrative of broad systemic deficiencies”¹²³

New York’s *Hurrell-Harring* case illustrates the deep divisions among judges about how the Sixth Amendment should be interpreted when a jurisdiction’s implementation of the right to counsel is challenged and whether courts are the proper vehicle for dealing with systemic indigent defense problems. The class action filed in Michigan illustrates the same divisions among judges, and in other ways is similar to *Hurrell-Harring*. In *Duncan v. Michigan*,¹²⁴ the complaint emphasized indigent defense deficiencies in three Michigan counties and, much like the complaint in the New York case, alleged that “the failings in those counties, and the types of harms suffered by these plaintiffs, are by no means limited or unique to the three counties. Defendants’ failure to provide funding or oversight of any of the State’s counties has caused similar problems throughout the State.”¹²⁵ Also, like the complaint in the New York case, the complaint claimed that “many indigent defense providers [in the three counties] have too many cases.”¹²⁶ And, like the New York case, declaratory and injunctive relief was sought in order to reform indigent defense based upon violations of the Sixth and Fourteenth Amendments to the Constitution, the Michigan Constitution, and Title 42 U.S.C. § 1983.¹²⁷

The State of Michigan’s motion to dismiss the complaint was denied by the trial court judge. Then, invoking much of the same reasoning later used by the New York Court of Appeals in the *Hurrell-Harring* case, a Michigan Court of Appeals affirmed in a 2:1 decision.¹²⁸ On April 30, 2010, the Michigan Supreme Court unanimously affirmed

¹²³ *Id.*

¹²⁴ *Duncan v. Michigan*, No. 07-000242-CZ (Circuit Court of Ingham County, filed February 22, 2007). The complaint is *available at* <http://www.aclu.org/racial-justice/duncan-et-al-v-state-michigan-complaint>.

¹²⁵ *Duncan v. Michigan*, Complaint at 5.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 5.

¹²⁸ *Duncan v. Michigan*, 774 N.W.2d 89 (Mich. Ct. App. 2009). An important part of the Court of Appeals reasoning for refusing to dismiss the case is contained in the following passage:

The *Strickland* Court made clear that where there is actual or constructive denial of counsel “[p]rejudice ... is so likely that case-by-case inquiry into prejudice is not worth the cost.” ... Taking into consideration this precedent for the purpose of analyzing justiciability, it is reasonable to conclude that justiciable harm or injury exists when there is an actual denial of counsel, there is an overwhelmingly deficient performance by counsel equating to constructive denial of counsel, or when counsel with conflicting interests represents an indigent defendant. As will be detailed later in this opinion, plaintiffs’ complaint contains allegations that fit within the categories of actual and constructive denial of counsel, as well as allegations that encompass other situations in which prejudice is presumed. Our conclusion that the two-part test in *Strickland* should not control this litigation is generally consistent with caselaw from other jurisdictions addressing comparable suits.

Id. at 127–128.

the ruling of the Michigan Court of Appeals, thus denying once again defendants' motion for summary disposition of the case.¹²⁹ However, on July 16, 2010, in a stunning 4:3 decision, consisting of a single paragraph, the Michigan Supreme Court vacated its order of April 30, 2010, reversed the 2009 judgment of the Michigan Court of Appeals and held that the case was not justiciable. The Michigan Supreme Court, therefore, remanded the case to the trial court for entry of summary disposition in favor of defendants.¹³⁰ However, that was not the end of the matter, because on November 30, 2010, the Michigan Supreme Court reversed itself again, this time remanding the case for further proceedings in the trial court.¹³¹

C. Federal Government Lawsuits: A Potential Remedy

The depth of the indigent defense crisis in this country, as well as the mixed results achieved through litigation in state courts, has prompted calls for the federal government not only to provide financial support of state indigent defense systems¹³² but also to be able to challenge deficiencies in these systems through litigation. In September 2010, the American Constitution Society (ACS) released a briefing paper that outlines several litigation strategies that Congress could authorize the federal government to pursue.¹³³

Perhaps the most promising course would be to grant the Department of Justice (DOJ) authority to “file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations throughout the country.”¹³⁴ DOJ already is authorized to file lawsuits against state officials who systematically deny juveniles their due

¹²⁹ *Duncan v. Michigan*, 780 N.W.2d 843 (Mich. 2010).

¹³⁰ *Duncan v. Michigan*, 784 N.W.2d 51 (2010). Following this decision, plaintiffs filed a motion for reconsideration. See John Minnis, *Duncan v. State of Michigan—Attorney Files Motion for Reconsideration in Indigent Counsel Case*, JACKSON COUNTY LEGAL NEWS, September 6, 2010, available at <http://www.legalnews.com/jackson/697121>.

¹³¹ *Duncan v. Michigan*, 790 N.W.2d 695 (2010). An Internet posting explains that the Michigan Supreme Court's reversals of position in *Duncan* are attributable to membership changes of the Michigan Supreme Court. See David Carroll, *Gideon Alert: As Michigan Supreme Court Again Reinstates ACLU Duncan Lawsuit, the Race to the Bottom Continues in Chippewa and Bay Counties*, December 2, 2010, available at <http://nlada.net/jscri/blog/gideon-alert-michigan-supreme-court-again-reinstates-aclu-duncan-lawsuit-race-bottom-cont>. The Michigan Supreme Court's order of November 30, 2010 will be published with separate statements of several of the justices. See *Duncan v. Michigan*, 2010 WL 5186037, December 22, 2010.

¹³² See, e.g., JUSTICE DENIED, *supra* note 2, Chapter I, at 200–201 (Recommendation 12); ABA GIDEON'S BROKEN PROMISE, *supra* note 34, Chapter I, at 41–42 (Recommendation 2).

¹³³ Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, Issue Brief, AM. CONST. SOC'Y (September 2010), available at <http://www.acslaw.org/indigentdefense>.

¹³⁴ *Id.* at 5.

process rights to effective legal representation, so the proposal is merely an extension of a kind of authority that DOJ has now pertaining to state juvenile court proceedings.¹³⁵ The briefing paper also argues that DOJ should be authorized to deputize private litigants to file federal enforcement actions and that nongovernmental actors be incentivized by fee-shifting provisions that would enable attorney fees to be recovered if the lawsuits succeed.¹³⁶

Near the end of September 2010, Sen. Patrick Leahy, chair of the Senate Judiciary Committee, introduced legislation to reauthorize the Justice for All Act, which was first enacted in 2004.¹³⁷ Key provisions of the proposed legislation, which were not part of the original Justice for All Act, closely resemble the first proposal contained in the ACS briefing paper. Thus, the proposed bill declares the following:

[It is] “unlawful for any governmental authority or any person acting on behalf of a governmental authority to engage in a pattern or practice ... that deprives persons of their rights to assistance of counsel as protected under the Sixth Amendment and Fourteenth Amendment to the Constitution of the United States.”¹³⁸

And, when “the Attorney General has reasonable cause to believe that a violation ... [of the foregoing provision has occurred], the Attorney General ... may, in a civil action, obtain appropriate equitable relief to eliminate the pattern or practice.”¹³⁹ The effective date of these provisions would be delayed two years from the enactment date of the statute to provide states adequate time to improve their indigent defense systems. To assist states in doing so, the statute authorizes an appropriation of \$5 million for fiscal years 2011 to 2015, to allow the Attorney General to provide, upon request,

¹³⁵ As Professor Primus explains:

DOJ currently has the authority under [Title 42 U.S.C.] Section 14141 to file federal enforcement actions against states that are systematically depriving juveniles of their due process right to effective trial counsel. However, the problem of states systematically violating juveniles’ constitutional right to counsel persists. Some states routinely deny juveniles access to counsel altogether.

Id. at 7. The cases instituted thus far under the current statute have usually involved federal government challenges to conditions of juvenile detention facilities, which also are covered under Section 14141.

¹³⁶ *Id.* at 5, 7–8. A third proposal advanced in the briefing paper calls for a posttrial habeas corpus cause of action. *Id.* at 8–12. See also Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010).

¹³⁷ Justice for All Act of 2004, Pub. L. 108–405, Oct. 30, 2004, 118 Stat. 2260 (codified in scattered sections of 18 and 42 U.S.C.).

¹³⁸ Justice for All Reauthorization Act of 2010, S. 3842, § 12(c)(1), available at <http://www.govtrack.us/congress/bill.xpd?bill=111-3842>.

¹³⁹ *Id.* at § 12(c)(2).

“technical assistance to States and local governments ... to meet the obligations established by the Sixth Amendment to the Constitution”¹⁴⁰

If this legislation is enacted and funds appropriated, it could potentially lead to substantial improvements in indigent defense among state and local governments. Not only could expert consulting services be provided under the auspices of DOJ to foster improvements, but jurisdictions would know that if they did not address deficiencies in their indigent defense systems, they might be sued by the federal government.

While the proposed legislation is, therefore, promising, the reality is that its passage remains doubtful, especially in a badly divided Congress in which the improvement of indigent defense is not likely to be a high priority.¹⁴¹

¹⁴⁰ *Id.* at § 12(b)(2). Others have suggested that Congress enact a new federal cause of action to enable indigent defendants to seek equitable relief in the federal courts for systemic Sixth Amendment violations on a prospective basis. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. LEG. 487 (2010); Cara H. Drinan, *A Legislative Approach to Indigent Defense Reform*, Issue Brief, AM. CONST. SOC'Y (July 2010), available at <http://www.acslaw.org/indigentdefense>.

¹⁴¹ Republicans gained several seats in the Senate and took control of the House by a large margin in the 2010 election. Many of these Republicans campaigned on promises to cut federal spending, which has been a focus of debate during the new Congress. See, e.g., <http://www.thefiscaltimes.com/Articles/2011/02/09/GOP-Spending-Cuts-Hit-Obama-Priorities.aspx?p=1>.

CHAPTER 8

Case Studies:
Public Defense Programs and Control of Caseloads

So much has been written about excessive caseloads in public defense that it is easy to forget that there are defense programs that manage to avoid the problem. In this chapter, I discuss three effective programs that I visited in preparation for writing this book. Two of the programs employ full-time public defenders, whereas the third is an assigned counsel program that relies solely upon private lawyers.

The three programs differ from one another. This fact, in part, accounts for their selection; each program also illustrates important lessons about the delivery of defense services. The first of these programs is a statewide public defense agency that furnishes representation through both public defenders and private counsel (the Massachusetts Committee for Public Counsel Services). The second program is a large urban public defender agency with a sizeable staff but limited responsibilities for the representation furnished by assigned counsel (the District of Columbia Public Defender Service). The third program is comprised solely of private lawyers and provides representation in a California county (the Private Defender Program of San Mateo County).

In reviewing these programs, I discuss their respective caseloads and the factors that enable them to be controlled. I also describe the commitment of the programs to training and the way in which the two programs with public defenders provide supervision. In addition, in the case of the Massachusetts and San Mateo County programs, I discuss their oversight of assigned counsel. Also, because it is so unusual among assigned counsel programs, I summarize the San Mateo County approach in providing investigators to assist lawyers. In Chapter 9, I offer a summary of the three programs and the most critical factors they have in common.

Several disclaimers are appropriate at the outset. First, the three programs featured in this chapter are not the only ones in the country that succeed in avoiding excessive caseloads. Surely there are other programs that provide defense services in state courts that could have been included had time and resources permitted me to review them.¹

In addition, because I did not conduct in-depth site evaluations, my descriptions of the three programs do not cover all facets of their operations. While I interviewed persons associated with the programs and reviewed substantial material related to each, I did not inspect files maintained by defense lawyers, interview clients that lawyers previously represented, or observe court proceedings in which lawyers represented clients. For these reasons, I do not offer categorical assessments of the quality of representation provided by each.

Finally, while I do not review or contrast the financial support for the three indigent defense programs, they undoubtedly are among the better-funded programs in the country. Absent their current levels of funding, the programs could not be expected to

¹ As I noted in the Introduction and discuss later, excessive caseloads are not a significant problem for federal defender programs. See also *infra* notes 42–45 and accompanying text, Chapter 9.

have the same success in controlling the caseloads of their lawyers or in providing the level of services that they do.

A. Massachusetts Committee for Public Counsel Services (CPCS)²

CPCS Statute

Indigent defense in Massachusetts is provided through a statewide program, known as CPCS. Among public defense programs, the name—“Committee for Public Counsel Services”—is unusual, and so, too, is the breadth of its jurisdiction, which extends to all criminal and certain noncriminal legal services, as set forth in its statute.³ The CPCS statute provides for the establishment of both a “public defender division,” consisting of salaried public defenders, and a “private counsel division,” through which private lawyers are assigned to provide representation on a per-case basis.⁴ Unlike some statewide public defense programs, CPCS has broad responsibilities for the appointment of private counsel and the establishment of standards for their representation.⁵ CPCS employs more than 400 persons, including staff lawyers, investigators, and social workers in its Public Defender Division, Children and Family Law Division, and Youth Advocacy Department.⁶

² Information about CPCS not supported with footnote citations was acquired through multiple e-mail exchanges and during in-person interviews with CPCS officials, the first and most extensive of which was held in Boston on November 27, 2007. In gathering information about CPCS, I received extensive help from William J. Leahy, former Chief Counsel of the agency, Andrew Silverman, Deputy Chief Counsel of the Public Defender Division, and Nancy Bennett, Deputy Chief Counsel of the Private Counsel Division. I am grateful to all of them for their assistance.

³ See MASS. GEN. LAWS ANN. ch. 211D, §§ 1–16 (West 2005 & Supp. 2011). The history of the CPCS and its jurisdiction is discussed in the report of a study commission established by the Massachusetts legislature. See REPORT OF THE COMMISSION TO STUDY THE PROVISION OF COUNSEL TO INDIGENT PERSONS IN MASSACHUSETTS 4–5 (2005) [hereinafter ROGERS COMMISSION REPORT], *available at* www.publiccounsel.net/administration/pdf/Rogers%20Commission%20Report.pdf.

⁴ MASS. GEN. LAWS ANN. ch. 211D, §§ 6 (a) and (b).

⁵ *Id.* at § (b). See also *infra* notes 40–52 and accompanying text.

⁶ The staff of CPCS also includes three Training Directors and personnel who train, certify, support and oversee the performance of private counsel; staff to pay private counsel, investigator and expert witness bills; and an internal Audit and Oversight Unit to maintain the integrity of its expenditures. In addition, CPCS maintains an in-house Immigration Impact Unit and a Special Litigation Unit. CPCS operations are directed by a ten-member management team that includes, in addition to the Chief Counsel, the General Counsel, the Deputies Chief Counsel for the Public Defender Division, the Private Counsel Division, and the Children and Family Law Division; the Director of the Mental Health Litigation Unit, the Director of the Youth Advocacy Department, the assistant Deputy Chief Counsel for the District Court offices within the Public Defender Division, the Chief Financial Officer and the Director of Human Resources.

Independence

Oversight by an independent board of trustees of the functions of indigent defense providers is essential. The first of the ABA's Ten Principles emphasizes the need for an independent governing body,⁷ but the idea actually dates back to the ABA's first edition of ABA Standards Relating to Providing Defense Services, approved by the ABA House of Delegates in 1968, five years after the *Gideon* decision.⁸ Massachusetts has an independent board, known as the "Committee," that oversees the work of CPCS. The Committee consists of fifteen persons appointed to three-year terms by the Massachusetts Supreme Judicial Court.⁹ According to the CPCS statute, in making its appointments the court is to "give appropriate consideration to nominees for the fifteen positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association, and other appropriate groups, including, but not limited to, the Massachusetts Black Lawyers' Association, Women's Bar Association, and the Massachusetts Association of Women Lawyers."¹⁰

Regardless of the structure for appointing governing boards of defense programs, there is no guarantee that the members will always act independently and resist inappropriate pressures exerted by judges and executive officials.¹¹ In an effort to ensure independence, the 2009 Justice Denied report urges that "members of the Board or Commission of the agency ... be appointed by leaders of the executive, judicial, and legislative branches of governments, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointment."¹² While the

⁷ "The public defense function, including the selection, funding, and payment of defense counsel, is independent." ABA TEN PRINCIPLES, *supra* note 57, Chapter I, at 1.

⁸ The ABA Standards stated as follows:

The [legal representation] plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees.

ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, Std. 1.4 (1968). Similar language is contained in the current edition of ABA standards for defense representation. *See* ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at 5-1.3. For discussion of problems that sometimes arise in the absence of independence and how independence can be achieved, *see* JUSTICE DENIED, *supra* note 2, Chapter I, at 80-84, 185-188.

⁹ MASS. GEN. LAWS ANN. ch. 211D, § 1.

¹⁰ *Id.*

¹¹ The report of the National Right to Counsel Committee provides examples of inappropriate pressures to which defenders are sometimes subjected by judges and executive officials. *See* JUSTICE DENIED, *supra* note 2, Chapter I, at 80-84.

¹² *Id.* at 185, Recommendation 2.

CPCS statute does not conform to this recommended structure, the former head of CPCS has stated that the “members [of the Committee] serve with complete independence, and complete fidelity to the great principles of fair play and equal justice which gave rise to the *Gideon* case itself, and all that has followed.”¹³ Ultimately, a strong tradition of acting independently can be just as important as the procedures for establishing the oversight group.¹⁴

Special Statutory Provisions

To a considerable degree, the success of CPCS, including its ability to control the caseloads of its lawyers, is attributable to its enabling legislation. Below are the statutory provisions that seem to be most significant. In noting the statute’s language pertaining to caseloads, I discuss litigation of several years ago in which the CPCS statute was prominently discussed.

- The Committee is required to “establish standards and guidelines for the training, qualifications and removal of counsel in the public and private counsel divisions who accept its appointments, and shall provide pre-service and in-service training for both private counsel and public counsel who accept assignments and salaried public counsel.”¹⁵ While there are other state public defender statutes that deal with training, the Massachusetts law is likely the only one to mandate “pre-service

¹³ E-mail from William Leahy, former Chief Counsel, CPCS, to Norman Lefstein (September 25, 2009, 2:20 p.m.) (on file with author).

¹⁴ Just as this book was nearing completion during the spring of 2011, Massachusetts Governor Deval Patrick proposed significant changes to the state’s program of indigent defense. All of these changes were still pending when the book went to press:

Changes include abolishing the existing independent commission that oversees the Committee for Public Counsel Services (CPCS) and creating a new public defender department under the executive branch. The Governor would also end CPCS’ primary reliance on the private bar and instead provide most services through full-time staffed public defender offices. Under the Governor’s plan, the new department would also be responsible for conducting eligibility screening and collecting fees from indigent clients for services.

David Carroll, *Gideon Alert: MA Governor Proposes Disbanding Statewide Defender Commission*, January 26, 2011, available at <http://www.nlada.net/jscri/blog/gideon-alert-ma-governor-proposes-disbanding-statewide-defender-commission>.

Thus, the features that make the Massachusetts defense program successful, consistent with ABA recommendations, would be altered in fundamental ways. See, e.g., *supra* notes 61–62 and accompanying text, Chapter 1, and *infra* notes 28–29 and accompanying text, Chapter 9. In contrast to Governor Patrick’s proposal, effective June 2010, the State of New York enacted a law establishing, for the first time, a statewide Office of Indigent Legal Services to be governed by a nine-member board for the purpose of the improving the quality of indigent defense representation provided by public defenders, assigned counsel, and conflict offices. Ironically, William J. Leahy, formerly head of CPCS, was appointed to serve as executive director of the new program. A description of the New York Office of Indigent Legal Services is available at <http://www.nylj.com/nylawyer/adgifs/decisions/021511lippman.pdf>.

¹⁵ MASS. GEN. LAWS ANN. ch. 211D, § 4.

and in-service” training for both public defenders and private counsel and also to require the establishment of qualification and removal standards.

- Further, the statute requires that the Committee “supervise and maintain a system for the appointment or assignment of counsel” at all stages of criminal and non-criminal proceedings in which counsel is required for indigent persons.¹⁶ Pursuant to this authority, appointments are made to lawyers who have been certified by CPCS to accept assignments in particular types of cases. Judges and their staffs are thus removed from the daily process of arranging for the appointment of lawyers to specific cases.¹⁷
- The statute prohibits lawyers from the public defender division from being “assigned to represent more than one defendant in any matter before any court on the same case or arising out of the same incident”¹⁸ Thus, the representation of one or more codefendants by multiple public defenders constitutes a conflict of interest and is prohibited by the CPCS statute. In contrast, in a number of states, rules related to imputed disqualification have been relaxed and codefendants are sometimes represented by different public defenders either from the same office or from branch offices.¹⁹
- The Committee is required to “establish standards” for representation by public defenders and private attorneys that include “vertical or continuous representation at the pre-trial and trial stages . . . whenever practicable.”²⁰ Although vertical representation is strongly recommended by the ABA,²¹ the statutory preference in Massachusetts is absent from most other state statutes that establish public defense programs.

¹⁶ *Id.* at §§ 5 and 6 (b).

¹⁷ This is consistent with ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at 5-1.3 (a): “The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-services programs.” See also ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at Principle 1.

¹⁸ MASS. GEN. LAWS ANN. ch. 211D, § 6(a)(i). Although not specifically prohibited by Massachusetts law, lawyers from the private counsel division also do not represent codefendants except occasionally in bail proceedings when only one duty day lawyer is present at arraignment. In *Mass. v. Davis*, 381 N.E.2d 181, 186 (Mass. 1978), the state’s Supreme Judicial Court addressed the representation of codefendants: “Regardless of the source from which the conflict is derived, to establish a violation of one’s right to counsel a defendant need only demonstrate the existence of a conflict. Once a conflict is shown, there is no requirement that resulting prejudice be proved.” The decision adheres to the approach of *Holloway v. Arkansas*, 435 U.S. 475 (1978), decided earlier the same year.

¹⁹ See JUSTICE DENIED, *supra* note 2, Chapter 1, at 98–99.

²⁰ MASS. GEN. LAWS ANN. ch. 211D, § 9(a).

²¹ See ABA PROVIDING DEFENSE, *supra* note 8, Introduction, at Std. 5-6.2 (“Counsel initially appointed should continue to represent the defendant throughout the trial court proceedings”); ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at Principle 7 (“The same attorney continuously represents the client until completion of the case.”).

- In addition, the Committee must “establish standards” that ensure “adequate supervision provided by experienced attorneys who shall be available to less experienced attorneys.”²² In implementing this provision, CPCS compensates supervising lawyers and mentors for private assigned counsel.²³
- The Committee is also required, “subject to appropriation, [to] utilize its attorney staff within the private counsel division.”²⁴ Thus, while the private bar is not guaranteed a fixed minimum percentage of the cases, and public defenders are not limited to a maximum percentage of the cases,²⁵ the Committee is obligated to make sure that the private bar is actively engaged in furnishing defense representation. However, the statute recognizes that the state’s appropriation may have an impact on the extent of private bar participation.²⁶
- Finally, and most important for purposes of controlling caseloads, the Committee is required to “establish standards” for both public defender and private assigned counsel that “shall include ... specified caseload limitation levels.”²⁷ The significance of this language and the way in which the Massachusetts Supreme Judicial Court (SJC) has sustained the Committee’s authority over its caseloads is described below.²⁸

Significant Litigation

In May 2004, Hampden County in Western Massachusetts had too few private lawyers to appoint to criminal cases because of the state’s extremely low rates of compensation paid to assigned counsel.²⁹ In response to this situation, judges appointed CPCS

²² MASS. GEN. LAWS ANN. ch. 211D, § 9(e)(iii).

²³ For further discussion of this subject, *see infra* notes 44–45 and accompanying text.

²⁴ *Id.* at § 6A.

²⁵ In contrast, *see infra* note 68 and accompanying text dealing with the D.C. Public Defender Service, in which the applicable statute specifies the maximum percentage of cases that the agency may represent.

²⁶ The ABA has long urged the “active and substantial participation of the private bar” in systems of indigent defense. *See* ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at 5-1.2 (b). *See also infra* note 14 (material quoted in text), Chapter 9.

²⁷ MASS. GEN. LAWS ANN. ch. 211D, § 9(c).

²⁸ Much of the litigation that occurred in 2004 (along with its impact on CPCS and the right to counsel in Massachusetts) is described in THE SPANGENBERG GROUP, INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM (2005), *available at* <http://www.sado.org/fees/MAindigdefreform2005.pdf>. On the day following the *Lavallee* decision (*see infra* note 31 and accompanying text), the Massachusetts Legislature, in Chapter 243 of the Acts of 2004, increased all private counsel compensation rates by \$7.50 per hour. On July 28, 2005, one year to the day following the decision, the Legislature in Chapter 54 of the Acts of 2005 further increased the rates of compensation. For the current rates, *see infra* notes 46–47 and accompanying text.

²⁹ “In April 2004 the private counsel division rate structure was as follows: \$30 per hour for District Court cases; \$39 per hour for Superior Court non-homicide Superior Court cases; and \$54 per hour for murder cases.” ROGERS COMMISSION REPORT, *supra* note 3, at 5.

to provide defense services, but no lawyers from the public defender division filed appearances, except for the purpose of providing representation at bail or preventive detention hearings. In short order, twenty-three defendants in several district courts were held for prosecution without counsel, and the District Court ordered the CPCS Chief Counsel to personally represent these defendants. The next day, in an effort to invoke the general superintendence powers of the Supreme Judicial Court of Massachusetts (SJC),³⁰ CPCS and the American Civil Liberties Union of Massachusetts filed a petition on behalf of the defendants, urging that the trial courts in Hampden County order higher rates of compensation for private lawyers. CPCS also insisted that due to funding limitations it lacked sufficient lawyers from its public defender division to represent the defendants.

On July 28, 2004, the SJC issued its opinion in *Lavallee v. Justices in the Hampden Superior Court*³¹ and held that the defendants were being deprived of their right to counsel under the Massachusetts Constitution. The court ordered that no defendant could be held for more than seven days without counsel and that no case could be maintained against a defendant who was without counsel for more than forty-five days. The SJC rejected the Attorney General's suggestion of alternative remedies, which included requiring lawyers from the CPCS public defender division to represent the defendants or be held in contempt for refusing to do so.³²

The decision of the SJC accepted the position of CPCS that it was unable to provide the requisite representation:

The Attorney General contends that because there are adequate remedies available, relief under ... [powers of general superintendence] should be denied. He first describes certain “administrative remedies” within CPCS, including (1) assignment of lawyers from the public defender division of CPCS The “relief” described involves the internal management of CPCS and is not something that is available to the petitioners under any administrative procedure.

There is no merit in the further suggestion that an available remedy lies in contempt proceedings that could be brought against CPCS. While contempt may be an appropriate remedy in certain circumstances, there is no indication that it is warranted here. If the Attorney General has reason

³⁰ “The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.” MASS. GEN. LAWS ANN. ch. 211 § 3.

³¹ 812 N.E.2d 895 (Mass. 2004).

³² Brief of the Defendants-Appellees, *Lavallee v. Justices in the Hampden Superior Court*, No. SJC-09268 (Mass., June 28, 2004).

to believe that a judge's assignment order is being disregarded, he may seek appropriate relief, including contempt.

Finally, the Attorney General contends that "failing all else ... CPCS should move in the lower court for relief, such as continuances, or the suppression of an uncounselled lineup identification, or even dismissal in an extreme case." This would be an eminently reasonable solution except for the fact that CPCS says it does not have any attorneys available to represent petitioners in the manner suggested.³³

The acceptance of CPCS representations about its public defender caseloads is also reflected in a memorandum opinion of a single justice of the SJC issued less than two weeks after the *Lavallee* decision.³⁴ During July 2004, while the *Lavallee* litigation was pending before the SJC, a Superior Court judge of Hampden County ordered CPCS to enter appearances on behalf of three defendants who were without counsel. Although CPCS asserted that their lawyers in the local office had reached their caseload limits, the trial court insisted that the CPCS lawyers file appearances. The matter was appealed to a single justice of the state's highest court, who on August 9, 2004, vacated the trial court's order and issued the following memorandum decision:

The committee is authorized by the Legislature ... to establish caseload levels for attorney in its public counsel division to ensure quality representation for indigent criminal defendants. In this regard the committee exercises discretion carrying out a legislative function The committee is presumed to act in good faith in determining caseload limits The caseload limits established by the committee for its public counsel division had been determined long before the shortage of attorneys in Hampden County developed. There has been no showing that the caseload limits were established to frustrate or undermine the assignment of cases to attorneys in the committee's Hampden County office. There is no showing that the committee has acted other than in good faith in setting the caseload limits for its public counsel division.³⁵

Conceivably, the court would have issued the same order even if the CPCS statute did not authorize the committee to establish "caseload limitation levels." But the legislature's authorization to CPCS to determine its own caseloads undoubtedly made it easier for a single justice of the SJC to defer to CPCS respecting the availability of its staff to accept additional cases. In 2009, during the 25th Anniversary Celebration of

³³ *Lavallee*, *supra* note 31, 812 N.E.2d at 906–907.

³⁴ *Lavallee v. Justices in the Hampden Superior Court, Supreme Judicial Court for Suffolk County No. SJ-2004-198,199*, Spina, J., (2004).

³⁵ *Id.*

CPCS, the program's former chief counsel referred in his remarks to the *Lavallee* decision and to the single justice opinion quoted above:

I am very pleased to say that in the *Lavallee* litigation in 2004— not only in the famous opinion by a unanimous Supreme Judicial Court, but also in a critical Single Justice decision issued by Justice Spina, which reversed a Superior Court Judge's order that disregarded our public defender caseload limits—the court acted decisively to enforce the independent agency operation promised [in our statute] It is precisely these caseload limits, enshrined in our statute and enforced by our Court, which are the very bedrock of quality control.³⁶

Ensuring Quality

Public Defender Division

The CPCS employs about 200 staff lawyers who work out of thirty offices of varying sizes. About 100 of these lawyers are assigned to Superior Court, which has jurisdiction of the state's most serious felony cases; 80 are assigned to District Courts, which have jurisdiction over less serious felonies and misdemeanors; 10 are appellate lawyers; and 8 to 10 lawyers are engaged in training, immigration impact work, and special litigation. In addition, public defenders in two specialized offices represent youthful offenders and juveniles charged with delinquency. Finally, other CPCS lawyers provide mental health representation and legal services in children and family law cases. As noted earlier, CPCS employs staff investigators and social workers who assist public defenders in their representation. The Public Defender Division also employs a lawyer who serves as its Forensic Services Director and is responsible for assisting both staff and private lawyers in locating appropriate expert assistance on cases that involve forensic issues. Lawyers are able to access reasonably necessary funds for retaining experts pursuant to state law.³⁷

For public defenders who practice in District Court, caseload guidelines provide that an attorney with at least six months experience should carry between thirty and forty-five open and active cases at any one time. The guidelines call for an increase to thirty-five to fifty cases of open and active cases for lawyers who have a minimum of at least one year experience. Typically, the caseloads of these lawyers include a mix of misdemeanors and lesser felony cases of the kind prosecuted in District Court.

³⁶ William J. Leahy, former Chief Counsel, Committee on Public Counsel Services, Remarks at CPCS 25th Anniversary Celebration, July 1, 2009, *available at* http://www.publiccounsel.net/Practice_Areas/cafl_pages/pdf/cafl_news/Cafl_newsletter_summer_09.pdf.

³⁷ See MASS. GEN. LAWS ANN. Ch. 261, §§ 27A–G.

Lawyers who practice in Superior Court normally provide representation in the most serious and time-consuming felony cases, such as murders and sex offense cases, and they carry caseloads in the range of thirty to thirty-five open and active cases. In both Superior and District Courts, lawyers receive new cases on “duty days” when they are designated to go to court in order to receive new cases. However, when a lawyer’s caseload is too high, the lawyer does not appear in court on one of his or her designated days, and the new cases that would have been assigned to the public defender are assigned to a member of the private counsel division. Thus, the private bar is the essential “safety valve” that enables the public counsel division to control the caseloads of its staff lawyers. Although the CPCS is committed by statute to vertical representation,³⁸ occasionally cases initially assigned to one of its public defenders will be transferred to another staff lawyer as a means of caseload control. Normally, during the course of a year, public defenders who practice in the state’s Superior Courts represent approximately ninety persons charged with felony offenses, although the number of cases that they close during the year will be fewer than this.

The CPCS also places considerable emphasis on the supervision of lawyers in its public defender division, maintaining to the extent possible a supervisory ratio of 1:5. Supervision and training are described on the website of the program:

Written supervision guidelines are utilized to ensure that all attorneys receive careful supervision and guidance as they handle the serious cases which make up the Public Defender Division’s work. New Public Defender Division attorneys attend a four-week, in-house, training program conducted in September by the CPCS Training Unit. The new lawyer training program combines an in-depth review of Massachusetts substantive and procedural criminal law with a highly intensive trial skills training component. A large number of staff Public Defenders Division attorneys, investigators and social workers assist in the training of the new lawyers. Following the conclusion of the September training, the new lawyers reconvene monthly throughout the balance of their first year for additional one and two-day training modules.

The CPCS Training Unit also provides ongoing training to all staff attorneys throughout the year, including: semi-annual statewide training conferences; week-long jury skills courses; a quarterly training bulletin summarizing recent appellate decisions; and focused day-long training programs.³⁹

³⁸ See *supra* note 20 and accompanying text.

³⁹ Committee for Public Counsel Services, Training and Supervision, *available at* http://www.public-counsel.net/Practice_Areas/criminal_public_defender_division_pages/training_supervision.html.

Private Counsel Division

Although the size of the CPCS public defender division staff was expanded following the *Lavallee* litigation, over 90% of CPCS representation is still provided by approximately 3000 private lawyers who comprise the private counsel division. To be eligible to provide representation, lawyers must first be certified by CPCS in the practice area for which they seek to receive assignments. This may be for murder cases; Superior Court felony cases; Youthful Offender cases; District Court lesser felony and misdemeanor cases; juvenile delinquency cases; or appeals and post-conviction cases.⁴⁰

The certification process requires the submission of an application to CPCS. For example, to become certified in first- and second-degree murder cases, an applicant must provide the names and addresses of three criminal defense practitioners familiar with the applicant's work. In addition, the applicant must explain why he or she meets the following qualifications:

1. "Five years of criminal litigation experience."
2. "Familiarity with practice and procedure of Massachusetts courts."
3. "Lead counsel in at least ten jury trials of serious and complex cases within the preceding five years, at least five of which have been life felony indictments, in which the cases resulted in a verdict, decision or hung jury." To meet this requirement, the applicant must provide information about each of the cases, including "a description of the major issues."
4. "Familiarity with and experience in the utilization of expert witnesses, including psychiatric and forensic evidence." Cases describing the use of expert witnesses should be included in the list of ten jury trials required under number 3.
5. "Attendance at specialized training programs" Also, the applicant is requested to submit the "names, dates, and sponsors of training programs which meet ... [this] requirement" ⁴¹
6. Certification for murder and superior court case assignments is for a term of four to five years. Lawyers must apply for recertification for these assignments at the conclusion of their terms. Initial certification for District Court representation is provisional and is subject to a satisfactory performance review within the lawyer's first twelve to twenty-four months of handling case assignments. Maintenance of

⁴⁰ Committee for Public Counsel Services, *available at* http://www.publiccounsel.net/Certification_Requirements/criminal_cases/criminal_cases_index.html.

⁴¹ Committee for Public Counsel Services, *Murder Cases*, *available at* http://www.publiccounsel.net/Certification_Requirements/criminal_cases/murder_cases.html.

certification for all criminal and delinquency cases requires annual attendance at eight hours of continuing legal education approved by CPCS.

Lawyers approved for the private counsel division must agree to provide continuous representation in trial court proceedings in whichever area they are certified,⁴² and they must also agree to adhere to detailed CPCS performance guidelines applicable to their area of certification.⁴³

Administration and supervision of lawyers in the private counsel division is carried out by CPCS in cooperation with “Bar Advocate Programs,” which have been established in each of the twelve counties in Massachusetts. The Bar Advocate Programs are not-for-profit corporations, each of which hires an administrator to coordinate duty day assignments of private lawyers who have been certified by CPCS to provide representation. In larger counties, an assistant is hired to aid the Bar Advocate Program’s administrator. The contracts executed between CPCS and Bar Advocate Programs require the county programs to provide at least twelve hours of jury trial skills training for all lawyers who did not try a case to jury verdict during the preceding year.⁴⁴ In 2009, these Bar Advocate Programs presented 120 live training presentations statewide for private counsel handling CPCS case assignments.

Each of the Bar Advocate Programs, in cooperation with CPCS, selects several part-time “supervisory attorneys” with whom CPCS contracts to provide oversight for the representation furnished by private counsel division lawyers. The duties of supervisory attorneys include the assessment of any complaints filed against assigned counsel, training of lawyers, and performance evaluations. Performance reviews are conducted pursuant to a standard protocol, and each year supervisory lawyers file more than 500 supervisory reports with CPCS. In addition, CPCS assigns and compensates “resource

⁴² For example, with respect to the defense of murder cases, the CPCS website explains:

Attorneys who accept first and second-degree murder cases must represent their clients at all stages of the criminal proceedings except the appeal of a conviction to the Appeals Court or Supreme Judicial Court. In the event of a conviction, however, it remains the responsibility of the trial attorney to file a Notice of Appeal, Motion to Withdraw, a Motion to Appoint Substitute Counsel and to request CPCS to assign successor counsel for the appeal. In addition to representing the client in Superior Court, the attorney who accepts a murder assignment must provide representation at the District Court arraignment and probable cause hearing and at any sentence appeal before the Appellate Division of the Superior Court.

Id.

⁴³ Committee for Public Counsel Services, *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_4_full.pdf.

⁴⁴ The training requirement is mandatory, and a lawyer who fails to meet the obligation may not receive new case assignments or be scheduled for duty day appearances. However, the contracts permit the county programs to waive the requirement of skills training for lawyers who have tried to jury verdict six or more cases during the preceding five years. Additional training requirements for private counsel division lawyers are contained in chapter 3 of the CPCS Assigned Counsel Manual, *available at* http://www.publiccounsel.net/private_counsel_manual/chapter_three.html.

attorneys,” who are certified for superior court cases and serve as part-time “mentors” to private lawyers who provide representation in District Court cases. Resource lawyers are assigned to all trial-level private defense counsel who have not achieved certification for superior court or youthful offender case assignments. Mentors are used because of a belief that lawyers are more apt to seek advice from persons who are not designated as “supervisory lawyers.”⁴⁵

The compensation paid to private counsel is set by statute, subject to state appropriations.⁴⁶ At present, CPCS normally pays private lawyers \$50 per hour for District Court cases, \$60 per hour for Superior Court cases, and \$100 per hour for murder cases.⁴⁷ The hourly compensation rates are the same for both in-court and out-of-court work, and no caps are placed on the amount of compensation that can be paid to counsel on any given case. CPCS does not seek information about the number and types of private retained cases that private counsel division lawyers represent. However, CPCS limits the number of cases to which private lawyers can be appointed each year and also places a ceiling on the number of hours for which private lawyers may bill per fiscal year.

As explained on the CPCS website, “[t]o assure both the equitable distribution of cases to qualified private counsel and the quality of representation, the Committee has adopted a weighted system of caseload limits, with a particular weight for each type of case assignment and an absolute limit of 250 cases per year.”⁴⁸ Listed below are several of the annual case weights adopted by CPCS:

District Court criminal cases.....	(weight = 1)	(250)
Superior Court.....	(weight = 2)	(125)
Delinquency Cases.....	(weight = 1.5)	(165) ⁴⁹

⁴⁵ For further discussion of supervision and mentoring, *see supra* notes 1–17 and accompanying text, Chapter 3.

⁴⁶ MASS. GEN. LAWS ANN. ch. 211D, § 11.

⁴⁷ *See* Committee on Public Counsel Services, *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_5.pdf. Approval of compensation claims is entrusted to CPCS, which is consistent with ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-2.4 (“Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.”).

⁴⁸ The weighted limit of 250 cases per year was adopted effective, November 3, 2009. Previously the weighted caseload limit was 300. The change was approved at a meeting of the Committee on October 21, 2009, and announced in a memorandum of Nancy Bennett, Deputy Chief Counsel of the Private Counsel Division. *See* Committee for Public Counsel Services, Assigned Counsel Manual, Policies and Procedures Governing Billing and Compensation, *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_5.pdf.

⁴⁹ *Id.*

Thus, during the course of a year, a private lawyer with a mixed caseload cannot be appointed to more than 50 Superior Court felony cases (a weight of 100), 126 District Court misdemeanor cases (a weight of 126), and 16 delinquency cases (a weight of 24). These caseload limits are enforced by means of a CPCS computerized system, with assignments exceeding the limits immediately rejected with notice to counsel.

In addition, CPCS imposes “an annual cap of billable hours per fiscal year, currently 1,800 hours.”⁵⁰ The purposes of this ceiling are to promote quality defense services, an equitable distribution of cases, and to guard against over-billing. Also, except for murder cases, lawyers are limited to a presumptive maximum of ten billable hours per day.⁵¹ However, a lawyer who is on trial may bill up to a maximum of fourteen hours per day.⁵²

B. Public Defender Service (PDS), Washington, D.C.⁵³

Defense representation in the District of Columbia is provided by the Public Defender Service (PDS) and private lawyers appointed by judges. The types of criminal and juvenile cases in which PDS provides representation are similar to those that public defenders and private lawyers handle in the courts of the fifty states.⁵⁴ Violations of federal, as opposed to D.C. law, are represented by the Federal Public Defender for the District of Columbia.⁵⁵

PDS employs about 125 lawyers, organized into seven practice groups: trial division, appeals, mental health, special litigation, parole, community defender, and civil legal services.⁵⁶ The largest of these groups is the trial division, which has about sixty law-

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Information about PDS not supported with citations was acquired during in-person meetings with agency officials and through e-mail exchanges. In May 2008, together with others, I had a lengthy conversation in D.C. with Avis Buchanan, Director of PDS. Also, I visited the offices of PDS in September 2008, at which time I met again with Ms. Buchanan, the chief of the trial division, and several of the agency’s staff lawyers. Also, in November 2009, I had a telephone interview with Julia Leighton, PDS General Counsel; and in June 2010 I interviewed via telephone Claire Roth, Special Counsel to the Director of PDS. I am grateful to all of the persons who assisted me in my review of PDS operations and the assignment of private lawyers. In addition, this summary of PDS was aided substantially by the NLADA study of PDS, published in 2008 and referenced at *infra* note 61.

⁵⁴ For further information about the kinds of cases that PDS may represent, see *infra* notes 73–74 and accompanying text.

⁵⁵ Information about the Federal Public Defender for the District of Columbia is contained on its website, *available at* <http://www.dcfpd.org/>.

⁵⁶ Information about each of these divisions is contained on the PDS website, *available at* <http://www.pdsdc.org/Default.aspx>.

yers. The division includes about ten lawyers who handle serious juvenile delinquency cases. In addition, PDS has three non-lawyer programs or divisions: investigations, offender rehabilitation (ORD), and the defender services office (DSO). ORD is comprised of social workers who, along with other activities, work with PDS lawyers in developing sentencing plans that encourage alternatives to incarceration.⁵⁷ DSO determines the financial eligibility of persons for legal representation and, in cooperation with the courts, coordinates the assignment system of private lawyers and public defenders to specific cases, as discussed later.⁵⁸ The agency's "executive management office" provides day-to-day supervision of the program's total staff of approximately 220 persons, as well as strategic planning for the future.

In 1973, the former Law Enforcement Assistance Administration (LEAA), which was part of the U.S. Department of Justice, designated the Public Defender Service (PDS) "An Exemplary Project" and suggested that it could "serve as a model for other jurisdictions"⁵⁹ because it had "demonstrated its ability to provide quality legal

⁵⁷ The agency's website, *available at* <http://www.pdsdc.org/PDS/OffenderRehabilitationDivision.aspx>, explains ORD, as follows:

The Offender Rehabilitation Division (ORD) is composed of forensic social workers and forensic professional counselors who are sentencing specialists. They work with clients who present a broad range of emotional, social, psychiatric, and substance abuse related problems. They provide attorneys with psychosocial assessments, and develop individualized treatment plans and sentencing recommendations for clients to whom they are assigned. All of the sentencing specialists are skilled and experienced master level, or beyond, licensed social workers or professional counselors who address DC Superior Court judges to provide viable community-based alternatives to incarceration, where appropriate.

⁵⁸ *See infra* notes 100–104 and accompanying text. The work of the DSO is explained on the PDS website, *available at* <http://www.pdsdc.org/PDS/DefenderServicesOffice.aspx>, as follows:

The Defender Services Office executes this function [as prescribed by statute] by determining the financial eligibility for court-appointed counsel of every arrested child and adult, and by coordinating the availability of CJA attorneys, law school students, pro bono attorneys, and PDS attorneys six days a week (Monday through Saturday) including holidays. Because defense counsel is appointed prior to the arrestee's initial appearance in court, the work of the Defender Services Office is vital to the overall functioning of the Superior Court's criminal arraignment process. In addition, the office provides assistance to lawyers and the public by notifying attorneys of their clients' re-arrest and parole matters, providing court logistical information to clients and their families, and responding to general inquiries about court operations.

⁵⁹ AN EXEMPLARY PROJECT: THE D.C. PUBLIC DEFENDER SERVICE, Vol. I Policies and Procedures, Foreword (Law Enforcement Assistance Administration 1973) [hereinafter AN EXEMPLARY PROJECT]. Volume II consisted of training materials, which were used by the agency at the time. PDS was the only defender program in the country that LEAA designated an "exemplary project." I served as director of PDS during 1972–1975 and submitted the agency's exemplary project application to LEAA. From 1969 to 1972, I served as the agency's deputy director. When I was hired by the Board of Trustees, the agency was known as the Legal Aid Agency of the District of Columbia. It became the D.C. Public Defender Service in 1970. *See infra* notes 65–66 and accompanying text.

representation to its clients.”⁶⁰ Today, nearly forty years later, the agency continues to be a model program of public defense, with features that set it apart from most, if not all, large urban public defender programs in the nation. In 2008, the National Legal Aid & Defender Association (NLADA) published an extremely positive evaluation of the Public Defender Service, concluding that “the PDS experience is one to be emulated.”⁶¹ Set forth below are important keys to the success PDS has enjoyed.

PDS Statute

Created by Congress in 1970, the PDS statute authorizes an eleven-person Board of Trustees to “establish general policy for the Service.”⁶² The Board, which must include at least four non-attorney members, is appointed by the three chief judges of the major D.C. federal and local courts and the city’s mayor.⁶³ The most important specific responsibility given to the Trustees is to “appoint a Director and Deputy Director of the Service, each of whom shall serve at the pleasure of the Board.”⁶⁴

PDS succeeded the District of Columbia Legal Aid Agency (LAA), which since about 1960 provided defense services in criminal and juvenile cases in D.C. When LAA was transformed into PDS, the agency employed about fifteen lawyers, but like PDS it also was governed by a Board of Trustees.⁶⁵ In the first edition of ABA Standards Relating to Providing Defense Services, approved in the late 1960s, the Legal Aid Agency’s Board was touted as a model for ensuring independence of the defense function.⁶⁶

⁶⁰ *Id.*

⁶¹ EVALUATION OF PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA: HALTING ASSEMBLY LINE JUSTICE, PDS: A MODEL OF CLIENT CENTERED REPRESENTATION, Executive Summary iii (Nat’l Legal Aid & Defender Assoc. 2008) [hereinafter NLADA HALTING ASSEMBLY LINE JUSTICE].

⁶² D.C. CODE § 2-1603 (a) (2007).

⁶³ *Id.* at (b). The chief judges are from the United States District Court for the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia.

⁶⁴ D.C. CODE § 2-1604 (2007).

⁶⁵ I was personally familiar with the Legal Aid Agency and its staff because I practiced in D.C. doing criminal and juvenile defense work during 1963–1964 as part of a graduate fellowship program of the Georgetown University Law Center.

⁶⁶ Commentary to ABA standard 1.4 stated the following:

A means of insulating the plan [for indigent defense representation] from politics and protecting the professional independence of the lawyers serving under it which has been tested in many jurisdictions is the establishment of a board of trustees In the District of Columbia, this device has been adapted to a public defender system. The concept of a Board of Trustees to administer a public agency is familiar in many other contexts such as public education and hospitals.

AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 20 (1968). For the relevant part of the 1968 first edition blackletter standard, *see supra* note 8.

For many years, the PDS Board of Trustees has taken seriously its duty to steer an independent course. For example, in the early 1970s, when private lawyers refused to accept case assignments due to concern about whether they would ever be paid for their representation, the director of PDS, with the unanimous support of the Trustees, refused the request of the chief judge of the D.C. Superior Court that the agency's lawyers significantly increase their caseloads. Because of the Trustees' support, the chief judge withdrew his insistence that the agency's lawyers accept many additional cases, and other ways of dealing with the crisis were implemented.⁶⁷

In addition to securing the independence of the defense function, the PDS statute contains provisions that have implications for the agency's control of its caseloads. On an annual basis, the statute limits PDS to representing not more than 60% of the persons determined to be eligible for agency representation.⁶⁸ The statute also provides that "[t]he Service shall determine the best practicable allocation of its staff personnel to the courts where it furnishes representation."⁶⁹ And, finally, the statute states that "[t]he director shall make assignments of the personnel of the Service."⁷⁰ These provisions support the long-held position of the agency that it is in charge of the caseloads

⁶⁷ NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at 8 ("In the early 1970's, PDS's independence allowed then-director Norman Lefstein to preserve caseload controls, when initially challenged, without fear of risk to his livelihood or professional reputation."). The reference in the report relates to a confrontation that I had with the chief judge of the D.C. Superior Court over PDS caseloads. During the spring of either 1973 or 1974, members of the private bar refused en masse to accept court appointments, because the Congressional appropriation was deemed inadequate to cover their payment vouchers when submitted at the conclusion of their cases. As a result, the chief judge asked to have lunch with me to discuss what the agency could do to "assist" the city's criminal and juvenile courts handle the cases that previously had been accepted by private lawyers. The chairman of the PDS Board of Trustees, Professor Samuel Dash of the Georgetown University Law Center, also attended the luncheon meeting. The chief judge told me at the outset of our meeting that the agency's lawyers would need to increase substantially their caseloads to cover the cases that the private bar was no longer willing to accept. In response, Professor Dash and I explained that this would destroy everything that we had achieved in controlling the caseloads of PDS lawyers and would seriously undermine the quality of representation the agency could provide. At one point, I recall telling the chief judge that he could hold me in contempt if he wanted, but the agency was unwilling to do what was being asked of it. Reluctantly, the chief judge accepted our refusal to "help" the courts, and the discussion turned to other ways of handling the crisis. The support of the agency's Board of Trustees was critical to my ability to reject the court's request that the agency's lawyers represent large numbers of additional cases. As an alternative, the agency agreed to recruit and train private members of the bar from large law firms to accept cases temporarily on an emergency pro bono basis. In 1983, a similar "strike" of private assigned counsel led the Federal Trade Commission to claim that the lawyers were engaged in a conspiracy to fix prices and to conduct a boycott that constituted unfair methods of competition. The case ultimately was decided by the U.S. Supreme Court, which held in favor of the FTC and against the lawyers. *See* *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

⁶⁸ D.C. CODE § 2-1602 (b) (2007).

⁶⁹ *Id.*

⁷⁰ D.C. CODE § 2-1605 (a) (2007).

of its lawyers. Although judges appoint PDS staff lawyers to their cases, the agency's statute does not actually address the practice of judges making appointments either to PDS or to specific PDS lawyers.⁷¹ However, the PDS statute specifically authorizes judges to appoint private lawyers to provide defense representation.⁷²

The PDS statute also lists the kinds of D.C. code violations and other proceedings in which the agency is authorized to provide representation. These include offenses punishable by imprisonment of six months or more, juveniles alleged to be delinquent or in need of supervision, commitments of persons alleged to be mentally ill, as well as specialized proceedings such as the commitment of chronic alcoholics.⁷³ The statute further provides that representation may be furnished in "appellate, ancillary, and collateral proceedings."⁷⁴ The Service also is authorized to assist private attorneys appointed to furnish representation in the same categories of cases in which PDS provides defense services.⁷⁵

PDS Staff: Ensuring Quality

The training of PDS lawyers, their supervision, and the way in which caseloads are monitored and controlled, are essential features of the program.

Training

Since the early 1970s when PDS was created, the agency's practice has been to hire its new Trial Division lawyers as a group, all of whom begin work at PDS on the same day in October. This enables these new lawyers to attend the agency's in-house training program at a time when they have no other PDS responsibilities. The idea of a PDS training program for all new lawyers, to be implemented before the start of any client representation, dates back to a conversation I had in the early 1970s with the agency's first director, Barbara Allen Babcock.⁷⁶ Essentially, we concluded that, much like police

⁷¹ Appointments to "a Public Defender Service attorney" are contemplated by the Plan for Furnishing Representation to Indigents Under the District of Columbia Criminal Justice Act, effective March 1, 2009, *available at* http://www.dccourts.gov/dccourts/docs/cja_plan.pdf.

⁷² The only language in the PDS statute about courts appointing lawyers is contained in the following sentence: "The Service shall establish and coordinate the operation of an effective and adequate system for appointment of private lawyers to represent persons described in subsection (a) of this section, but the courts shall have final authority to make such appointments." D.C. CODE § 2-1602 (b) (2007).

⁷³ *Id.* at § 2-1602 (a)(1).

⁷⁴ *Id.* at § 2-1602 (a)(2).

⁷⁵ *Id.*

⁷⁶ Following her service as PDS director, Barbara Babcock joined the Stanford Law School faculty, where she is now the Judge John Crown Professor of Law, Emerita. Professor Babcock was the first woman appointed to the Stanford Law School's regular faculty and the school's first woman to hold

and fire departments that do not allow new police officers and firefighters to begin their work until they have completed a period of intensive training, our agency would not entrust the fate of our clients to new, inexperienced lawyers without first making sure they were adequately trained. Accordingly, we appointed a “training director” and designated other senior lawyers to assist with training; thus, the agency’s first training program was begun.

In the early 1970s, the training program lasted six weeks, whereas today it has been expanded to eight weeks. According to the LEAA description of PDS as an exemplary project, the program in the 1970s emphasized “seminars on law and tactics in particular areas from discovery, to suppression hearings, to cross-examination to argument; simulated exercises and role-playing in each skill area; background assignments of substantive statutory and case law; and preparation of critique of written work and simulation performance.”⁷⁷ Video replays were used so that new lawyers could study themselves on tape and be critiqued by experienced staff lawyers. Now, almost forty years later, the agency’s training program continues to include these same components, and it also covers new matters such as scientific evidence and collateral consequences of convictions. In addition, today the agency has a digital electronic moot courtroom and an adjoining training room, neither of which were available in the 1970s.

During the PDS training program, new lawyers are introduced to the Trial Division’s “Clients’ Bill of Rights” (BOR). Despite its name, this document was not developed to be given to clients; instead, it is given to the agency’s lawyers to inform them of what clients should be able to expect when represented by a PDS lawyer.⁷⁸ In some respects, the BOR resembles defense function performance standards developed by the ABA and NLADA;⁷⁹ but in other respects the BOR is different from these national standards. Like national standards, the BOR states that “[c]lients are entitled to have their lawyers investigate their cases thoroughly including viewing evidence in the government’s possession, visiting the scenes of offenses with which they are charged, and identifying and hiring experts if warranted by the case.”⁸⁰ But unlike national standards, the BOR also provides that “a client is entitled to have all information about

an endowed chair. She is known for her research of the history of women in the legal profession and, in particular, for her research into the life of California’s pioneering female lawyer and inventor of the public defender, Clara Foltz. *See, e.g.*, BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* (2011); and Barbara Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267 (2006).

⁷⁷ AN EXEMPLARY PROJECT, *supra* note 59, at 29.

⁷⁸ A copy of the BOR form is reproduced in Appendix A.

⁷⁹ *See, e.g.*, *supra* note 13, Chapter 1 and *supra* note 30, Chapter 2.

⁸⁰ Compare, for example, ABA DEFENSE FUNCTION STANDARDS, *supra* note 13, Chapter 1, Std. 4-4.1 (a): Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities.

a case's history and future proceedings, deadlines, dates, etc., reflected on and in the PDS case jacket so that readily discernible from the client's jacket are the procedural history of the case, and action needed to be taken immediately"⁸¹ The BOR is also used in evaluating lawyer performance, as explained later.⁸²

The PDS emphasis on training is not confined to its initial eight-week training program. When lawyers begin client representation, they are assigned to Trial Practice Groups (TPGs) that meet bimonthly and in which instruction alternates between substantive law and trial skill exercises. TPGs also furnish an opportunity for lawyers to discuss with others the cases on which they are working. Training is sometimes further enhanced through co-counsel arrangements in criminal and juvenile court cases. Some co-counsel arrangements are just for trial purposes, whereas others last throughout the agency's representation of the client.⁸³

In addition, there is a one-week training program for Trial Division lawyers transferred from juvenile court to the felony criminal court, and new appellate lawyers also attend a one-week training program. There is even a technology training program and space for technology training.⁸⁴ Moreover, training is not confined to the agency's legal staff—there is a three-week training program for new PDS staff investigators and a one-week training program for new interns and law clerks.

Finally, there are several annual training programs produced by PDS for staff lawyers and the private lawyers who accept court-assigned cases. These include an annual two-day Criminal Practice Institute and a Forensic Science Conference that deals with topics such as DNA, fingerprints, ballistics, and crime scene reconstruction. Also, during the summer there is a series of twice-weekly lectures on new topics in criminal law.

⁸¹ While this requirement makes excellent sense, it is not typical of requirements in national defense performance standards. However, the requirement is reminiscent of those imposed on solicitors in England and Wales who seek certification from the Legal Services Commission to provide defense representation. See Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L. REV. 835, 871–875 (2004) [hereinafter Lefstein, *In Search of Gideon's Promise*].

⁸² See *infra* note 88 and accompanying text.

⁸³ Co-counsel arrangements are most commonly used in complex Felony I cases and in cases heard on an accelerated basis. When this occurs, the emphasis is not on training (because the lawyers already are experienced) but is intended to ensure that quality defense services are provided.

⁸⁴ The NLADA evaluation of PDS describes the technology facilities as follows:

PDS maintains a technology training room designed in classroom style with 12 PCs at multiple workstations and with an overhead projector system that allows the staff technology trainer to project images on a large screen for all students to follow the offered instruction. In addition to organized classes available to all PDS staff, the technology trainer also has the capacity to send out short, specific subject matter technology training programs through the e-mail system to one or more designated employees. Training may be offered as a subject matter class, a unit wide or user group program, or on a one-on-one basis.

NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at 45 n. 61.

Supervision

All PDS lawyers who provide trial-level representation in felony and juvenile delinquency proceedings are closely supervised, except for about twenty of the agency's most experienced lawyers qualified to handle Felony I cases. The supervision of lawyers is overseen by the chief of the trial division, who is assisted by a deputy trial chief and twelve line supervisors. Also, every day of the week (except Sundays), PDS designates a "supervisor-on-duty" so that if a lawyer's regular supervisor is unavailable, a senior-level person can be reached if emergency advice is needed.

To have sufficient time to provide adequate supervision and mentoring, supervisors are responsible for no more than three to four lawyers, and the supervisors carry reduced caseloads of twelve to fifteen felony cases. The trial chief meets biweekly with all supervisors and, "based upon agency goals and assessments of the supervisors, [the agency] adjusts workload through the case assignment process."⁸⁵ Supervisors are substantially able to track the work of their supervisees through the agency's electronic case-tracking system.

Normally, new lawyers begin at PDS by representing clients charged in "felony" juvenile delinquency cases. The supervision of these lawyers emphasizes "extensive instruction on how to investigate cases (done in teams of two lawyers . . .), prepare cases for trial; draft and file appropriate motions; litigate motions for adjudicatory hearings; and prepare/present appropriate disposition arguments and alternative placement recommendations."⁸⁶ Typically, of the approximately ten lawyers assigned to the agency's juvenile practice, one serves as chief of the section, three are supervisors with reduced caseloads, one is a permanent juvenile practice attorney, and six are staff lawyers who started at the agency within the preceding twelve months.

To ensure that supervised lawyers are exposed to a range of experienced lawyers, PDS supervisors usually are rotated among supervisees every six months. The transfer of junior lawyers from one supervisor to another is facilitated by the use of the agency's "Lawyer Development Plan" (LDP), which is a written evaluation form completed by the outgoing supervisor and given to the lawyer's new supervisor.⁸⁷ The LDP assessment includes the performance of staff lawyers measured against goals listed in the BOR form.⁸⁸ For example, Article 5 of the BOR states that

[a]ll clients are entitled to in-person meetings with their lawyers, including promptly after their initial appearance in court. At an initial meeting a

⁸⁵ *Id.* at 12.

⁸⁶ NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at 17.

⁸⁷ A copy of the LDP form is reproduced in Appendix B.

⁸⁸ The BOR—Clients' Bill of Rights form—is also discussed at *supra* notes 78–82 and accompanying text.

client can expect an in-depth interview, regarding his/her life and the facts and circumstances of the case, as well as an explanation of the attorney-client privilege, how the criminal/juvenile case will proceed, the stages of the case After the initial client visit, incarcerated clients are entitled to be seen any time there is a significant development in the case Clients are entitled to have notes of the topics covered during the attorney-client visits taken and dated.

The LDP evaluation form requires supervisors to assess lawyers in response to “Client Contact (initial/frequency)” and “Organization of files,” among many other factors. The LDP also contains space for the supervisor to list “GOALS FOR NEXT THREE MONTHS” and “ACTION PLAN FOR IMPROVEMENT GOALS.”

Caseloads

As stated in NLADA’s 2008 report, “PDS simply does not accept cases if, in doing so, they would harm a client and/or put an attorney in breach of her ethical duty to provide competent representation due to case overload.”⁸⁹ To achieve this objective, the agency does not adhere to annual numeric caseload standards but instead focuses on current caseloads and whether or not staff lawyers are able to provide quality representation to their clients.

The PDS approach, unchanged since 1970 when the agency was founded, is consistent with the ABA’s ethics opinion on caseloads: “The Rules [of Professional Conduct] do not prescribe a formula to be used in determining whether a particular workload is excessive Although such standards [on numerical caseload limits] may be considered, they are not the sole factor in determining whether a particular workload is excessive.”⁹⁰ The opinion then lists various factors to consider in assessing a lawyer’s current caseload, which is exactly what PDS does. Besides the quality of representation, PDS considers factors such as the litigation’s complexity, speed at which cases turn over, available support services, as well as other staff lawyer responsibilities.⁹¹ Additional factors in assessing the caseloads of staff attorneys include the relative lack

⁸⁹ NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at ii.

⁹⁰ ABA Formal Op. 06-441, *supra* note 36, Chapter 2, at 4. *See also* ABA EIGHT GUIDELINES, *supra* note 76, Chapter 2, at 8–9: “Consistent with prior ABA policy, these Guidelines do not endorse specific numerical caseload standards, except to reiterate a statement contained in the commentary to existing principles approved by the ABA: ‘National caseload standards should in no event be exceeded.’” The reference to national caseload standards refers to those adopted in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals. *See supra* notes 91–99 and accompanying text, Chapter 2.

⁹¹ *See* NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at ii. The PDS approach to caseloads is similar to the way that CPCS deals with the caseloads of its lawyers. *See supra* text immediately following note 37.

of open discovery in the District of Columbia,⁹² as well as the mix of serious felony cases handled by agency's trial division lawyers. This last factor is especially important because PDS represents "approximately 80% of the Felony 1 cases (e.g., homicide, rape) and the majority of those offenses with mandatory sentences and possible life sentences (e.g. armed carjacking, armed kidnapping, armed robbery)."⁹³

PDS develops a schedule each month of the dates each staff lawyer will go to court so that judges might appoint them individually to several new cases. Thus, as noted earlier, appointments are made to staff lawyers in their individual capacity, not to the Public Defender Service as an agency.⁹⁴ However, if a staff lawyer is deemed unable to accept new assignments due to the lawyer's existing caseload, the lawyer's name will be removed from the duty day list of available lawyers, and the cases that the staff lawyer would have received will be directed either to other PDS staff lawyers or to members of the private bar. The decision to remove a staff lawyer's name from the list of available lawyers to accept new cases is an infrequent occurrence and made only after consultation with the lawyer's supervisor. For the vast majority of staff lawyers, this occurs only once or twice a year at the most.

The PDS approach to caseloads and the numbers of cases handled by staff lawyers can be further summarized as follows:

- PDS is committed to "vertical representation," and thus the same attorney represents the client throughout the life of the case at the trial level. Even when lawyers move from Juvenile Court to representing adults in felony cases, the lawyers retain their juvenile cases.⁹⁵
- New PDS lawyers assigned to handle juvenile cases typically have about ten "felony" juvenile delinquency cases; the number of cases is relatively low for several reasons: the lawyers are new, the lawyers conduct investigation in each other's cases, most of the clients are in custody, and the cases are subject to a 30-day speedy trial right.⁹⁶
- When these lawyers move to general felony practice, usually during their second year at the agency, "the target caseload for the lawyers is 20 to 30 pretrial cases."⁹⁷

⁹² *Id.* at 12.

⁹³ *Id.* at 11.

⁹⁴ See *supra* note 71 and accompanying text.

⁹⁵ NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at 22. If a staff lawyer resigns from PDS, the agency accepts responsibility for the client's case, and thus the case is normally transferred to another PDS staff lawyer. This is the only time that a case at the trial level is transferred from one lawyer to another. Also, since its inception, PDS staff lawyers represent only one codefendant in multiple defendant cases. The emphasis on vertical representation and representing only one of multiple codefendants is similar to the practice of CPCPS. See *supra* notes 18–20 and accompanying text.

⁹⁶ NLADA HALTING ASSEMBLY LINE JUSTICE, *supra* note 61, at 12.

⁹⁷ *Id.*

- The staff lawyers who provide representation in cases that are part of the Accelerated Felony Trial Calendar, which involve potential life sentences and are subject to a 100-day speedy trial rule, “are not to exceed 25 pre-trial cases”⁹⁸ This enables the agency to maintain parity with the caseloads of its prosecutor counterparts.
- The caseloads of staff lawyers handling Felony I offenses, which are subject to life sentences without parole (death penalty offenses in other jurisdictions), “are not to exceed 20 pre-trial cases at this practice level.”⁹⁹ This number of cases also enables the agency to maintain caseload parity with its prosecution counterparts.
- While there are variations among individual lawyers, on an annual basis a PDS lawyer handling felony cases will close in the range of 110–120 cases per annum; staff lawyers handling “felony” juvenile delinquency cases will close approximately 180 cases per annum.

Private Assigned Counsel

The appointment of private criminal defense practitioners has been essential in enabling PDS to control the caseloads of its staff lawyers. Similarly, CPCS in Massachusetts would not be able to maintain control of the caseloads of its public defenders without substantial participation of private defense lawyers throughout the state.¹⁰⁰ There are a number of differences, however, in the structure for providing defense services among private practitioners in the two jurisdictions. In D.C., judges decide whether lawyers are qualified to be appointed to cases, retain authority to appoint lawyers to specific cases, and approve vouchers for compensation submitted by assigned counsel. In Massachusetts, judges are not involved in the certification of private lawyers to provide representation, nor are they engaged in the day-to-day appointment of lawyers to cases or in the approval of their vouchers for compensation.¹⁰¹ In addition, Massachusetts has a comprehensive program to provide mentoring and supervision to private counsel who provide defense services,¹⁰² whereas no program of this kind exists in D.C.

The most important features of the assigned counsel program in D.C. are outlined below:¹⁰³

⁹⁸ *Id.* at 13.

⁹⁹ *Id.*

¹⁰⁰ See *supra* note 40 and accompanying text.

¹⁰¹ See *supra* text accompanying notes 16–17 and 40–47.

¹⁰² See *supra* text immediately following note 43.

¹⁰³ The description of the assigned counsel program that follows is based upon discussions with PDS personnel mentioned previously (see *supra* note 53) and on the materials listed hereafter: Plan for Furnishing Representation to Indigents Under the District of Columbia Criminal Justice Act,

- After the Defender Service Office (DSO) of PDS determines eligibility, DSO prepares a suggested list of lawyers to be appointed to specific cases. Some judges accept DSO's suggested list of lawyers to be appointed to specific cases, whereas other judges make changes to DSO's recommendations.
- The lawyers eligible for appointment are normally drawn from one of four groups: PDS staff lawyers; private assigned counsel who are members of the approved Criminal Justice Act (CJA) panel;¹⁰⁴ pro bono lawyers from private law firms who have been approved for appointment and who agree to serve without compensation; and students from D.C. law schools who qualify under a student practice rule.
- In order to become a panel lawyer, an application must be completed and submitted to the Superior Court. The application form consists of twenty questions and seeks information about a variety of subjects, including the lawyer's education, work experience, litigation and courtroom experience, prior criminal history or disciplinary complaints from jurisdictions in which the applicant is admitted, and names of Superior Court officials familiar with the applicant's work. Applications are reviewed by a "CJA Panel Advisory Committee" composed of two members designated by the Director of PDS, two members designated by the President of the Superior Court Trial Lawyers Association, one member designated by the President of the D.C. Association of Criminal Defense Lawyers, and three non-institutional members designated by the Superior Court's chief judge. The advisory committee makes recommendations to the Superior Court's "CJA Panel Implementation Committee," consisting of twelve Associate Judges and one Magistrate Judge, which decides on the final membership of the CJA panel.
- The current CJA panel was approved in January 2010. Of the 431 applicants who applied for service on the CJA panel, 222 were approved as qualified for appointments to all types of cases, and an additional 46 lawyers were approved for misdemeanor representation only. The Superior Court plans to approve anew the CJA panel every four years.

effective March 1, 2009; Report of the Superior Court Criminal Justice Act Panel Implementation Committee, Jan. 2010; Report of the Superior Court Family Oversight Committee, Jan. 2010; CJA Panel Application; Superior Court of the District of Columbia, Criminal Division, Attorney Practice Standards for Criminal Defense Representation; Superior Court of the District of Columbia Administrative Order 10-02 (Re-establishment of the Criminal Justice Act Panel of Attorneys); Administrative Order 10-01 (Re-establishment of Family Court Attorney Panels); Administrative Order 09-06 (CJA and CCAN Fee Schedule); Administrative Order 09-05 (CJA Guideline Fees for Superior Court Cases); Administrative Order 05-03 (CJA Panel Advisory Committee); and Administrative Order, 04-09 (Increases Yearly Cap for CJA and CCAN Vouchers to \$135,200).

¹⁰⁴ Non-CJA panel attorneys may be appointed only in "exceptional circumstances" when the appointing judge documents the reasons for doing so.

- Lawyers accepted as CJA panel members must agree to complete eight hours of continuing legal education related to indigent defense, and they must promise to comply with the Superior Court's "Attorney Practice Standards for Criminal Defense Representation." The standards, which cover the attorney-client relationship, pretrial responsibilities, hearings, trial preparation, and postconviction advocacy, are intended to ensure the provision of "quality legal representation." While disciplinary action against defense counsel is always possible in the event of misconduct in providing defense services, sanctions for violations are not specified.
- Private assigned lawyers are compensated at the rate of \$65 per hour, regardless of whether the representation is provided in juvenile, misdemeanor, or felony cases. For misdemeanor cases (including juvenile delinquency offenses that would be a misdemeanor if committed by an adult), maximum compensation is \$2,000 per case. For felony cases (including juvenile delinquency offenses that would be a felony if committed by an adult), maximum compensation is \$7,000 per case. These caps on compensation can be exceeded for extended or complex representation upon approval of the chief judge of the Superior Court.
- Although there is no limit on the number of cases to which lawyers may be appointed over the course of a year, the annual amount they can be paid is \$135,200, which is based upon 2000 hours of work (2000 hours × \$65 per hour = \$135,200).

C. Private Defender Program (PDP), San Mateo County, California

The funding of indigent defense in California is at the county level, and the majority of counties rely primarily upon staffed public defender programs as the means of delivering services.¹⁰⁵ During the late 1960s, the Board of Supervisors of San Mateo County considered establishing a public defender program to fulfill its requirement to provide counsel for the poor. Asked for its opinion, the Board of Directors of the San Mateo County Bar Association objected, fearing that the proposed agency would lack the necessary resources to meet the demands thrust upon it. As an alternative, the Bar Association "proposed to establish and administer the County's indigent defense program,"¹⁰⁶ utilizing the talents of solo practitioners and small firms with expertise in

¹⁰⁵ A list of all California county public defenders can be accessed on the website of the California County Public Defender Association, *available at* <http://www.cpda.org/County/county.pdf>.

¹⁰⁶ ANNUAL REPORT FISCAL YEAR 2008–2009 TO THE BOARD OF SUPERVISORS SAN MATEO COUNTY 7 (San Mateo County Private Defender Program) [hereinafter PDP ANNUAL REPORT]. Prior to establishment of the PDP, the system of defense in San Mateo County was entirely *ad hoc*, with lawyers frequently appointed because they happened to be in the courtroom and without regard to whether they had the requisite experience to provide representation in the cases to which they were assigned. Also, compensation claims of lawyers were often reduced by judges who were responsible

criminal law. The County accepted the Bar Association's proposal, and the PDP of San Mateo County began operations in February 1969. Now, more than forty years later, the PDP has developed into a model assigned counsel program, relying exclusively on independent private lawyers.

Unlike Massachusetts and Washington, D.C., there are no salaried full-time public defenders in San Mateo County. However, the PDP has many of the same attributes of the Massachusetts and D.C. programs, in that the PDP is independent, monitors the caseloads of private lawyers to ensure that they are not excessive, requires training and mentoring, and evaluates the quality of the legal representation provided by its lawyers.¹⁰⁷ Thus, the PDP is an outstanding illustration of what the ABA means in recommending "coordinated assigned counsel" programs.¹⁰⁸

Organization of the PDP

Independence and Management

The San Mateo County Bar Association is a nonprofit corporation governed by a fourteen-member Board of Directors. The PDP is overseen by a ten-member standing committee of the Bar Association, known as the "Private Defender Program Committee," which reports to the Board of Directors.¹⁰⁹ The head of the PDP—its Chief Defender—is hired by the Board of Directors and reports to the Board, while also working closely with the Private Defender Program Committee.¹¹⁰

for approving them. *Id.* at 6.

¹⁰⁷ The mission statement of the PDP declares that its purpose "is to provide high quality legal representation to every indigent person who has been entrusted to us by the San Mateo County Superior Court." *Id.* at 1.

¹⁰⁸ See ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at 5-1.2 (b) ("Every system [of defense representation] should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system ...").

¹⁰⁹ The committee is provided for in the by-laws of the San Mateo County Bar Association. Five of the committee members must have at least five years experience as PDP panel lawyers handling serious felony cases. Lawyers employed by the County Counsel's Office and the San Mateo District Attorney's Office are prohibited from serving as committee members.

¹¹⁰ The Chief Defender of the PDP is John Digiacinto. Myra Weiher serves as the program's Assistant Chief Defender. I received considerable assistance from both during my visit to the PDP in January 2010, and I am grateful to them for the cooperation and help they provided to me. I also express thanks to the ten PDP panel lawyers and two members of the judiciary who agreed to be interviewed during my visit. I also express appreciation to James Bethke, Director of the Texas Task Force on Indigent Defense, who accompanied me on my site visit to the PDP. Information about the PDP that is not supported with footnote citations was acquired during the in-person meetings to which I refer or are contained either in the PDP ANNUAL REPORT (*see supra* note 106) or in the PRIVATE DEFENDER PROGRAM ATTORNEY MANUAL: POLICIES AND PROCEDURES FOR INDEPENDENT CONTRACTOR ATTORNEYS (2010) [hereinafter PDP ATTORNEY MANUAL].

In addition to the Chief Defender, the PDP staff consists of eleven persons: an Executive Assistant to the Chief Defender, an Assistant Chief Defender, a Managing Attorney for Juvenile Court (delinquency and dependency cases) and for PDP representation in mental health cases, a Chief Investigator, a Controller, a Senior Bookkeeper, a Billing Coordinator, and an Office Manager assisted by three other staff. The PDP is housed in downtown Redwood City, near the county's courts, and PDP lawyers often stop at the office, which has space for them to meet.

The PDP is funded by San Mateo County pursuant to a contract executed between the county and the San Mateo County Bar Association.¹¹¹ Besides listing the types of cases for which the PDP was responsible, the last contract between the parties contained provisions for a fixed sum to be paid to the Bar Association during the first year of the contract and automatic increases in the annual contract price to be either 4% of the previous year's contract or the consumer price index for the San Francisco area, whichever was greater.

The contract also acknowledged uncertainty about the number of cases for which lawyers would be needed during the ensuing five years, and hence the parties "agree to meet, at the request of either party, to discuss any such concern at the earliest possible time so as to determine whether changes in the terms of the Agreement are necessary."¹¹² Additional contract provisions covered "performance benchmarks," including attorney training, evaluations of attorneys, the handling of client complaints, attorney caseloads, initial client meetings, and community outreach. Finally, the contract required the PDP's Chief Defender to submit an annual report addressing each of these and other subjects to the county's Board of Supervisors within ninety days after the end of each contract year.

PDP Lawyers

In its Annual Report for 2008–2009, the number of PDP lawyers is listed as 115, and the number of panel lawyers today is substantially unchanged. Almost all PDP lawyers are solo practitioners who provide representation in misdemeanor, felony, and juvenile delinquency and dependency cases. However, five lawyers devote their time to assisting other PDP lawyers with motions and handling extraordinary writs, and one lawyer divides her time between these specialized legal activities and trial work.¹¹³ The size of the PDP panel of lawyers is based on the program's "need for additional lawyers [and] ...

¹¹¹ The last contract between the parties was from June 1, 2006, through June 30, 2011. See PDP ANNUAL REPORT, *supra* note 106, at Appendix B, which contains a copy of the agreement.

¹¹² *Id.* at para. 3, Compensation.

¹¹³ Appeals of cases handled by the PDP are taken by the California Appellate Project in San Francisco, whose website is *available at* <http://www.capsf.org/>.

the current caseload and projections for the future.”¹¹⁴ PDP lawyers may retain private clients while handling cases for the program, but on average lawyers spend approximately 80% of their time handling PDP cases. Invariably, there are many more lawyers seeking admission to the PDP than there are available openings, and thus the program is able to be selective in adding new members.

Admission to the PDP requires submission of a written application together with a resume. If deemed appropriate, an interview will be held with the Assistant Chief Defender and then the Chief Defender. Criteria for selection to the panel include the applicant’s skill level, information obtained from references and other persons with knowledge of the applicant, fluency in a foreign language, and an “evaluation of the applicant’s devotion to the representation of the indigent as opposed to a simple desire to supplement his or her income.”¹¹⁵ Both admission and removal from the PDP panel is entrusted to the Chief Defender. Besides disciplinary proceedings, reasons for removal can include the following:

- Failure to handle assigned cases in a satisfactory and professional manner;
- Violating professional ethics; ...
- Failure to comply with the rules, regulations or policies of the Private Defender Program;
- Failure to attend mandatory training seminars and programs ...¹¹⁶

According to the Chief Defender, usually at least one member of the PDP panel is removed each year.

PDP lawyers reflect substantial diversity in defense experience, gender, ethnicity, and racial composition. Just over half of the lawyers have more than fifteen years of experience; the rest of the panel range in experience from under five years (18 lawyers); five to ten years (22 lawyers); and ten to fifteen years (10 lawyers). Forty-nine of the lawyers (43% of the total panel) have experience either as deputy prosecutors (26 lawyers) or with public defender programs (23 lawyers). Seventeen lawyers (15% of the panel) are members of a racial minority; 38 lawyers are women (33% of the panel); and 17 lawyers are fluent in Spanish.¹¹⁷

The PDP is assigned to provide representation in all cases in which the San Mateo County courts determine that persons are eligible for legal representation due to their inability to afford counsel. The panel lawyer selected to provide representation is

¹¹⁴ PDP ATTORNEY MANUAL, *supra* note 110, at para. 2.2.3 a.

¹¹⁵ *Id.* at para. 2.2.3 d.

¹¹⁶ *Id.* at para. 2.2.3 a., b., d., e.

¹¹⁷ PDP panel lawyers also are fluent in fourteen additional languages—Byelorussian, Cantonese, Catalan, Czech, Dutch, French, German, Hebrew, Hindi, Italian, Polish, Russian, Tamil, and Ukrainian. PDP ANNUAL REPORT, *supra* note 106, at 13.

determined by PDP management, which matches the seriousness of the case with the experience of the lawyer while also taking into account the number of previous assignments to the lawyer during the recent past. Thus, judges in San Mateo County are not involved in making decisions about lawyers to appoint to specific cases.¹¹⁸

Although the PDP is committed to vertical representation, exceptions are made for arraignment calendar courts in which felony and misdemeanor defendants appear for the first time.¹¹⁹ In misdemeanor cases, arraignment calendar lawyers are rotated daily, and lawyers who attend these arraignments may retain up to five cases in which they appear. In felony cases, arraignment calendar lawyers do not rotate, and the panel lawyers do not retain the cases in which they appear. Instead, the lawyers provide temporary representation at the arraignment, following which PDP management promptly assigns the case to a PDP lawyer.¹²⁰

The fee schedule for PDP lawyers is significantly more complex than the hourly fees paid to private lawyers in either Massachusetts or D.C.,¹²¹ because the PDP uses a combination of hourly fees and flat fees for various events in which lawyers participate.¹²² To illustrate, in a routine misdemeanor or felony case, if a lawyer provides representation in a jury trial, the lawyer will be paid \$125 per hour and will also be eligible for “preparation fees” for work spent in advance of trial at the rate of \$260 per day. These fees will be in addition to other fees the lawyer will have earned during earlier stages of the case in which representation was provided. All serious felony cases are paid on an hourly basis, ranging from \$95 per hour to \$165 per hour, depending on the charges. These hourly rates are the same for in-court and out-of-court work, and no caps are placed on the amount of compensation that can be paid to counsel on any given case. The fee schedule also contains special provisions for “extraordinary fee requests,” which are handled either by management or by a PDP Special Litigation Fee Committee.

¹¹⁸ Thus, the practice in San Mateo County is similar to Massachusetts, because there, too, judges are not involved in selecting lawyers to be appointed to cases. Also, as in Massachusetts, compensation claims submitted by PDP lawyers are approved by administrators, not by judges. See *supra* note 16–17 and accompanying text and *supra* note 47.

¹¹⁹ Similar to the CPCS in Massachusetts and PDS in Washington, D.C., a separate PDP lawyer is appointed for each codefendant in a multiple-defendant case. Because PDP lawyers are independent contractors, conflicts of interest among PDP lawyers are avoided.

¹²⁰ There are a number of provisions in the program’s Attorney’s Manual designed to ensure that clients are effectively represented. Consider, for example, the following: “Only those lawyers possessing extensive felony and misdemeanor experience will be selected for assignment to in-custody arraignment calendars No felony cases will be closed on an arraignment calendar at which the client is making his or her initial court appearance.” PDP ATTORNEY MANUAL, *supra* note 110, at para. 3.1.3.

¹²¹ See, e.g., *supra* notes 46–47 and accompanying text for the assigned counsel fee structure in Massachusetts.

¹²² See PDP ANNUAL REPORT, *supra* note 110, at Appendix E, which contains the program’s complete fee schedule.

Ensuring Quality

Investigations

In many assigned counsel programs, lawyers must seek court permission to retain an investigator, funds to do so are limited, and requests are not always granted. As a result, lawyers often are discouraged even from asking for investigative assistance. In contrast, the PDP has its own Chief Investigator, strongly encourages the use of investigators, and prides itself on *never* refusing a lawyer's request to retain an investigator regardless of whether the case is a felony, misdemeanor, or juvenile case.¹²³ To obtain an investigator, PDP lawyers submit a written request to the PDP's Chief Investigator, and thus judicial permission to hire an investigator is not required.¹²⁴

According to its 2008–2009 Annual Report, thirty-six private investigators, all independent contractors, performed services for PDP lawyers and their clients. Investigators are compensated on an hourly basis so they have an incentive to spend as much time as necessary on their assigned cases. PDP policy is to permit lawyers to select the investigator they prefer whenever feasible. A password-protected PDP website shows lawyers which of the program's investigators are available to accept assignments. Investigators are organized into teams depending on the kinds of cases on which they typically work, i.e., homicide, major felony, felony, misdemeanor, and cases requiring a Spanish-speaking investigator.

To facilitate the work of PDP investigators, a listserv has been established through which they can exchange information and ideas with the program's Chief Investigator and with one another. Although California does not require continuing education to maintain a private investigator's license, the PDP has instituted mandatory training for all of its investigators. In addition, the PDP has begun a mentoring program for all new investigators when they begin working on PDP cases.

¹²³ The PDP also readily approves the retention of experts, because it has funds in its budget to cover the expense. Requests for experts are directed to the Chief Defender, the Assistant Chief Defender, or the Managing Attorney for Juvenile Court. Thus, defense counsel is able to avoid *ex parte* requests of judges to approve expert witness expenses. In the past, the program has approved retaining experts from other parts of the country and even from abroad.

¹²⁴ Also, in Massachusetts, private counsel division lawyers seek permission for investigators from CPCS, not from judges. In Washington, D.C., assigned counsel seeking to retain an investigator or expert must obtain court permission in an *ex parte* proceeding. See Plan for Furnishing Representation to Indigents Under the District of Columbia Criminal Justice Act, *supra* note 103, at para. D (9).

Training

PDP lawyers must complete more than the twenty-five hours of continuing legal education over a period of three years required of all lawyers in California.¹²⁵ However, during their first full year with the program, PDP lawyers must “complete 21 hours of relevant classes or equivalent training”¹²⁶ After their first year, the number of required hours of education or equivalent classes is reduced to fifteen hours per year.¹²⁷

Each year, the PDP conducts several of its own mandatory training seminars. Panel lawyers unable to attend mandatory seminars are required either to view a videotape or listen to an audiotape of the programs in order to maintain their eligibility to receive appointments to cases. During 2008–2009, mandatory seminars dealt with “New Laws and Revisions for 2009” and “Voir Dire.” In addition, the PDP organizes and hosts a number of other seminars for panel members who may attend without cost. During 2008–2009, fourteen such programs were offered providing 18 hours of CLE credit. Five of the programs were designed for juvenile court practitioners.

Finally, each year, PDP lawyers may draw upon a fund to be used for “approved education and training programs that are directly related to the types of cases he or she is handling for PDP clients.”¹²⁸ The program also covers the cost of panel lawyers to join various defense-related organizations such as the California Attorneys for Criminal Justice, the California Public Defenders Association, and the National Association of Criminal Defense Lawyers.

Mentoring

All new PDP lawyers are assigned mentors, who are active panel lawyers with more than ten years experience in either criminal and/or juvenile defense representation. In addition, mentors are assigned to lawyers who transition from one panel to another (e.g., from juvenile to criminal court) and when, in the judgment of PDP management, a lawyer has not had sufficient trial experience within the prior three years. When I visited the PDP in January 2010, approximately fifteen panel lawyers (about 13% of the total panel) were assigned to mentors.

The primary role of mentors is to meet frequently with their mentees, thoroughly review with them their cases, attend interviews and various types of hearings in which mentees provide representation, and critique their performances. According to the PDP’s “Mentor Program Manual,” mentors are expected to “be available by telephone

¹²⁵ Website of the State Bar of California, *available at* <http://mcle.calbar.ca.gov/>.

¹²⁶ PDP ATTORNEY MANUAL, *supra* note 110, at para. 2.5.3.

¹²⁷ *Id.*

¹²⁸ PDP ANNUAL REPORT, *supra* note 106, at 36. *See also* PDP ATTORNEY MANUAL, *supra* note 110, at para. 2.5.2.

or in person to consult with the mentee on an as-needed basis.”¹²⁹ Recently, the program was strengthened by the addition of a senior PDP lawyer with more than thirty-five years of experience, who devotes all of his PDP time to mentoring lawyers who have cases scheduled to be tried and observing them in trial. Mentors also assist lawyers with practical matters related to serving as a PDP panel lawyer such as the program’s fee schedule, billing procedures, and preparing investigation requests. To ensure the success of the mentoring program, PDP’s fee schedule compensates mentors for their efforts.

The length of time that mentee lawyers are assigned to a mentor varies, as “it depends entirely on the pace of the ... lawyer’s progress.”¹³⁰ A lawyer in his sixth year with the PDP who was representing felony defendants acknowledged that he still had a mentor with whom he met to discuss his most serious cases. Similarly, the Mentor Program Manual recognizes that the role of the mentor may vary depending on the specific needs of the mentee. The manual also declares that the “[t]he mentor/mentee relationship should be reflective of a relationship between colleagues or partners, not as between employee and supervisor.” Interviews of PDP lawyers working with mentors suggested that this goal was being achieved. Several of the program’s newer lawyers commented that they relied heavily on their mentors and that the PDP felt like “family” because “everyone always was willing to help.” The lawyer added, however, “if you mess up, they will tell you.” Another lawyer explained that she “talks to her mentor constantly—more than her family.” In 2009, for the first time, mentees were asked to comment about their mentors through an online survey administered by PDP management.

Performance Evaluations

Each year, the Chief Defender and Assistant Chief Defender undertake an evaluation of each PDP lawyer. The criteria for these evaluations are contained in the program’s “Evaluation Standards,” which are published as an appendix to the PDP Annual Report. The list of standards is comprehensive, containing seventeen different areas for consideration, including recognition of legal issues in assessing cases; legal research and use of pretrial motions; effective use of investigators and experts; witness preparation; case negotiations and sentencing; advocacy skills; ethics and integrity; effective communication with clients; interactions with PDP staff and court personnel; and calendar management.

To assist in conducting evaluations, PDP lawyers are required to complete an annual survey about the work they performed during the previous year. For example, lawyers

¹²⁹ This document is an appendix to the PDP ATTORNEY MANUAL, *supra* note 110.

¹³⁰ PDP ANNUAL REPORT, *supra* note 106, at 32.

must list all cases tried during the past year and their results, CLE courses attended that were not sponsored by the PDP, and the legal research tools that they used in preparing motions, briefs, etc. Lawyers also are asked to attach a “motion or brief” they prepared during the past year that is an example of their own work and that was not a “canned” document developed for a prior case.¹³¹ The instruction for this requirement explains that the “brief or motion is to be an example of your work, and your work alone. If you have not submitted any such document in the one-year period, please so indicate in your answer to the question.”¹³²

In making judgments about the performance of PDP lawyers, the Chief and Assistant Chief Defender take into account the responses of lawyers to the annual survey, whether the lawyers attended CLE programs in addition to those organized by the PDP, use of investigators, billing records, and complaints against the lawyer, if any.¹³³ The Chief and Assistant Chief Defender also attend trials and other proceedings to make personal assessments of the skills of PDP lawyers. PDP mentors also share with the Chief and Assistant Chief Defender their views of the progress of their mentees.

The PDP Annual Report for 2008–2009 explains that following their most recent annual assessments the Chief or Assistant Chief Defender met personally with twelve PDP lawyers to discuss various performance issues.¹³⁴ Their most frequent concern dealt with the apparent underuse of investigators by three lawyers handling criminal cases and by five lawyers providing representation in juvenile court. The issue was reviewed with each of the lawyers involved. Also, a lawyer assigned to his first serious felony case did not seem to be preparing the case appropriately. The case, therefore, was reassigned to another PDP member and a remedial training program was instituted for the lawyer. In addition, a lawyer who was handling misdemeanor cases failed to return his annual survey and was suspended from receiving new appointments.

¹³¹ *Id.* at 40.

¹³² *Id.*

¹³³ Each day an experienced felony lawyer is designated to be present at the PDP’s offices to serve as the “Officer of the Day.” The purpose of this program is to ensure that there is always someone available to answer client questions and to track complaints about PDP lawyers. During 2008–2009, 287 calls were received from clients, broken down as follows: 196 were general inquiries and questions; 83 pertained to relationship issues between PDP lawyers and clients; and 8 of the calls raised performance issues. In each instance of a complaint, the Assistant Chief Defender reviewed the documentation prepared by the Officer of the Day, and an inquiry was made of the PDP lawyer respecting the matter. In two instances, after investigation, the Assistant Chief Defender arranged for the lawyers’ cases to be reassigned to other panel members. As the Annual Report points out, given the volume of cases handled by the PDP, complaints against PDP lawyers surfaced in 0.03% of the cases in which the program was designated to provide representation. *Id.* at 43.

¹³⁴ *Id.* at 41.

Caseloads

The Bar Association's agreement with San Mateo County requires that the PDP provide information each year in its Annual Report about lawyer caseloads:

The Association and County agree that the number and type of cases for which a lawyer is responsible may impact the quality of representation individual clients receive. While there are many variables to consider, including the seriousness or complexity of each case and the skill and experience of the individual lawyer, useful information might be gathered from an evaluation of the caseloads of Private Defender Program Attorneys. To this end, the Private Defender Program shall include the caseloads of each Private Defender Program attorney by type of cases, as well as the average caseloads for the Private Defender Program as a whole in the annual report ...¹³⁵

The data reported by the PDP are based on a weighted caseload study conducted among a group of PDP lawyers in 2001–2002.¹³⁶ The study led to the program determining maximum numbers of various types of cases that PDP lawyers could competently handle over a twelve-month period, assuming that they were devoting 100% of their time to the representation of PDP cases.¹³⁷ Approximately every two years, therefore, all PDP lawyers are required to estimate the amount of time that they devote to PDP cases in their law practice. Thus, if a lawyer devotes 80% of his or her time to PDP cases, the maximum numbers of various types of cases to which the lawyer can be appointed over twelve months is reduced by 20%. The data presented in the PDP's 2008–2009 Annual Report shows that slightly more than 60% of PDP lawyers spent 90% or more of their time on PDP cases, so, for these lawyers, there is either no reduction or only a modest reduction in the maximum numbers of various types of cases to which the lawyers *may* be appointed.

Based upon the program's 2001–2002 weighted caseload study, the maximum numbers of cases to which PDP lawyers are permitted to be appointed are higher than those recommended in the 1973 NAC standards.¹³⁸ However, the overwhelming majority of

¹³⁵ *Id.* at Appendix 2, para. 10 d.

¹³⁶ For discussion of weighted caseload studies, *see supra* notes 6–46 and accompanying text, Chapter 6.

¹³⁷ The specific maximum numbers of various types of cases that PDP lawyers can represent are as follows: misdemeanors—450; misdemeanors involving domestic violence—334; Felony 1 cases—265; Felony 2 cases—174; Juvenile Delinquency cases—335; and Juvenile Dependency cases—188. The PDP's weighted caseload study was based upon the availability of 1860 hours for casework per year. In reporting its data, the PDP does not give the names of lawyers, but instead each lawyer is given a number, and thus it is possible to determine the precise number and types of cases to which each lawyer was appointed during the fiscal year. *See* PDP ANNUAL REPORT, *supra* note 110, at 44–47 and Appendix G.

¹³⁸ For discussion of the NAC caseload standards, *see supra* notes 91–104 and accompanying text, Chapter 2. The PDP Annual Report explains why it believes that its weighted caseload study came out with higher case limits than the NAC:

PDP lawyers do not come close to reaching their target numbers of maximum cases. In fact, as noted in the PDP's 2008–2009 Annual Report, “the average PDP lawyer handled only 47.24 percent of the targeted maximums for all types of cases.”¹³⁹ My own review of the PDP data revealed that only 13 of 103 lawyers exceeded 75% of their targeted maximums for all types of cases.¹⁴⁰ Of all lawyers during 2008–2009, only one exceeded his targeted maximum, and the excess over 100% was slight—only 2.57%.

While the data in the Annual Report is essential in understanding the program's caseloads, my interviews with PDP lawyers were equally revealing. The ten lawyers with whom I spoke represented a range of experience; some were senior lawyers whereas others were relatively new to the program. I asked the lawyers about their *pending* caseloads, because I had reviewed the Annual Report and knew the number of cases to which PDP lawyers were appointed each year. Without exception, the lawyers told me that their caseloads were modest and, in the view of several lawyers in a position to compare, substantially lighter than the caseloads typically handled by California public defenders.

Here is a sample of what I was told by the lawyers I interviewed:

- Lawyer 1 had many years of experience and had previously been a public defender in two different California defender agencies. He reported that his caseloads as a public defender were manageable but that he knew of California public defenders who were overwhelmed, handling as many as 100 felonies at a time. He stated that he spent almost all of his time on PDP cases and that his current caseload was fifteen to twenty serious felony cases. He added that he worked with three or four different investigators and had an investigator assigned to virtually all of his cases.

The most striking ... [reason] is the computer, which enables lawyers to do on-line research, create brief banks, produce template motions, and track their time easily. Other factors relate to the way criminal cases are handled in San Mateo County Superior Court. For example, rather than being required to handle one case at each pretrial conference or SCR [Superior Court Review], PDP lawyers are able to set three or four cases on the same calendar, thus handling multiple cases in the same time as it would take to handle one. The fact that most of the courtrooms that handle criminal cases are within 100 yards of the County Jail also contributes to lawyer efficiency. The makeup of the PDP itself also contributes to the findings of the study. Because homicide-qualified PDP lawyers also handle misdemeanors and less serious felonies, they bring a wealth of experience to the process of defending our clients.

Id. at 46.

¹³⁹ PDP ANNUAL REPORT, *supra* note 110, at 47.

¹⁴⁰ I noted earlier that the number of PDP panel lawyers was listed as 115 in the program's 2008–2009 annual report. Data is reported on only 103 lawyers, however, because not all members of the panel were available to accept appointments during the fiscal year. Also, one lawyer was engaged full-time in mentoring less experienced lawyers as they prepared for trials, and five lawyers devoted their time to assisting lawyers with motions and extraordinary writs.

- Lawyer 2 had been with the PDP for about three and one-half years. He estimated that his current pending caseload was thirty, consisting of about ten felonies and twenty misdemeanors.
- Lawyer 3 started with the program six years earlier and was now handling some felony cases in addition to misdemeanors. He estimated that he currently had about thirty cases, probably about ten felonies, and twenty misdemeanors. While observing that few panel members ever leave the PDP, this lawyer added that “the caseloads in the PDP are way lower than in PD offices.”
- Lawyer 4 was a senior lawyer who graduated from law school twenty-six years earlier. He had been a public defender in a large California city for fifteen years and been with the PDP for four years. He characterized his experience as a public defender as performing “triage” because he “could never dedicate enough time to ... [my] cases.” In contrast, he said that with the PDP he could spend as much time as needed on his cases and could also ask not to be appointed to new cases. He explained that when the PDP calls, “the question that I am asked is whether I am available to take a new case.” This lawyer indicated that he devoted about 60% of his time to PDP cases and had about fifteen to twenty felony cases, whereas his public defender caseload was probably about fifty to sixty felony cases, with some lawyers having as many as seventy-five to eighty cases. This lawyer estimated that if a California defender had adequate time to prepare and provided representation in a mix of serious and lesser felony cases, the lawyer could probably close about ninety to 100 cases over a twelve-month period.
- Lawyer 5 started his career as a public defender but had been with the PDP for nearly forty years, spending nearly 100% of his time on PDP cases. At the time of my interview, he was mentoring one lawyer engaged in juvenile representation and also was available to assist other lawyers handling juvenile cases. In addition, he was mentoring a lawyer handling a serious criminal case. Lawyer 5’s personal caseload was about twenty misdemeanors and ten to fifteen juvenile delinquency cases.

The foregoing summary of conversations with PDP lawyers would be incomplete without noting that all of the lawyers with whom I spoke were extremely proud of the program and pleased to be a part of it. Because the lawyers controlled their caseloads, had ample investigative services, and were adequately compensated, they were unanimous in their belief that the PDP had achieved a measure of success uncommon among public defense programs. Asked whether they had complaints about the program or thought there were areas in need of improvement, the lawyers mentioned only two relatively modest concerns. The first related to the absence of benefits such as health insurance, and the second pertained to the difficulty of PDP lawyers taking collective action on issues of concern, because they were independent contractors.

CHAPTER 9

Recommendations:
Indigent Defense Structures and Litigation Strategies

In the previous eight chapters, I discussed a range of issues related to excessive caseloads. In Chapter 1 I explained why the problem is so difficult to solve, and in Chapter 8 I described defense programs that nevertheless succeed in controlling their caseloads. Many other issues have been covered along the way, including rules and standards on caseloads, the detrimental effect of having too many cases, the importance of defense leadership, the possible liability of persons for terminating lawyers with legitimate concerns about their caseloads, and ways to determine appropriate staffing needs. I also reviewed recent litigation in which caseload challenges have been filed in courts. With the foregoing as background, I turn now to a discussion of reforms that I believe are essential if excessive caseloads are to be avoided. I first focus on the way in which defense services are provided and then on suggestions related to caseload litigation.

A. Indigent Defense Structures

While there are differences among the three defense programs featured in Chapter 8, significant similarities are evident. For example, both the Massachusetts Committee on Public Counsel Services (CPCS) and the D.C. Public Defender Service (PDS) emphasize training and close supervision of their full-time staff lawyers.¹ Both CPCS and the San Mateo County Private Defender Program (PDP) devote substantial resources to mentoring and supervising assigned counsel and conducting annual performance reviews.² In all three jurisdictions, private lawyers must first be screened in order to be eligible for appointments to cases,³ and assigned counsel can be removed from panels of eligible lawyers if performance is deemed unsatisfactory.⁴ Also, Massachusetts and D.C. limit the amount of income that assigned counsel can earn annually.⁵

In order to control the size of caseloads, CPCS and PDS staff lawyers are sometimes excused from attending court on days that they were scheduled to appear for the purpose of receiving new case assignments.⁶ Similarly, panel lawyers of the PDP are asked

¹ See *supra* notes 15, 39, 76–78 and accompanying text, Chapter 8. One of the most important similarities that all three programs enjoy is independence from the judiciary and executive branches of government, as further discussed in the next section. See *infra* notes 23–37 and accompanying text.

² See *supra* notes 44–45, 129–134 and accompanying text, Chapter 8.

³ See *supra* notes 40–42, 103–104, 115–116 and accompanying text, Chapter 8.

⁴ In D.C., unlike Massachusetts and San Mateo County, the authority to remove private lawyers from an assigned counsel panel is vested in judges, not in administrators charged with overseeing assigned counsel representation.

⁵ See *supra* notes 50–52, 104 and accompanying text, Chapter 8. Massachusetts imposes a billable hour cap of 1800 hour per year; in D.C., \$135,200 is the amount of annual compensation that a private lawyer can earn for indigent defense representation.

⁶ See *supra* notes 38, 94 and accompanying text, Chapter 8.

if they are able to accept new cases, but they are always able to reject new assignments.⁷ Thus, each of the programs recognize that lawyer caseloads are not simply a function of caseload numbers or an inflexible standard but, as the ABA's 2006 ethics opinion recognized, must be determined on an individual basis.⁸

Role of the Private Bar

While the foregoing summary of the three defense programs captures some of the most important reasons for their success, it omits two additional, critical factors. *The first is that in each jurisdiction there is an elastic supply of private lawyers available to accept cases, and this enables caseloads of public defenders and private lawyers to be controlled.* In Massachusetts and D.C., despite the presence of full-time public defenders, the majority of indigent defense cases continue to be represented by assigned counsel.⁹ If private lawyers were not present in adequate numbers to provide defense services, the public defenders in each jurisdiction would surely be overrun with cases just as they are in much of the country.¹⁰ Similarly, in San Mateo County, the panel of assigned counsel is large, and there are always more private lawyers who want to become part of the program than there are openings available.¹¹ Accordingly, in San Mateo County, just as in Massachusetts and D.C., lawyers are not pressured to accept new cases when they believe they lack the requisite time to deliver competent and diligent services.¹²

The ABA recommends that “every system [of public defense] should include the active and substantial participation of the private bar.”¹³ The commentary to this standard explains:

[A] “mixed” system of representation consisting of both private attorneys and full-time defenders offers a “safety valve,” so that the caseload pressures on each group are less likely to be burdensome.

In some cities, where a mixed system has been absent and public defenders have been required to handle all of the cases, the results have been unsatisfactory. Caseloads have increased faster than the size of the staffs

⁷ See, e.g., *supra* note 40 and text accompanying interview of “Lawyer 4,” Chapter 8.

⁸ See *supra* notes 49–50 and accompanying text, Chapter 2.

⁹ See *supra* notes 24–26, 40, 68 and accompanying text, Chapter 8.

¹⁰ See, e.g., *supra* note 72 and accompanying text, Chapter 7, noting the relatively small number of indigent cases to which private lawyers in Kentucky are appointed in comparison to the overwhelming majority of cases assigned to the State’s public defender agency.

¹¹ See *supra* note 113 and accompanying text, Chapter 8.

¹² See *supra* note 7 and accompanying text.

¹³ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, Std. 5-I.2 (b).

and necessary revenues, making quality legal representation exceedingly difficult.¹⁴

Unfortunately, over time, the ABA's recommendation about the need for a "mixed system" of representation comprised of "active and substantial private bar participation" has been ignored in many jurisdictions, and thus the role of private lawyers in indigent defense has increasingly been marginalized. Meanwhile, the number and size of public defender offices have grown, but their staffs are almost everywhere burdened with too many cases. In contrast, the programs in Massachusetts, D.C., and San Mateo County have heeded the ABA's warning about what happens when the private bar is not sufficiently involved in providing defense representation.

Contrary to prevailing practice, the ABA has never recommended that there should *always* be public defenders assisted by a handful of private lawyers. Just the opposite is true. The ABA has urged that in addition to "active and substantial" private bar involvement in public defense, the plan for "legal representation ... should provide for the services of a full-time defender organization *when population and caseload are sufficient to support such an organization.*"¹⁵ Today, given the nation's population and the growth in prosecutions since the standard was written, full-time defender programs make sense in much of the country.

Several recent developments in indigent defense are noteworthy because they conform to principles that the ABA has espoused. In 2009, the Maine Commission on Indigent Legal Services (MCILS) was established by the legislature.¹⁶ Prior to the new law,

¹⁴ *Id.* at 7.

¹⁵ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, Std. 5-1.2 (a). While the provision of criminal justice standards quoted is clear, a statement in the ABA's Ten Principles of a Public Defense Delivery System, which is based upon the standards, is subject to possible misinterpretation: "Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar." ABA TEN PRINCIPLES, *supra* note 54, Chapter 1, at Principle 2. Conceivably, this could be interpreted to mean that when the caseload is not sufficiently high, there should only be a public defender. The position of the ABA contained in *Providing Defense Services* is similar to the 1973 recommendation of the National Advisory Commission on Criminal Justice Standards and Goals. See NAC COURTS, *supra* note 89, Chapter 1, at 263–264. While the Commission recommended that there should be full-time public defenders in view of the expertise that specialists in criminal defense can develop, the Commission also urged "that the role of the private bar in providing defense services be retained." *Id.* at 264. In the Commission's view, "[a]n indispensable condition to fundamental improvement of the [criminal justice] system is the active and knowledgeable support of the bar as a whole." *Id.* Similarly, in 2004 the ABA Standing Committee on Legal Aid and Indigent Defendants recommended that "[b]ar associations should be steadfast in advocating on behalf of ... defense services." ABA GIDEON'S BROKEN PROMISE, *supra* note 34, Chapter 1, at 44.

¹⁶ See ME. REV. STAT. ANN. tit. 4, §§ 1801–1805 (1989 & Supp. 2010). There also was an important legislative development in Alabama in the spring of 2011, as the Office of Indigent Defense Services was established to oversee all aspects of providing defense counsel in that state. See David Carroll, *Alabama Creates Statewide Indigent Defense System*, June 9, 2011, available at <http://www.nlada.net/>

indigent defense in Maine was under the control of judges who appointed private lawyers to indigent cases and approved their compensation.¹⁷ The MCILS is an independent body charged with developing “a system that uses appointed private attorneys, contracts with individual attorneys or groups of attorneys ... necessary to provide quality and efficient legal services.”¹⁸ The Commission’s duties include establishing “a method for accurately tracking and monitoring case loads of assigned counsel and contract lawyers.”¹⁹

Thus, unlike other states that have established indigent defense commissions, Maine has decided not to have a public defender program but instead to deliver defense services solely through private lawyers operating under the auspices of an independent commission. Not only is this consistent with ABA standards, especially in view of Maine’s relatively small population,²⁰ but the coordinated nature of the program should be able to prevent individual assigned counsel from becoming overwhelmed with too many cases. And as the PDP in San Mateo County demonstrates, if there is training, mentoring, and supervision, as well as adequate funding, the Maine approach can succeed.

The establishment of the first-ever public defender office in Houston is another development in indigent defense substantially consistent with ABA standards. As the nation’s fourth largest city, Houston is clearly large enough to justify a full-time public defender program.²¹ Until its public defender office was approved in 2010, Houston was the largest city in the country without a public defender agency. Significantly, the new program is being established in a way to ensure that there will be a “hybrid system for indigent defense” consisting of both public defenders and private assigned lawyers.²² Because substantial private bar involvement is expected to be retained, caseloads of public defenders should remain manageable.

jseri/blog/gideon-alert-alabama-creates-statewide-indigent-defense-system.

¹⁷ This information is recited in a “whereas” clause approved by the legislature when the Maine Commission on Indigent Legal Services was created. The Commission’s statute is *available at* <http://www.maine.gov/mcils/index.shtml>.

¹⁸ ME. REV. STAT. ANN., *supra* note 16, at § 1804 (3)(A).

¹⁹ *Id.* at (3)(G).

²⁰ Maine’s population exceeds 1.3 million, thereby ranking it forty-first among the nation’s fifty states. See <http://www.pressherald.com/news/Census-Maine-population-grow-42-percent-in-past-decade.html>.

²¹ Since at least 1990, Houston has ranked as the fourth largest city in the U.S., behind New York, Los Angeles, and Chicago. See <http://www.infoplease.com/ipa/A0763098.html>. In two years, the public defender program is expected to expand to sixty-eight lawyers. *Id.*

²² *Id.*

Securing Independence and Empowering the Defense

The second critical factor that enables the defense programs in Massachusetts, D.C., and San Mateo County to succeed is that none are controlled by judges or executive branch officials. CPCS and PDS are overseen by independent boards,²³ whereas the oversight of the PDP is vested in the county's independent private bar association.²⁴ In Massachusetts and San Mateo County, cases are assigned to lawyers by administrators, not by judges.²⁵ While judges in D.C. still approve appointments of lawyers to cases, PDS staff attorneys are appointed only when the agency signals that they are available to accept new assignments.²⁶ Also, in both Massachusetts and San Mateo County, compensation paid to assigned counsel is approved by administrators of CPCS and the PDP.²⁷

Thus, the three jurisdictions substantially comply with recommended principles of sound indigent defense programs. Earlier I noted that ABA standards and the ABA Ten Principles strongly endorse independent governing structures to oversee defense services, including the “selection [of lawyers for cases], funding, and payment of counsel”²⁸ Further, the ABA endorses merit selection of chief defenders and their staffs and the exclusion of judges from hiring and firing such personnel.²⁹

Much like the ABA, the National Right to Counsel Committee recommends that defense programs be independent and overseen by a board or commission.³⁰ The Committee's recommendation is explained in its report:

It is exceedingly difficult for defense counsel always to be vigorous advocates on behalf of their indigent clients when their appointment, compensation, resources, and continued employment depend primarily upon satisfying judges or other elected officials. In contrast, prosecutors and retained counsel discharge their duties with virtually complete independence, subject only to the will of the electorate in the case of prosecutors and to rules of the legal profession. Judges, moreover, do not select or

²³ See *supra* notes 9–14, 62–67 and accompanying text, Chapter 8.

²⁴ See *supra* note 109 and accompanying text, Chapter 8.

²⁵ See *supra* notes 16–17, 118 and accompanying text, Chapter 8.

²⁶ See *supra* note 94 and accompanying text, Chapter 8.

²⁷ See *supra* notes 46–47, 121–122 and accompanying text, Chapter 8.

²⁸ ABA TEN PRINCIPLES, *supra* note 57, Chapter 1, at 1. See also *supra* note 7, Chapter 8, which contains citations to ABA PROVIDING DEFENSE SERVICES and the first edition of the standards published in 1968. Even then the ABA stressed the importance of defense lawyers not being subjected to judicial oversight or political influence.

²⁹ ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-4.I.

³⁰ For the Committee's recommendation of the persons who should appoint members of the independent board or commission, see JUSTICE DENIED, *supra* note 2, Chapter 1, at 185 (Recommendation 2).

authorize compensation for prosecutors or for lawyers retained by persons able to afford an attorney's fee. At a minimum, judicial oversight of the defense function creates serious problems of perception and opportunities for abuse.

What is needed are defense systems in which the integrity of the attorney-client relationship is safeguarded and defense lawyers for the indigent are just as independent as retained counsel, judges, and prosecutors.³¹

In other words, while executive and legislative branches of government must necessarily determine the funding and structure of indigent defense, they should no more seek to control defense lawyers than they do any of the other actors in criminal and juvenile justice systems. Legislatures, for example, should not pass laws that erode rules of legal ethics applicable to defense lawyers,³² subject defense function standards to legislative approval,³³ and adopt legislative structures that fail to promote the independence of the defense function.³⁴

Similarly, in an adversary system of justice, judges should not be involved in selecting and compensating the lawyers on one side. Such practices enable judges to favor some lawyers over others for reasons unrelated to the quality of representation to be provided, thereby undermining the fair administration of justice.³⁵ Although ABA Standards for Criminal Justice and the ABA Ten Principles reject judicial control of the defense function as inappropriate, the ABA's Model Code of Judicial Conduct recites

³¹ *Id.* at 186.

³² For example, the Colorado legislature has declared that “[c]ase overload, lack of resources, and other similar circumstances shall not constitute a conflict of interest.” COLO. REV. STAT. § 21-1-103 (2005). This provision cannot be reconciled with COLORADO RULES OF PROFESSIONAL CONDUCT, R. 1.7 (a)(2). *See also supra* notes 60–61, Chapter 2, and accompanying text.

³³ *See* LA. REV. STAT. ANN. § 15:148(C) (West 2005 & Supp. 2011). This provision is discussed in Norman Lefstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L. 125, 134–135 (2008).

³⁴ Recall the story that told earlier about the head of a statewide public defender program overseen by a board whose members were appointed by the state's governor. When the state's public defender was asked why he would not challenge in court his agency's caseloads, he replied that the governor appoints all of the members of his board, and the governor would see to it that he was fired. *See supra* note 68 and accompanying text, Chapter 1.

³⁵ The report of the National Right to Counsel Committee cites examples in which judicial selection of defense counsel has led to unfair allocations of appointments and retaliations against lawyers for taking too many cases to trial or otherwise being too aggressive in their representation. *See* JUSTICE DENIED, *supra* note 2, Chapter 1, at 82–84. If a fair and unbiased system for appointing counsel is developed in which assignments are based on the qualifications of counsel, there are no compelling reasons why the system must be administered by judges. The ABA has recommended that assignments to counsel should not be ad hoc but based instead upon a written, well-publicized plan. *See* ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-2.1 and accompanying commentary.

that “[a]ppointees of a judge include assigned counsel,”³⁶ seemingly implying that such conduct is perfectly fine. The authors of the Model Code apparently were unaware that ABA policy rejects judicial appointments of assigned counsel, because they make no mention of this long-standing ABA position. The Model Code also fails to note that there is an “appearance problem” when judges appoint lawyers in criminal and juvenile cases, even though judges are admonished to avoid “the appearance of impropriety.”³⁷

Several years ago I discussed with a state Supreme Court justice the subject of judges appointing lawyers to the cases of indigent defendants and suggested that it would be preferable if assignments were made by an independent, “responsible agency,” as recommended by ABA guidelines dealing with death penalty cases³⁸ and other ABA standards. However, the jurist promptly dismissed my suggestion, commenting that the appointment of defense lawyers is a “judicial function.” His response made me realize that the subject was not one to which he had ever devoted much prior thought. He simply accepted without question the long-standing practice of judges selecting lawyers to provide representation in criminal and juvenile cases.

State court judiciaries have not been especially interested in relinquishing their authority over indigent defense, perhaps because of a failure to appreciate the problem and a desire to ensure that cases proceed expeditiously in their courts. In many states, judges have become dependent on public defenders to provide the requisite representation regardless of caseloads and the quality of the legal services provided. When lawyers from the Missouri State Public Defender program sought to withdraw from representation due to excessive caseloads, the trial judge explained his thinking in rejecting the motion:

Well, interesting situation here. I’ve got a young man in my county who is indigent and who’s in legal trouble. He’s charged with two felonies, he absolutely needs the services of counsel and protection of a lawyer, there is no question about that.

The Public Defender’s objection in this case puts the Court in the absolute middle, they put me in a situation where on one side I’ve got folks [who] are indigent, who are eligible If I don’t appoint a lawyer for them they sit, they can’t make bond, they can’t get out. All flies in the face of our system, it flies in the face of our constitution

³⁶ ABA MODEL CODE OF JUDICIAL CONDUCT, R. 2.13, cmt. 1.

³⁷ *Id.* at R. 1.2.

³⁸ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 3.1 Designation of a Responsible Agency (rev. ed. 2003) [hereinafter ABA DEATH PENALTY GUIDELINES].

I'm not saying the Public Defenders aren't over-worked, I'm not saying that at all but I appoint the Public Defenders Office in situations exactly like ... [the defendant's] situation and I don't know how to move his case and how to provide him what the law of the land provides.³⁹

The judge's statement starkly reveals the structural and financial deficiencies in providing indigent defense services in Missouri and in much of the country. Neither in the passage quoted nor at any time during the hearing did the judge ever mention appointing private lawyers to provide the necessary representation. This undoubtedly is because in Missouri private assigned counsel are not much involved in providing indigent defense representation, and the court understood that funds to pay private counsel were in short supply.⁴⁰ In the end, therefore, without disputing the agency's claim that its lawyers were overworked, the judge refused the requested relief, thereby upholding Missouri's failure to provide adequate support for indigent defense. Unfortunately, this scenario is not especially unusual, as public defenders normally must seek relief from the courts, thereby thrusting judges into the middle of a problem for which they are not responsible.

How can the kind of situation that arose in Missouri be avoided so that judges are not called upon to "enforce" the failure of state and/or local governments to provide adequate financial support for indigent defense? The answer is to *empower* defender programs and remove judges from the middle of the problem. For this to occur, several steps are essential:

- First, as suggested earlier in this chapter, jurisdictions must recognize that caseload relief for overworked public defenders will not be achieved unless there are adequate numbers of private assigned or contract lawyers who are trained, supervised, and adequately compensated for their services.
- Second, the judge as middle person—as "enforcer"—needs to end. To achieve this, leaders of public defense programs, aided by state judiciaries, defense boards or commissions, and the private bar must constantly seek necessary indigent defense reforms and adequate funds for public defenders, assigned counsel and/or contract lawyers.⁴¹

³⁹ State of Missouri v. Jared Blacksher, Circuit Court of Christian County, Case No. 10CT-CR00905 & 06, Transcript of Record at 110 (August 10, 2010). This hearing was held in the aftermath of the Missouri Supreme Court's decision in *State ex rel. Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870 (2009) (en banc), which is previously discussed. See *supra* notes 85–103 and accompanying text, Chapter 7.

⁴⁰ In fact, in its *Pratte* decision, *supra* note 39, the Supreme Court of Missouri expressed considerable concern for the lack of adequate state funds to compensate private counsel for providing indigent defense representation. See *supra* note 102 and accompanying text, Chapter 7.

⁴¹ The ABA Standing Committee on Legal and Indigent Defendants (ABA SCLAID) has recommended that state and local bar associations, as well as other organizations and individuals, be aggressive in

- *Third—and most important of all—public defender programs need to be empowered to direct cases to private lawyers without having to convince judges that public defenders have too many cases and therefore need caseload relief.*

As noted in the Introduction to this book, the problem of excessive caseloads in indigent defense is in the state courts, not in the federal courts. Not only is the funding for defense services substantially more generous in federal courts for federal and community defender programs and Criminal Justice Act (CJA) panel lawyers who furnish defense representation,⁴² but in many federal districts the defender programs oversee the assignment of cases to their own staff lawyers *and* to private panel lawyers approved for appointments under the federal district court's CJA plan.⁴³ Thus, in many federal districts, the defender program designates the private panel lawyers to be appointed, and their appointments are then ratified by federal judges. CJA plans, moreover, provide that panel lawyers are to be appointed in a "substantial" number of the federal district's cases, which is defined in a model CJA plan as approximately 25% of annual appointments.⁴⁴ In fact, panel lawyers in the federal courts, receive closer to 40% of the cases and are far better compensated than private lawyers assigned to handle indigent cases in state courts.⁴⁵

supporting indigent defense reforms and in seeking adequate financial support for such programs. See, e.g., GIDEON'S BROKEN PROMISE, *supra* note 34, Chapter I, at 44–45.

⁴² Data for 2008 indicate that total spending on indigent defense was \$5.3 billion nationwide. This includes state and county expenditures, as well as federal government expenditures for defense services *in the federal courts*, i.e., for public defender programs and Criminal Justice Act assigned counsel. The latter sum was \$849 million (nearly 16% of all expenditures). These data were compiled by ABA SCLAID and posted on its website. See Reports and Studies (Expenditures and Revenues), *available at* www.indigentdefense.org.

⁴³ See 18 U.S.C. 3006A (2006 & Supp. 2009). The federal CJA statute requires that "[e]ach United States District Court, with the approval of the judicial council of the circuit ... place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation." *Id.* at § (a). Upon approval of the judicial council of each circuit, district federal or community defender agencies can be established. Federal defender programs are headed by a "Federal Public Defender" who is appointed by the court of appeals of the circuit. *Id.* at § (g)(2)(A). Community Defenders are nonprofit organizations "established and administered by a group authorized by the plan to provide representation." *Id.* § (g)(2)(B).

⁴⁴ The CJA statute states that "[p]rivate attorneys shall be appointed in a substantial proportion of the cases." *Id.* at § (a)(3). The Model Criminal Justice Act Plan is on the website of the Administrative Office of United States Courts:

Ratio of Appointments. Where practical and cost effective, private attorneys from the CJA Panel will be appointed in a substantial proportion of the cases in which the accused is determined to be financially eligible for representation under the CJA. "Substantial" will usually be defined as approximately 25% of the appointments under the CJA annually throughout the district.

See Appendix 2A: Model Criminal Justice Act Plan, Sec. VI. C., *available at* <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx>.

⁴⁵ The Office of the United States Courts reports the following statistics:

The approach of the federal courts in which defender programs are able to direct cases to private lawyers is uncommon in state courts but not completely unknown. Probably the Massachusetts' CPCS resembles most closely the practice in federal courts, as CPCS controls both the intake of its staff lawyers' cases and coordinates appointments to assigned counsel.⁴⁶ However, Massachusetts differs from most federal districts because a majority of the cases are actually represented by assigned counsel,⁴⁷ whereas in federal courts the majority of cases are represented by either federal or community defenders. Also, in at least Maryland and Wisconsin, state statutes empower statewide

Federal defender organizations, together with the more than 10,000 private "panel attorneys" who accept CJA assignments annually, represent the vast majority of individuals who are prosecuted in our nation's federal courts In those districts with a defender organization, panel attorneys are typically assigned between 30 percent and 40 percent of the CJA cases, generally those where a conflict of interest or some other factor precludes federal defender representation. Nationwide, federal defenders receive approximately 60 percent of CJA appointments, and the remaining 40 percent are assigned to the CJA panel. Today, panel attorneys are paid an hourly rate of \$125 per hour in non-capital cases, and, in capital cases, a maximum rate of \$178 per hour. These rates were implemented January 1, 2010, for work performed on or after that date. The rates include both attorney compensation and office overhead. In addition, there are case maximums that limit total panel attorney compensation for categories of representation (for example, \$9,700 for felonies, \$2,800 for misdemeanors, and \$6,900 for appeals). These maximums may be exceeded when higher amounts are recommended by the district judge as necessary to provide fair compensation and the chief judge of the circuit approves.

Website of the Administrative Office of the United States Courts, *available at* <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx>. The most recent data on compensation paid to appointed counsel in indigent criminal cases in state courts is contained on the website of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants. *See Rates of Compensation Paid to Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview* (June 2007) [Rates of Compensation Paid to Appointed Counsel]. *See Reports & Studies, Salaries & Compensation Rates*, *available at* www.indigentdefense.org. Litigation of fee rates for assigned counsel is discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 104–109. *See also* Simmons v. State Public Defender, *supra* note 90, Chapter 2, in which the Iowa Supreme Court in 2010 held that a \$1,500 fee cap for appellate work was unenforceable, thereby authorizing contract lawyers to be paid more than the fee cap when a higher fee is shown to be reasonable and necessary; and Brown v. Howard, No. 26991, South Carolina Supreme Court, June 21, 2011. In the South Carolina case, the State's highest court rejected the appeal of assigned counsel who sought payment in excess of \$3,500, which is the statutory presumptive fee cap for felony trial work. The court ruled that the "takings clause" of the Fifth Amendment is implicated when defense lawyers represent indigent clients and trial court judges retain authority to pay more than the \$3,500 pursuant to state law. However, in this case the refusal of the trial court judge to authorize more than \$3,500 was held to be justified because of the unprofessional manner in which defense counsel conducted himself in the trial court.

The disparity in the amount of fees paid to assigned counsel in the federal courts compared to state courts continues to be significant. Standard hourly billing rates for lawyers in private practice nationwide *average* \$342 per hour for equity or shareholder partners; \$329 per hour for non-equity partners; \$234 per hour for staff lawyers; and \$219 per hour for associate lawyers. THE SURVEY OF LAW FIRM ECONOMICS, 2010 Edition 87 (July 2010).

⁴⁶ *See supra* notes 16 and 38 and accompanying text, Chapter 8.

⁴⁷ *See supra* note 40 and accompanying text, Chapter 8.

defender programs to assign cases to private lawyers.⁴⁸ The practice also exists in North Carolina, although it is not specifically authorized in the state's public defender statute.⁴⁹ Finally, as noted before, an Iowa statute authorizes the state's public defender program to return cases to a trial court judge if, due to a "temporary overload of cases"

⁴⁸ MD. CODE, Crim. Proc., § 16-208 (b) (2011) provides as follows:

- (1) Except in cases in which an attorney in the Office [of Public Defender] provides representation, the district public defender, subject to the supervision of the Public Defender, shall appoint an attorney from an appropriate panel to represent an indigent individual.
- (2) Panel attorneys shall be used as much as practicable.

However, a recent annual report of the program contains a statement about staff caseloads: "By any measure, attorney caseloads in almost every area of law and region of the State far exceed acceptable caseload standards established to protect effective representation as guaranteed in the U.S. Constitution, the Maryland Declaration of Rights and Maryland law." STATE OF MARYLAND, OFFICE OF THE PUBLIC DEFENDER, FISCAL YEAR 2010 ANNUAL REPORT II (2010), *available at* <http://www.opd.state.md.us/Index%20Assets/Annual%20Report%20FY2010%20finaldr5.pdf>. The reason that the assignment of cases to private lawyers does not lead to manageable caseloads for public defenders is that the program lacks sufficient funds to compensate members of the private bar. The head of the Maryland statewide defender program stated as follows:

We are reduced to paneling cases only in conflict cases, not for caseload relief. Maryland panel fees at \$50.00 per hour with caps of \$750 for misdemeanor and \$3,000 for felonies are among the lowest in the country. This fact reduces the pool of qualified lawyers who will take our cases. We cannot compete with the federal CJA panel for attorneys. CJA attorneys are adequately compensated with (comparatively) reasonable hourly rates and higher caps.

E-mail from Paul B. DeWolfe, Public Defender, Office of the Maryland Public Defender (December 22, 2010 7:27 a.m., EST) (on file with author).

Similar to Maryland, Wisconsin law provides as follows: "Whenever the director of a local public defender organization is appointed as counsel, he or she may assign the case to any qualified attorney [certified to accept appointments] or attorneys employed by the local public defender organization." WIS. STAT. ANN. § 977.08 (3)(d) (2007 & Supp. 2010). However, just as in Maryland, there is sometimes a lack of funds to compensate private assigned counsel as the State appropriation runs out before the end of the fiscal year, thus requiring lawyers to wait until the next fiscal year in order to be paid. Telephone interview with Michael Tobin, Deputy State Public Defender, Wisconsin State Public Defender's Office (July 2, 2011). Moreover, the rate of compensation for assigned counsel in Wisconsin is fixed by statute for all offenses at \$40 per hour, which is one of the lowest fee rates in the nation. *See Rates of Compensation Paid to Appointed Counsel, supra* note 45, at 19 and Table at 9. In some jurisdictions, defender programs are authorized to contract with private lawyers to provide representation. However, this option does not offer the same flexibility in controlling staff defender caseloads as simply assigning cases to private lawyers as the need arises. *See, e.g.,* MONT. CODE ANNOT., §§ 47-1-104 (3), 47-1-216 (2009); N.D. CODE ANNOT., § 54-61-02 (2008 & Supp. 2009).

⁴⁹ In North Carolina, the state commission that oversees the Office of Indigent Defender Services (IDS) has broad rule-making authority. *See* N.C. GEN. STATS. § 7A-452(a) (2004 & Supp. 2010). In state judicial districts with a public defender, IDS rules direct the local public defender to adopt regulations. At present, every plan adopted by local district defenders contains a "farm out" provision, pursuant to which cases can be assigned by the defender to private lawyers either because of case overload, a conflict of interest, special expertise of a particular private lawyer, or other justifiable reason. *See also* Rules for Non-Capital Criminal and Non-Criminal Trials, Sec. 1.5 and accompanying commentary, *available at* <http://www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%201.pdf>. The "Indigent Appointment Plans" of district defenders are posted on the IDS website, *available at* <http://www.ncids.org/>.

it is unable to provide representation. The court is then obliged to arrange for the case to be represented by a contract or private assigned lawyer.⁵⁰

In a number of states (e.g., Louisiana⁵¹ and Missouri⁵²) statewide defense programs are authorized to prepare standards respecting caseloads. However, when programs determine that their limits have been reached, they almost always must still ask judges to assign cases to private lawyers. This raises a fundamental policy question: when will state systems of justice begin to trust defense programs to make appropriate decisions about their caseloads and remove judges from having to decide such matters? If there are concerns that a defense program is not handling a sufficient number of cases, the matter ought to be an issue between the defender and state and/or local governing bodies responsible for funding indigent defense, not a subject for judicial decision-making. Obviously, a prosecutor's office is not required to obtain judicial approval to file charges against an accused and justify to the satisfaction of the trial court that its staff size is sufficient to handle its caseload. The public, courts, and funding authorities recognize that prosecutors are professionals entitled to make independent professional judgments and exercise their discretion without judicial oversight. Is it not time that we extend similar recognition to those responsible for managing defense programs? By doing so, protracted, expensive, and sometimes unproductive litigation about caseloads can be avoided in state courts just as it is in federal courts.

Client Selection of Counsel

I argue in the preceding section that control of caseloads is more likely to be achieved *if* (1) there is a sufficient supply of adequately compensated, well-trained and supervised private lawyers to provide defense services; *if* (2) judges are not involved in selecting lawyers for cases and in approving their claims for compensation; and *if* (3) public defender programs are not required to seek judicial permission to refuse additional cases or to withdraw from representation, but instead can arrange for private counsel to handle the cases.

But even if all of these reforms were implemented, private lawyers might still accept too many cases in an effort to curry favor with administrators of public defender or other programs responsible for referring cases to them and approving their compensation. Likewise, public defenders might still take on more work than they should and fail to pursue as vigorously as they should the interests of their clients. To incentivize lawyers to control their caseloads and ensure that clients' interests are always paramount, another indigent defense reform should be considered: enable the free market

⁵⁰ See *supra* notes 87–90 and accompanying text, Chapter 2.

⁵¹ See *supra* notes 119–122 and accompanying text, Chapter 2.

⁵² See *supra* notes 85–91 and accompanying text, Chapter 7.

to function and permit clients to select their own lawyers much as we permit patients with Medicare to select their own doctors. Although the practice makes enormous good sense and is used successfully with indigent legal services in other countries, it has never been seriously considered as a way to reform indigent defense in the United States.⁵³ Given the persistence of excessive caseloads, this approach should be implemented at least on an experimental basis and, if successful, much more broadly.

The way in which competition among lawyers can lead to the control of caseloads was impressed upon me several years ago when I studied the system in England and Scotland for providing legal services in criminal cases.⁵⁴ In England, solicitors provide the initial defense representation of accused persons, but to do so they must be licensed by the Legal Services Commission (LSC), which compensates them for their services.⁵⁵ However, because the accused is able to hire his or her own lawyer from among solicitors approved by the LSC, solicitors are not usually court appointed.⁵⁶ Although solicitors are subject to a wide variety of regulations, there are no rules respecting caseloads.⁵⁷ When I asked solicitors whether either they or their colleagues sometimes accept too many cases, they had some difficulty even understanding my question. The reason was simple: in England, because clients often select their lawyers from among solicitors approved by the LSC, solicitors cannot afford to accept more work than they can effectively handle. As one solicitor explained to me, “we can’t take on too many cases and fail to represent our clients adequately, lest clients will not select us the next time representation is needed and will not recommend us to others.” Thus, the English system of criminal legal aid functions in a manner substantially similar to the private practice model of client representation. Clients are able to “vote with their feet” and thus lawyers succeed when they have “repeat business” due to client satisfaction.

In addition to being selected by clients to provide representation, solicitors in England can also obtain new cases by having their names listed on police station and magistrate courts’ duty solicitor rosters, which are used to assign solicitors to cases of clients who

⁵³ Neither ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, nor the ABA TEN PRINCIPLES, *supra* note 54, Chapter 1, mention client selection of counsel. Based upon my personal involvement with these publications in various capacities, I know that the issue of client selection of counsel was never discussed. There also are no other standards prepared by other organizations that deal with the subject. Yet, from the standpoint of a person charged with an offense, the lawyer selected to provide representation surely ranks as among the most important.

⁵⁴ The results of my research were published in Lefstein, *In Search of Gideon’s Promise*, *supra* note 81, Chapter 8. My reference to England also includes Wales because the laws related to legal aid enacted by Parliament apply to both. *Id.* at n. 25. Discussion of the roles of solicitors and barristers in the legal systems of England and Wales is also contained in the article. *Id.* at n. 161 and n. 338.

⁵⁵ *Id.* at 861–871. The website of the Criminal Defence Service of the LSC is *available* at <http://www.legalservices.gov.uk/criminal.asp>.

⁵⁶ Lefstein, *In Search of Gideon’s Promise*, *supra* note 81, Chapter 8, at 862–863, 886.

⁵⁷ *Id.* at 871–883.

choose not to select their lawyer.⁵⁸ Beginning in 2001, the LSC opened England's first-ever public defender offices, which operate as part of LSC's Public Defender Service (PDS). In doing so, the LSC sought to explore whether the quality of defense representation might be enhanced through PDS offices and to provide an additional option to the consumers of legal services.⁵⁹ The way in which these eight new programs were started reflects England's commitment to having clients select their own lawyers, because the LSC decided from the beginning that solicitors serving as public defenders in the new offices would have to compete with private solicitors for their clients.⁶⁰

The decision to require client selection of counsel for those serving as public defenders was likely influenced by the experience in Edinburgh, Scotland, where a public defender office was opened in 1998.⁶¹ Initially, cases were assigned to the solicitors employed as public defenders by the new Edinburgh office, thereby eliminating their need to compete with private solicitors for their clients. However, the practice of assigning cases to the public defenders was halted in 2000 as competition for clients with private solicitors was introduced. This change was fully supported by the head of the defender

⁵⁸ *Id.* at 862–863, 886. “A client who receives assistance from a duty solicitor may elect to have that solicitor continue to provide representation throughout the defendant’s case. Alternatively, after the initial court appearance the client can decide to replace the duty solicitor with a solicitor of his choice.” *Id.* at n. 347. For discussion of police station representation and the national duty solicitor program to ensure the availability of legal assistance to those in custody on a twenty-four hour basis, see *id.* at 890–891.

⁵⁹ The second annual report of the PDS listed a range of objectives for the new public defender offices:

To provide independent, high quality and value-for-money criminal defence services to the public. Nationally and locally, to provide examples of excellence in the provision of criminal defence services. To provide us with benchmarking information to be used to improve the performance of the contracting regime with private practice suppliers. To raise the level of understanding within Government and the Lord Chancellor’s Department (LCD), (now the Department for Constitutional Affairs), and all levels and areas of the Legal Services Commission (the Commission), of the issues facing criminal defence lawyers in providing high quality services to the public. To provide us with an additional option for ensuring the provision of quality criminal defence services where existing provision is low or of a poor standard. To recruit, train and develop people to provide high quality criminal defence services—in accordance with the PDS’s own business needs—which will add to the body of such people available to provide criminal defence services generally. To share with private practice suppliers the best practice, in terms of forms, systems, etc., developed within the PDS to assist in the overall improvement of Criminal Defence Service (CDS) provision.

LEE BRIDGES, ED CAPE, RICHARD MOORHEAD AND AVROM SHERR, EVALUATION OF THE PUBLIC DEFENDER SERVICE IN ENGLAND AND WALES 3–4 (2007), available at http://www.legalservices.gov.uk/docs/pds/Public_Defenders_Report_PDFVersion6.pdf.

⁶⁰ Lefstein, *In Search of Gideon’s Promise*, *supra* note 81, Chapter 8, at 884–886. According to the LSC website, as of 2011, the LSC operates only four public defender offices in relatively small, rural communities, i.e., Cheltenham, Darlington, Pontypridd, and Swansea. For the website, see *supra* note 55.

⁶¹ Lefstein, *In Search of Gideon’s Promise*, *supra* note 81, Chapter 8, at 916, n. 528. Although Scotland is part of the United Kingdom, the Scottish Parliament and Executive have broad authority over most aspects of domestic, economic, and social policy. *Id.* at n. 25.

office, who was convinced that trust and confidence in his solicitors would be greatly enhanced if they were selected by clients instead of being assigned by the courts.⁶² A research study conducted during the period when public defenders were being assigned substantiated the director's conclusion, because clients consistently registered lower "levels of trust and confidence" in their public defender solicitors compared to clients who selected their own private solicitors.⁶³

Recently, I was reminded of England's and Scotland's commitment to having clients select their own solicitors when I was contacted about offering an expert opinion in a U.S. post-conviction felony case in which the defendant had been represented by an assistant public defender with way too many cases. The defender was employed by a large statewide defense agency and appointed to the defendant's case in February. In December, before the defendant's trial began, the defendant explained to the judge that his lawyer had never met with him until the past weekend and that for months he had been unsuccessful in reaching his public defender on the telephone:

I will say that he must be the busiest human being I've ever seen in my life. Since February I have been looking for some representation. I don't blame him. He has 120 active cases. He worked with me on Saturday and Sunday, but that was the only time he's had for me. But it's not fair that I have not been able to speak to my lawyer for months I just don't feel prepared with a day and a half of discussion.

While none of the client's statements were disputed by his lawyer, the trial nevertheless proceeded, a guilty verdict ensued, and the defendant was sentenced to prison. Clearly, the defendant was someone who would never again willingly accept representation by a public defender and would never recommend the public defender's office to anyone else. Yet, if the defendant or his friends were arrested in the same state again, they most likely would be assigned a public defender, because the agency represents the vast majority of indigent defendants in the jurisdiction.

More than thirty-five years ago, in *Faretta v. California*,⁶⁴ the U.S. Supreme Court held that defendants in criminal cases have a constitutional right under the Sixth Amendment to represent themselves. Much of the Court's rationale for its decision supports the right of indigent persons to select their own lawyers:

We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so

⁶² *Id.*

⁶³ Tamara Goriely, *Evaluating the Scottish Public Defense Solicitor's Office*, 30 J. L. AND SOC'Y 84, 97 (2003).

⁶⁴ 422 U.S. 806 (1975).

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment An unwanted counsel “represents” the defendant only through a tenuous and unacceptable legal fiction

But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.⁶⁵

But if a defendant rejects self-representation and wants to have counsel, the law in this country does exactly what *Faretta* said should not be done, namely, “compel a defendant to accept a lawyer” that the defendant might not want. Thus, in *Morris v. Slappy*,⁶⁶ the Supreme Court rejected a defendant’s claim that he was improperly denied a continuance of his trial when his public defender was hospitalized and another assistant public defender substituted on his behalf. In ruling against the defendant, the Court explained that an indigent defendant is not entitled to a “meaningful attorney-client relationship.”⁶⁷ Later, citing the *Slappy* decision, the Court declared as follows:

[W]hile the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.⁶⁸

Lower courts have applied this principle even when the lawyer requested by the accused is qualified and willing to provide representation.⁶⁹

⁶⁵ *Faretta*, 422 U.S. 806, 817, 820–821, 833–834 (1975).

⁶⁶ 461 U.S. 1 (1983).

⁶⁷ *Id.* at 14.

⁶⁸ *Wheat v. United States*, 486 U.S. 153, 159 (1988).

⁶⁹ See, e.g., *Hickey v. State*, 576 S.E.2d 628, 630 (Ga. Ct. App. 2003) (“An indigent defendant is entitled to reasonably effective assistance of counsel, not counsel of his own choice.”); *State v. Jimenez*, 815 A.2d 976, 980 (N.J. 2003) (“[A]ccused is guaranteed the right to the assistance of counsel, but not the constitutional right to counsel of his choice.”).

However, for the defendant with the financial means to retain counsel, the Court has embraced a distinctly different approach. In *United States v. Gonzales-Lopez*,⁷⁰ the Court reversed the conviction of a defendant pursuant to the Sixth Amendment when a trial court refused the defendant's request for paid counsel of his choice.⁷¹ Here is how Justice Scalia explained the majority's decision:

The right to select counsel of one's choice ... has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.⁷²

Despite the importance that the Court attached to permitting a defendant to retain the lawyer of one's preference, the Court reaffirmed that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."⁷³

But even if indigent defendants lack the constitutional right to a lawyer of their choosing, there is nothing to prevent a jurisdiction from establishing a program in which clients are permitted to select their own counsel. Law review commentators who have addressed the issue have been unanimous in urging that governments afford clients the opportunity to select their own lawyers.⁷⁴ The most recent in-depth discussion of the subject is contained in a paper written by two law professors and published by the

⁷⁰ 548 U.S. 140 (2006). The *Gonzales-Lopez* decision and the Court's other cases dealing with client selection of counsel are discussed in Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525 (2007) [hereinafter Hoeffel, *Toward a More Robust Right to Counsel*].

⁷¹ In the *Gonzales-Lopez* case, the trial court judge repeatedly rejected motions of an out-of-state lawyer to participate in the defendant's trial, despite the defendant having made clear to the judge that he wanted this lawyer to be part of his defense team.

⁷² *Id.* at 147–148.

⁷³ *Id.* at 151. The Court's justification for its disparate treatment of indigents and non-indigents involving choice of counsel appears to be based largely on administrative convenience. For example, referring to its prior *Morris v. Slappy* decision, *supra* notes 66–68 and accompanying text, the Court offered the following explanation: "We have recognized a trial court's wide latitude in balancing the right to counsel of choice ... against the demands of its calendar." *Gonzales-Lopez*, *supra* note 70, at 548 U.S. 152.

⁷⁴ Hoeffel, *Toward a More Robust Right to Counsel*, *supra* note 72; Lefstein, *In Search of Gideon's Promise*, *supra* note 81, Chapter 8; Kenneth P. Troccoli, "I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer, 20 LAW & INEQ. 1 (2002); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993).

Cato Institute.⁷⁵ While the arguments in support of client selection advanced in this paper are similar to ones discussed here,⁷⁶ several issues discussed by its authors deserve special mention.

First, the authors reject “large defender organization[s] providing the lion’s share of indigent defense services for a city or county, and do not focus on efforts ... to write charters that attempt to guarantee such organizations legal independence from the government that funds them.”⁷⁷ In lieu of public defenders, the authors envision “solo lawyers, small groups of practitioners, and larger firms,”⁷⁸ although public defender offices could also furnish representation so long as they competed successfully with private lawyers and were selected by their clients.⁷⁹ While I agree that in any system of client choice public defenders should have to compete with private lawyers for their clients just as in England and Scotland, I think it is unrealistic to expect that public defender programs throughout the country and the thousands of lawyers they employ are likely to disappear and be substantially, if not entirely, replaced by members of the private bar. Nor do I think this would be a positive development, because public defenders usually are not only dedicated to their work, but they often develop significant expertise and are able to provide training and serve as a resource to members of the private bar who also defend indigent clients in the jurisdiction. However, it undoubtedly will be necessary in many jurisdictions to adjust caseloads so that the private bar assumes responsibility for a larger percentage of the cases than they do now. To achieve

⁷⁵ STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM (Cato Institute 2010) [hereinafter SCHULHOFER, REFORMING INDIGENT DEFENSE], *available at* http://www.cato.org/pub_display.php?pub_id=12106.

⁷⁶ Schulhofer and Friedman explain:

[T]he ... [solution] we propose ... is to transfer the power to select the attorney from the court system to the defendant. So far as his own interests are concerned, the defendant has precisely the correct incentives. If available information is good enough to allow a defendant to appraise alternative providers of defense services, such a system solves the client’s problem. Even if the defendant cannot judge perfectly among alternative counsel, at least the decision will be made by someone with an interest in making it correctly; consumer sovereignty is, despite imperfect information, the mechanism that most of us use most of the time to control the quality of the goods and services we buy.

Id. at 12.

⁷⁷ *Id.* at 2–3.

⁷⁸ *Id.* at 12. “We hypothesize that this proliferation of ... [various types of defense providers] would provide a much needed spur for innovation, effectiveness, and loyalty to client interests.” *Id.* at 13. This is essentially the way defense services are furnished in England. See Lefstein, *In Search of Gideon’s Promise*, *supra* note 81, Chapter 8, at 882–889.

⁷⁹ “Finally, we would not exclude the possibility of a government-run staff of salaried public defenders A public defender ... would not compromise the value of a [proposed] voucher system provided that defendants remained free to reject the public option and that private service providers accordingly emerged as alternatives.” SCHULHOFER, REFORMING INDIGENT DEFENSE, *supra* note 75, at 12–13.

this goal, it also will be necessary to allocate additional financial resources in support of representation by private lawyers.

Because there are so many different ways in which indigent defense services are provided in the United States and client selection of counsel has never been tried, it is difficult to predict what would happen if such systems were introduced. Conceivably, jurisdictions that currently underfund indigent defense would persist in doing so, and this would result in clients refusing to choose public defenders and turning instead to poorly compensated, ineffective private lawyers, believing that they somehow must be better than public defender lawyers.⁸⁰ On the other hand, I think it is just as likely that client choice would lead public defender programs to more effectively use their existing resources; and, if not adequately funded, to become more aggressive and perhaps more convincing in seeking additional financial support. For example, client rejection of public defenders would strongly support the argument that defender programs need critical additional funds in order to limit caseloads and improve services as a means of attracting clients.

Consider, again, the story of Pat, who I discuss in the Introduction to this book. Pat complained to his boss about his caseload and his inability to represent effectively the more than 300 clients to which he was assigned. In response to Pat, the agency's supervisors and chief defender could scarcely have been less sympathetic, threatening to fire Pat if he filed a motion seeking to withdraw from any of his cases.⁸¹ Now, consider this same scenario if Pat's public defender agency had to compete with private

⁸⁰ The authors of the Cato Institute paper do not share my concern:

Until now we have put aside the question of how generously indigent defense services will be funded; we have simply argued that, with whatever resources society allocates to indigent defense, freedom of choice will enhance the quality of the services delivered There are legitimate concerns that without large increases in the resources devoted to indigent defense, other reforms may make little difference. We recognize that funding levels have a major impact on the quality of defense services and will continue to do so under the voucher regimes we propose. But whatever the level of funding, the attorney's independence from his adversary (the government) is the sine qua non of zealous representation, and freedom of choice for the client therefore remains a critical element in any plan for achieving effective defense services. If funding levels remain low, the pool of attorneys who serve the indigent will continue to include both able, altruistic lawyers, as well as minimally competent attorneys with few other opportunities, and highly skilled attorneys who are adept at cutting corners so that they can limit the harm to their clients while maintaining a decent income for themselves.

Id. at 15.

⁸¹ See *supra* notes 4–6 and accompanying text, Introduction. The authors of the Cato Institute paper offer their perspective about the kind of response Pat received from his agency's head and supervisors: "[M]ost chief defenders temper their zeal with pragmatic instincts for bureaucratic survival; if they did not, they could not keep their jobs. Thus, for most defenders, most of the time, accommodation to the case management and budgetary priorities of the court and county government is a fact of life." SCHULHOFER, REFORMING INDIGENT DEFENSE, *supra* note 75, at 7.

lawyers for their clients. I am doubtful that Pat's supervisors and boss would have reacted the same way. In fact, I believe that well before Pat ever complained about his caseload, all of the organization's leaders would have mobilized to improve the quality of their representation in order to retain current clients and attract new ones. This necessarily would have meant reducing the intake of new cases and aggressively seeking additional funding. Surely they would understand that their failure to respond in such fashion would likely mean they would go out of business because clients would shun them. Finally, I seriously doubt that Pat ever would have had as many as 300 clients to represent if clients had been permitted to select their own defense lawyers. Given the minimal representation that Pat and his fellow public defenders were able to provide to their clients, probably most would not have selected the public defender program but instead sought assistance of private lawyers if permitted to do so.

The professors who wrote the Cato Institute paper also discuss the need to inform defendants about the lawyers available to provide representation. As the authors explain, "[t]he court or county government could maintain a list of attorneys and firms it considers particularly well qualified to defend the indigent."⁸² However, they do not address just how courts or county governments should determine the qualifications of counsel and actually compile such lists. In fact, I believe that in any system of client selection of counsel, there needs to be more than just lists of lawyers deemed by judges to be especially well qualified. Instead, there need to be procedures for certifying as qualified both private lawyers and public defenders.⁸³ Obviously, if public defenders compete with private lawyers to provide representation for clients, the certification process needs to be handled by an authority that is separate and independent of the state or local jurisdiction's public defender agency.⁸⁴

⁸² *Id.* at 13.

⁸³ This is the approach developed by the LSC in England. See Lefstein, *In Search of Gideon's Promise*, *supra* note 81 Chapter 8, at 869–881. Efforts also occasionally have been undertaken in the U.S. to certify lawyers as qualified to provide indigent defense services. See *supra* notes 40–45 and accompanying text, Chapter 8, in which the system for certifying assigned counsel in Massachusetts is described.

⁸⁴ Earlier I referred to the ABA Guidelines related to death penalty representation, which call for the establishment of an independent "responsible agency" to certify and select lawyers to provide defense representation in death penalty cases:

The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties: 1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases; 2. draft and periodically publish rosters of certified attorneys; 3. draft and periodically publish certification standards and procedures by which attorneys are certified.

ABA DEATH PENALTY GUIDELINES, *supra* note 38, at Guideline 3.1.

B. Litigation Strategies

While I believe that eventually the kinds of reforms suggested in the preceding section can lead to reasonable caseloads, their implementation undoubtedly will be gradual. Meanwhile, in far too many jurisdictions excessive caseloads have become a permanent way of life, resulting in defense services that are far less than the promise of the Sixth Amendment and well below the commands of professional conduct rules. Therefore, lawyers who represent clients, supervisors, and heads of defense programs have a duty to act in an effort to control their caseloads.⁸⁵ If requests for sufficient appropriations are rejected and other alternatives unavailable, litigation is the inevitable last resort.⁸⁶ Because court challenges are so uncommon, especially when the national dimension of the problem is considered, I discuss several new, alternative ways of approaching litigation. But regardless of the approach pursued, the primary duty of defense programs and their lawyers is to existing clients. Accordingly, the first goal of litigation should be to halt the assignment of new cases and only, secondarily, to seek to withdraw from cases of existing clients if work on the client's behalf has begun.⁸⁷

Multiple Motions Instead of a Test Case

The prior chapter on litigation discussed test cases in Arizona, Florida, and Tennessee, in which public defender agencies challenged their program's current caseloads. In the Arizona and Florida cases, the defender programs claimed that the caseloads of all of their lawyers handling felony cases were too high;⁸⁸ in the Tennessee case, the lawsuit dealt with excessive caseloads of the program's lawyers providing misdemeanor representation, but data were also presented on felony caseloads to establish that the lawyers handling felonies were unable to defend clients charged with misdemeanors.⁸⁹ The lawsuits required considerable advance preparation time by the heads of the defense programs and senior staff; this is typical of major civil litigation. Statistical data on caseloads and other activities of lawyers had to be assembled, affidavits prepared, expert

⁸⁵ For the duty of lawyers to act under the ABA MODEL RULES, *see supra* notes 3–28 and accompanying text, Chapter 2.

⁸⁶ As stated in the ABA EIGHT GUIDELINES, *supra* note 76, Chapter 2, “[w]hen alternative options for dealing with excessive workloads, such as those listed in Guideline 5, are exhausted, insufficient, or unavailable, the Public Defense Provider is obligated to seek relief from the court.” *Id.* at 12 (comment to Guideline 6). For discussion of the ABA EIGHT GUIDELINES, *see supra* notes 76–83 and accompanying text, Chapter 2.

⁸⁷ “Because lawyers have as their primary obligation the responsibility to represent the interests of current clients, withdrawals from representation is less preferable than seeking to halt the assignment of new appointments.” *Id.* at 12 (comment to Guideline 6).

⁸⁸ For discussion of the Arizona and Florida litigation, *see supra* text accompanying notes 26–34 and 51–62, Chapter 7.

⁸⁹ For discussion of the Tennessee litigation, *see supra* notes 36–50 and accompanying text, Chapter 7.

and non-expert witnesses lined up to testify, and litigation strategies resolved. Even though private pro bono counsel were recruited to provide representation in all three cases, the lawsuits still required a great deal of time by those in charge. For this reason and the uncertainty of success, busy leaders of public defense programs are likely discouraged from launching time-consuming caseload litigation.⁹⁰

In lieu of the test litigation approach, public defense programs should consider an alternative that requires less time and advance preparation but holds at least as much promise of success. *If caseloads are deemed excessive, I propose that the heads of public defense programs and some or all of the program's lawyers do exactly what is required of them by rules of professional conduct.*⁹¹ *Thus, with each new assignment or group of assignments, the chief public defender or an assistant public defender, as may be appropriate, would make a suitable record, stating that the acceptance of the new case or cases will result in a violation of the rules of professional conduct and asking that the new assignment(s) not be made.*⁹² *And, just to be clear about the matter, I am suggesting that such motions be filed routinely until such time as relief is obtained, as further explained below:*

- States have approved the provision of the ABA Model Rules of Professional Conduct, which provides that “[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause”⁹³ If undertaking a client’s representation “is likely to result in a violation of the Rules of Professional Conduct or other law,” good cause is satisfied.⁹⁴ In explaining the meaning of this rule, a comment explains that “[f]or good cause a lawyer may seek to decline to represent

⁹⁰ See also the story told at *supra* note 34.

⁹¹ As discussed earlier, normally those in charge of defense programs will need to take the lead in challenging caseloads, because lawyers engaged in the daily defense of clients will rarely do so. See *supra* Chapter 4, Understanding Lawyer Behavior: Why Leadership Matters.

⁹² The motion of the chief defender or staff lawyer(s) could include a claim that due to excessive caseloads effective representation under the Sixth Amendment will be impossible. I do not believe, however, that the argument should be predicated on *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to demonstrate after conviction that defense counsel’s representation was prejudicial to the defendant. Instead, the defense should base its argument on *United States v. Cronin*, 466 U.S. 648 (1984), claiming that due to excessive caseloads “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659. Although *Cronin*, like *Strickland*, was a post-conviction case, the *Cronin* rationale can still be invoked pretrial as explained in JUSTICE DENIED, *supra* note 2, Chapter 1, at 110–112. An argument based on *Cronin* is also discussed at *supra* notes 76–81, Chapter 3. For discussion of the *Strickland* standard and its application to excessive caseloads, see *supra* notes 41–75 and accompanying text, Chapter 3. See also decisions in the Michigan and New York cases discussed at *supra* notes 104–131 and accompanying text, Chapter 7.

⁹³ ABA MODEL RULES R. 6.2

⁹⁴ *Id.* at 6.2 (a).

a person who cannot afford to retain counsel Good cause exists if the lawyer could not handle the matter competently”⁹⁵

- Assume that new cases are assigned to the chief public defender, followed by a member of the agency’s staff designated to provide representation. Consistent with the above professional conduct rule, I suggest that the chief defender make a formal record applicable to the new assignment(s), informing the court that acceptance of the new case(s) will lead staff members to violate rules of professional conduct. This could be done orally on the record or in a brief motion filed with the court. Whichever course is followed, I suggest that a hearing on the motion be requested.
- If new cases are not assigned to the head of the public defense agency but instead staff lawyers are appointed to cases in their own names, the lawyers could do exactly what is recommended for the chief public defender. Thus, the lawyers would make a formal record applicable to the new assignment(s), informing the court that their acceptance of the new case(s) will lead to a violation of rules of professional conduct. As with the chief defender, this could be done either orally on the record or through a brief motion. In each instance, a hearing on the motion should be requested.
- Regardless of whether new cases are assigned to the chief public defender or to a staff lawyer, if the requested hearing is granted, the leaders of the defender agency and its lawyer(s) will need to present testimony respecting their inability to accept additional cases since they cannot provide ethical representation as required by professional conduct rules. Thus, the testimony should concentrate on the number and status of pending cases of the lawyer(s) and the countless tasks not then being performed because of having too much work.⁹⁶ When the testimony is completed, it should leave little doubt that (1) competent and diligent representation is not now likely being provided; and (2) that additional appointments will only make matters worse. While preparation for this hearing will take some time on the part of all involved, it should not require nearly the same time commitment demanded of the test case litigation pursued in Arizona, Florida, and Tennessee.

If motions of the kind suggested are successful, the trial court judge presumably will appoint lawyers from outside the public defender agency to provide the necessary representation, and thus the defender agency’s caseload will not be further increased. On the other hand, if defense motions are routinely denied, the proposed approach accomplishes at least four things. First, in the event of a defendant’s conviction, whether after trial or a plea, claims of ineffective assistance of counsel will be bolstered

⁹⁵ *Id.* at cmt. 2.

⁹⁶ For an illustration of the kind of testimony suggested, see *supra* note 16 and accompanying text, Chapter 7, which quotes testimony presented in a case litigated in New Orleans.

because the defense can argue that there was concern from the very beginning of the defendant's case about whether there was adequate time in which to provide competent and effective representation. Second, the defense will be able to explain to its funding authorities that it has been so concerned about the caseloads of its lawyers that it has repeatedly and formally advised trial court(s) that because it lacks sufficient staff and resources it is failing to provide adequate defense services. Third, by placing on the record their belief that they are not providing defense services consistent with their professional obligations, the agency's chief defender, supervisors, and staff lawyers will protect themselves against possible disciplinary violation claims.⁹⁷ Finally, persistence in this approach, despite repeated denials of defense motions, is likely to attract media attention, and, on at least some occasions, publicity about the plight of defense services has contributed to a climate favorable to reform. As explained in the report of the National Right to Counsel Committee, "the reality is that news reports about problems in indigent defense and strong public support for improvements may make a difference not only when legislatures consider new laws, but also when courts decide difficult cases."⁹⁸

Despite doing exactly what rules of professional conduct require, some judges may react with considerable hostility if defense programs or their lawyers repeatedly ask not to be assigned to new cases. Conceivably, some judges might even seek to prevent the defense from making an oral record in open court objecting to new assignments, in which case the defense will have no choice except to file a written motion with the court clerk's office. A courtroom drama that I witnessed many years ago in Washington, D.C., is reminiscent of the kind of disagreement that might arise between judges and defense lawyers. A member of the public defense agency appeared before the court's central assignment judge on the morning that one of his cases was set for jury trial. After the government announced "ready," the public defender responded that he was not ready because he had not had adequate time to prepare his case due to the many other cases that he was simultaneously defending. When the judge summarily rejected his request for postponement, the defender replied that if he was forced to trial, he was certain that the representation that he furnished would be ineffective under the Sixth Amendment and that if his client was convicted following trial, he would be "the first person to testify in any postconviction proceeding about his failure to deliver representation of the kind required by the Constitution." To say that the judge was angered by the defender's statements, all of which were taken down by the court's reporter, would be an understatement. The judge became red in the face, yelled at the defender not to say things like that "on the record," and ordered the court reporter not

⁹⁷ The defense can also seek an interlocutory appeal of the trial court's denial of its motion, but such an appeal is normally not available as a matter of right. *See infra* note 110.

⁹⁸ *See* JUSTICE DENIED, *supra* note 2, Chapter I, at 146.

to take down anything further that the defender said. Nevertheless, the judge granted the defender's request for a continuance.⁹⁹

The foregoing exchange illustrates that defenders not only have considerable leverage in seeking necessary continuances but also in rejecting new cases. Sometimes, however, fortitude is necessary in applying that leverage. The defender described in the preceding story was fearless, because he was fully aware in advance that the judge would not take kindly to what he was going to say. But he made the record that he did because he understood that his client's interest was more important than whether or not the judge became angry. Similar fortitude may be required when defense agency heads or individual defenders seek to make a record about their inability to accept additional cases.

Refusing to Provide Representation in New Cases

As an alternative to filing repeated motions asking to be relieved of new appointments, defense programs or defense lawyers may want to consider simply refusing to represent clients when convinced that competent and diligent representation cannot be provided consistent with professional conduct rules. Assume that trial courts are appointing the head of the defense program or individual defenders to new cases, which is what occurs in a majority of jurisdictions. The suggestion is that the chief defender or the lawyers explain to the court, either orally or in an *informal* written communication (e.g., an e-mail, memorandum, or letter), that additional appointments cannot be accepted due to an excessive caseload. Thus, the defense declares that it is "unavailable" for additional court appointments, providing such information about the situation as deemed appropriate, and making clear that it will not provide representation in new cases.¹⁰⁰

Authority Related to Refusing Court Appointments

In the preceding section, I referred to ABA Model Rule 6.2 and its accompanying comment, which makes clear that if "good cause" is present, such as the inability to provide competent legal services, a lawyer may seek to decline to provide representation.¹⁰¹ The rule is silent about whether the defense is required to file a motion asking that new court appointments be stopped. Accordingly, Rule 6.2 is satisfied if a defense lawyer

⁹⁹ The lawyer in this story was Gary Bellow, who at the time was deputy director of the D.C. Legal Aid Agency, which was the predecessor program to the D.C. Public Defender Service. Gary was an exceptionally talented lawyer who devoted his life to public interest law. He is known best for his subsequent work as a faculty member at Harvard Law School, where he founded, developed, and directed the law school's clinical programs. Gary Bellow died in 2000 at the age of 64. A memorial website dedicated to his life is *available at* <http://www.garybellow.org/>.

¹⁰⁰ For additional discussion of declaring "unavailable," *see* text immediately after *supra* note 83, Chapter 2.

¹⁰¹ For the relevant rules of professional conduct, *see supra* notes 93–95 and accompanying text.

or defender program informs the court either orally or in a written communication short of a formal written motion, that additional cases cannot be accepted due to an inability to provide competent and diligent legal services for additional clients.

The ABA Criminal Justice Standard concerned with excessive workloads states that defense programs and individual lawyers are required to “take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments,” if they cannot furnish representation consistent with “professional obligations.”¹⁰² But neither the blackletter standard nor accompanying commentary mentions filing a written motion asking that the trial court not appoint defense programs or lawyers to additional cases. Instead, the commentary states only that “[i]n the case of a defender program with excessive workload, additional cases must be refused and, if necessary, pending cases transferred to assigned counsel.”¹⁰³

Filing a motion with the court is mentioned in the 2006 ABA ethics opinion on excessive workloads but only in connection with withdrawal from representation, not in relation to stopping the assignment of new cases. Thus, the ethics opinion states that if a lawyer is receiving appointments directly from the court and the lawyer’s “workload will become, or already is, excessive,”¹⁰⁴ appropriate action may include “requesting that the court refrain from assigning the lawyer any new cases”¹⁰⁵ While this request presumably could be in the form of a motion, the ethics opinion, consistent with Model Rule 6.2, omits any reference to filing a written motion with the court seeking to avoid new appointments.

The one source that mentions filing motions to stop new assignments is the ABA Eight Guidelines. The blackletter of Guideline 5 suggests that public defense providers take “prompt actions”¹⁰⁶ when workloads are or are about to become excessive, including “[n]otifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.”¹⁰⁷ However, the commentary to Guideline 5 suggests that “[w]hen a Provider cannot reduce excessive lawyer workloads, a motion filed with the court, aimed at stopping case assignments and/or permitting lawyers to withdraw from cases (see Guideline 6 *infra*), or conceivably the filing of a separate civil action, will be necessary.”¹⁰⁸ Moreover, Guideline 6, unlike ABA Model Rule 6.2, ABA

¹⁰² ABA PROVIDING DEFENSE SERVICES, *supra* note 8, Introduction, at Std. 5-5.3 (b).

¹⁰³ *Id.* at 74. For additional discussion of ABA PROVIDING DEFENSE SERVICES, Std. 5-5.3, see *supra* notes 65–69, Chapter 2.

¹⁰⁴ ABA Formal Op. 06-441, *supra* note 36, Chapter 2, at 5.

¹⁰⁵ *Id.*

¹⁰⁶ ABA EIGHT GUIDELINES, *supra* note 76, Chapter 2, at Guideline 5. For additional discussion of the Guidelines, see *supra* notes 76–83, Chapter 2.

¹⁰⁷ *Id.* at Guideline 5.

¹⁰⁸ *Id.*, cmt. to Guideline 5, at 11.

Providing Defense Services, and the ABA's ethics opinion, is explicit about the possibility of filing "motions asking a court to stop the assignment of new cases and to withdraw from new cases, as may be appropriate" ¹⁰⁹ The Eight Guidelines, however, do not preclude the other possible option, i.e., refusing to represent clients if the court rejects the defense announcement that it is "unavailable" to accept additional clients.

Difference Between Filing a Motion and Declaring "Unavailable"

It makes a difference whether the defense declares "unavailability" instead of filing a written motion asking that additional cases not be assigned. If a motion is filed, the defense is the moving party in a formal court proceeding and thus is responsible for establishing that it cannot provide competent and diligent representation to new clients due to its caseload. If the trial court rejects the defense motion, the judge's decision is usually not a final, appealable order as a matter of right, so the defense may be unable to avoid accepting the new court appointments. ¹¹⁰ But even if the trial court grants the defense motion, the court's order will likely be stayed and the defense ordered to continue to provide representation on behalf of new clients, despite its conclusion that competent and diligent representation is impossible. Previously, I discussed a case on appeal in Florida in which the public defender in Dade County filed motions to stop the assignment of new cases to its felony lawyers. Although the trial court substantially granted the public defender's motion, the order was stayed and the matter appealed by the State of Florida. The appellate process is now three years old, and in the meantime the public defender's office has had to continue to accept literally thousands of additional felony cases. ¹¹¹

On the other hand, suppose the defense does not file a motion to stop the appointment of new cases but instead advises the trial court that it is "unavailable" to accept them and explains its reasons. What outcomes might ensue? One possibility is that the trial court accepts the defense position, and arrangements are made for other lawyers to be appointed to the excess cases. The other possibility is that the trial judge becomes angry, objects to the defense position, and orders the defense either to accept the new cases or be held in contempt. ¹¹²

¹⁰⁹ *Id.*, Guideline 6. The commentary to Guideline 6 contains information about how to litigate such motions, suggesting that the indigent defense provider "may deem it advisable to present statistical data, anecdotal information, as well as other kinds of evidence." *Id.*, cmt. to Guideline 6, at 12.

¹¹⁰ See Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 1, Introduction, at 12: However, an interlocutory appeal from a trial court's denial of a defender's motion for relief based upon an excessive caseload appears not to be available anywhere as a matter of right. Invariably, when an appellate court hears an appeal in such a case, it is because the court has decided to do so in the exercise of its discretion.

¹¹¹ For discussion of the Miami Dade County litigation, see *supra* notes 51–62 and accompanying commentary, Chapter 7.

¹¹² Theoretically, even if a motion is filed by the defense asking that new appointments be halted,

How likely is it that the trial court will hold either a defense lawyer or head of a defense program in contempt for refusing to provide representation of new clients? A search of appellate decisions does not reveal *exact* precedents for defenders or the leaders of defense programs being held in contempt for refusing to provide representation in *multiple* cases due to excessive workloads.¹¹³ This is not surprising, because there are relatively few reported decisions in which either defense programs or lawyers have sought to withdraw from cases and/or to stop appointments. In reported cases, when the defense has complained of excessive caseloads and sought to refuse new appointments, they have filed motions seeking relief.¹¹⁴

However, there surely are some judges who will empathize when a defense program or lawyer refuses to proceed based upon concerns for their ethical duty and will be reluctant to hold well-intentioned defense lawyers in contempt. In Chapter 8, I related my one personal experience with this issue when in the 1970s I served as director of the Public Defender Service (PDS) in Washington, D.C. When I informed the chief judge of the D.C. Superior Court that PDS lawyers would not accept additional cases in order to deal with an emergency situation that had arisen, he accepted my position and together we pursued other solutions to the court's need for additional lawyers.¹¹⁵

The Case for Declaring “Unavailable” and Refusing to Proceed

There are potential advantages (and admittedly some risks) to the defense in forcing the court to be the moving party when there is a dispute about defense willingness to accept new appointments.¹¹⁶ Not only must the court prove that the conduct of

the defense could still refuse to proceed if the motion were denied. However, courts are apt to be especially unsympathetic to such a defense refusal, because, by filing a motion seeking caseload relief, the defense seemingly implies that it is willing to abide by judicial orders entered in response to its motion.

¹¹³ For cases in which defense lawyers have been held in contempt for refusing to provide representation in a single case when ordered to do so, *see supra* note 11, Chapter 2. *See also* J. W. Thomey, *Attorney's Refusal to Accept Appointment to Defend Indigent, or to Proceed in Such Defense*, 36 A.L.R.3d 1221 (1971).

¹¹⁴ This is what occurred in the Arizona, Florida, Louisiana, and Tennessee cases discussed earlier. *See supra* notes 11–62 and accompanying text, Chapter 7. These cases also are discussed in JUSTICE DENIED, *supra* note 2, Chapter 1, at 121–126.

¹¹⁵ *See supra* note 67, Chapter 8, at which additional details of my confrontation with the court are discussed. Also, I noted earlier that justices of the Massachusetts Supreme Judicial Court refused to hold in contempt lawyers from the State's defender agency when they refused to provide representation because of having reached their caseload limits. *See supra* notes 31–35, Chapter 8.

¹¹⁶ *See, e.g.,* *People v. McKenzie*, 668 P.2d 769 (Cal. 1983) (court may hold public defender in contempt when defender refuses to proceed due to belief that trial court's rulings rendered effective representation impossible); *In re Galloway*, 389 A.2d 55 (Pa. 1978) (finding of contempt proper when defense lawyer's request to withdraw was denied and defense lawyer refused to proceed). Moreover, the Supreme Court noted the following some years ago:

[A]ll orders and judgments of courts must be complied with promptly. If a person to

the defense is contemptuous, but if a contempt order is entered against the defense, it is sure to be a final appealable order for which the defense can seek a stay pending resolution of the dispute in the appellate courts.¹¹⁷ Conversely, if the defense provides representation when workloads are excessive, clients invariably are harmed in a variety of ways, such as pretrial release motions not being filed, necessary investigations not conducted, and guilty pleas entered when they should not be. If clients are convicted, reversals will be based upon the standard of *Strickland v. Washington*,¹¹⁸ which requires that prejudice be demonstrated.¹¹⁹ Thus, the harm visited upon clients when the defense labors under excessive caseloads is often irreparable.

whom a court directs an order believes that the order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. Meyers, 419 U.S. 449, 458 (1975). See also ABA MODEL RULES R. 1.16 (c).

¹¹⁷ The route pursuant to which a defense lawyer or head of a defense program might actually be held in contempt is difficult to predict. Here is one possible scenario: Assume that a court is notified by either a defense lawyer or head of a defense program that additional appointments cannot be accepted due to excessive workload, but the court nevertheless enters orders appointing the lawyer or defense program to new cases. Upon receipt of the order of appointment, assume further that the defense lawyer or head of the defense agency again informs the court of its “unavailability” to represent clients in the new cases to which they have been appointed, and therefore the defense does not plan to enter appearances for the new clients because of its duties under rules of professional conduct. Now, assume that the court holds the defense lawyer or head of the defender program in contempt. Whether this would be criminal or civil contempt is unclear, especially because the same conduct can sometimes be treated as either. Arguably, under the foregoing scenario, the defense conduct would not qualify as direct contempt, which can be punished summarily, because it did not occur in the presence of the court. More likely, the defense conduct would be regarded as

[i]ndirect or constructive contempt beyond the presence of the court ... ; punishment for such contempt usually requires the observance of all elements of due process of law Due process requires that an individual charged with an indirect contempt be given full and complete notification and a reasonable opportunity to meet the charges by asserting a defense or providing an explanation.

¹¹⁷ C.J.S. *Contempt* § 77 (1999). In contrast to the above hypothetical scenario, in *State v. Jones*, No. 2008-P-0018, 2008 WL 5428809 (Ohio Ct. App. 2008), a public defender was denied a continuance and, in the presence of the court, refused to proceed. The defendant was held in “direct criminal contempt” because the conduct occurred in the court’s presence. However, the appellate court reversed the contempt conviction, as explained in the discussion of the *Jones* case that follows in the text of this chapter. See *infra* notes 120–126 and accompanying text.

¹¹⁸ 466 U.S. 668 (1984).

¹¹⁹ As the National Right to Counsel Committee noted in *JUSTICE DENIED*, *supra* note 2, Chapter 1, at 40–41:

Since *Strickland* was decided, commentators have been virtually unanimous in their criticisms of the opinion. Some have echoed views of Justice Marshall, whereas others have accused the Supreme Court of being insensitive to the very serious problem of adequate representation. Most of all, the decision has been criticized due to the exceedingly difficult burden of proof placed on defendants in challenging counsel’s representation and because it has led appellate courts to sustain convictions in truly astonishing situations.

State v. Jones,¹²⁰ decided in 2008 by an Ohio appellate court, illustrates why the defense should consider declaring unavailability instead of acquiescing in the acceptance of new cases when it is unable to provide representation as required by rules of professional conduct. An assistant public defender was assigned to represent a client charged with misdemeanor assault, and the case was set for trial the following day. However, the public defender did not actually receive the client's file until the morning of trial, at which time he met with his client for twenty minutes and six of his other clients. When the defender advised the trial judge that his client wanted a jury trial, the judge informed the defender that the case would be tried that afternoon. The defender explained that he could not be ready by the afternoon because he needed to interview witnesses, but the judge warned the defender that he would be held in contempt if he refused to proceed, stating that "if a conviction resulted, the defendant could file an appeal on the basis of ineffective assistance of counsel."¹²¹ Ultimately, when the defender refused to proceed, he was held in contempt and ordered taken into custody. Soon afterwards the judge ordered a bond of 10% of \$1,000, the requisite fee on the bond was posted, and the public defender was released.

On appeal, the appellate court reversed the finding of contempt, concluding that "a continuance was warranted" and that its denial "was an abuse of discretion."¹²² As the appellate court further explained:

Under these circumstances, effective assistance and ethical compliance were impossible as appellant was not permitted sufficient time to conduct a satisfactory investigation as required by ... [rules of ethics] and the Sixth Amendment It would have been unethical for appellant to proceed with trial as any attempt at rendering effective assistance would have been futile.¹²³

The appellate court also concluded that the trial judge had "improperly placed an administrative objective of controlling the court's docket above its supervisory imperative of facilitating effective, prepared representation of a fair trial."¹²⁴ Further, the court noted that "[d]irect appeal is not a reliable remedy to fix an obvious error"¹²⁵ If the defendant had been convicted, "the presumption of innocence would have been

As a result of its dismay with the *Strickland* standard, the committee called for a new test for ineffective assistance of counsel, which would be "substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation." *Id.* at 212.

¹²⁰ *Jones*, *supra* note 117.

¹²¹ *Id.* at 1.

¹²² *Id.* at 4.

¹²³ *Id.*

¹²⁴ *Id.* at 5.

¹²⁵ *Id.* at 6

unfairly replaced by a burden on appeal to demonstrate a ‘reasonable probability’ that the result of the proceeding would have been different if ... [the defense] had been prepared.”¹²⁶

Refusing to proceed with representation due to excessive defense workloads and thus intentionally risking the possibility of contempt might seem to some to be irresponsible behavior that violates both decisional law and professional conduct rules.¹²⁷ But the idea is no different in principle from what the public defender did in the *Jones* case, except that in *Jones* the public defender was seeking to vindicate the rights at trial of a single defendant, whereas the rights of many more defendants, both during pretrial stages and at trial, are at stake when a defense lawyer or defense program seeks to avoid new appointments due to excessive workloads. In defending his position, the public defender in *Jones* cited to the trial court an earlier Ohio decision in which the facts were similar. The appellate court in the prior case put the matter succinctly: “Defense counsel should not be required to violate his duty to his client [under the Sixth Amendment and ethics rules] as the price of avoiding punishment for contempt.”¹²⁸ Yet, that is precisely what defense programs do when they file motions for judicial relief that are denied despite truly astonishing caseloads that prevent competent and diligent representation under rules of professional conduct.

Objecting to the Conduct of Prosecutors

In several of the cases discussed previously in which public defenders filed motions seeking relief from excessive caseloads, the quality of legal representation furnished can only be described as marginal at best, if not woefully inadequate.¹²⁹ No objective observer could regard the representation provided by the defenders in these cases as competent and diligent as required by rules of professional responsibility. The testimony of Mark Stephens, the Public Defender in Knoxville, Tennessee, summed up what too often occurs in public defense, when he described his lawyers as “flying by the seat of ... [their] pants.” Such representation is the antithesis of “competence,” which requires ... thoroughness and preparation reasonably necessary for the representation.”¹³⁰ Yet, in the cases filed by the public defenders in Miami and Knoxville, the local prosecutor,

¹²⁶ *Id.*

¹²⁷ See *supra* note 116.

¹²⁸ *In re Sherlock*, 525 N.E.2d 512 (Ohio App. 2d Dist. 1987) (quoting para. 3 of Appellate Court’s syllabus).

¹²⁹ Consider, for example, the representation described in the Knoxville, New Orleans, and Miami cases at *supra* notes 36–62 and accompanying text, Chapter 7. My characterization of the representation in those jurisdictions is not intended as a criticism of the lawyers, because in each instance they were burdened with far too many cases and had inadequate support services.

¹³⁰ ABA MODEL RULES R. 1.1.

the state attorney general, or both, opposed defense claims about their caseloads at the trial level and on appeal.¹³¹

The position typically adopted by prosecutors when public defenders complain about their caseloads is further illustrated by what has occurred in Missouri. For many years, studies have documented that the Missouri State Public Defender (MSPD) program is underfunded and constantly struggling with exceedingly high caseloads.¹³² As discussed earlier, in December 2009, the Missouri Supreme Court decided a case in which it acknowledged the overwhelming caseloads with which the MSPD was dealing and virtually conceded that the state's assistant public defenders were violating their responsibilities under rules of ethics.¹³³ As a result, the Missouri Supreme Court invited the agency to declare district state public defender offices "unavailable" to accept new cases when their caseloads had exceeded certain maximum numbers for three

¹³¹ As noted previously, the pleadings in the Knoxville case are on the website of the county's public defender agency. *See supra* note 38, Chapter 7. Pleadings related to the Miami litigation are on the website of the Miami-Dade County Public Defender. *See supra* note 62, Chapter 7. In the Knoxville case, the Public Defender was opposed by the office of the Tennessee Attorney General, which successfully intervened on behalf of the Tennessee Administrative Office of Courts (AOC), pointing out that the AOC would be responsible for additional defense service costs if the Public Defender were successful in reducing his caseload. In Tennessee, all funding of indigent defense services is provided by the State. In the Miami litigation, the Public Defender was opposed in the trial court by the State's Attorney in Miami and also by the General Counsel of the Florida Prosecuting Attorneys Association. On appeal, before a Florida intermediate appellate court and the Supreme Court of Florida, the State is represented by the Florida Attorney General's office. All funding of indigent defense is provided by the State of Florida.

¹³² *See, e.g.*, The Spangenberg Group and The Center for Justice, Law and Society at George Mason University, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM (October 2009), *available at* <http://members.mobar.org/pdfs/public-defender/2009-report.pdf>. The following is a partial summary of the report's conclusion:

For close to a decade, MSPD has received no substantial increase in its appropriations, despite the fact that year-by-year, MSPD has submitted budgets demonstrating that it is seriously underfunded and overloaded with cases. All three branches of government are on notice that Missouri has been operating a constitutionally inadequate system for some time now. MSPD has gone to the trial courts, to the courts of appeal, to the legislature, and to the governor. Yet the situation remains the same. And so each day in Missouri, the State places the lives of poor citizens into the hands of attorneys who are underpaid, overworked, and badly supervised Missouri's public defender system stands at the bottom of its sister states in terms of resources, and the results are alarming. Missouri's public defender system has reached a point where what it provides is often nothing more than the illusion of a lawyer.

Id. at 66.

¹³³ *Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870, 880 (2009) ("The excessive number of cases to which the public defender's offices currently are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned. The cases presented here to this Court show both the constitutional and ethical dilemmas currently facing the Office of the State Public Defender and its clients."). The *Pratte* decision and its aftermath is also discussed at *supra* notes 85–103 and accompanying text, Chapter 7.

consecutive months.¹³⁴ Accordingly, district offices of the MSPD either began to refuse additional cases or to put courts on notice that they may start to refuse new cases in the near future.¹³⁵ In response, the prosecutor who served as President of the Missouri Prosecuting Attorneys Association labeled the conduct of the MSPD as “reckless, self-interested and irresponsible” and “attempting to hold the entire criminal justice system hostage.”¹³⁶

In my judgment, it is inappropriate for prosecutors to oppose defense concerns about their caseloads when it is clear that defense programs are overwhelmed with cases and indigent defense reform would enhance the administration of justice. Long ago the U.S. Supreme Court recognized that in addition to obtaining convictions, prosecutors have responsibilities for the system of justice.¹³⁷ This broader duty is often ignored when prosecutors object to lawyers who challenge their caseloads as excessive. Further, under the ABA Model Rules and those of most jurisdictions, the prosecutor is properly regarded as a “minister of justice,”¹³⁸ whose responsibility is more than that of an advocate. The prosecutor has a duty “to see that the defendant is accorded procedural justice”¹³⁹ For prosecutors to oppose defense efforts in court to deal with excessive caseloads, or to speak out publicly against such efforts, is inconsistent with the duty of prosecutors to ensure that the justice system treats all accused persons fairly and in accord with due process.

As discussed earlier, under American law, indigent persons charged with a crime or a juvenile offense have no choice about their defense lawyer,¹⁴⁰ and this rule has been applied even when the lawyer requested by the accused is qualified and willing to provide

¹³⁴ *Id.* at 887.

¹³⁵ See, e.g., *Missouri Public Defender Offices Face Caseload Crunch*, COLUMBIA MISSOURIAN, August 15, 2010, available at <http://www.columbiamissourian.com/stories/2010/08/15/missouri-public-defender-offices-face-caseload-crunch/>; Kathryn Wall, *Christian County Judge: Public Defender's Office Must Represent Client*, SPRINGFIELD NEWS LEADER, August 11, 2010, available at <http://www.news-leader.com/article/20100811/NEWS01/8110432/Christian-County-judge-Public-defender-s-office-must-represent-client>.

¹³⁶ Heather Ratcliffe, *Public Defenders Say Criticism Based on Bad Information*, ST. LOUIS POST-DISPATCH, August 19, 2010, available at http://www.stltoday.com/news/local/crime-and-courts/article_01e30ffd-ae92-504a-b91a-bc89a35e7e07.html.

¹³⁷ *Berger v. United States*, 295 U.S. 78, 88 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

¹³⁸ ABA MODEL RULES R. 3.8, cmt. 1.

¹³⁹ *Id.*

¹⁴⁰ See cases cited and accompanying text at *supra* notes 68–69.

representation.¹⁴¹ Consistent with this approach, defendants cannot insist that their lawyers be replaced due to their excessive workloads. But when prosecutors argue that the caseloads of counsel are reasonable and hence no relief should be granted to the defense, the state of the law is truly turned upside down; even though the accused has no right to be heard about the selection of his or her lawyer, the prosecutor does. In addition, regardless of motive, prosecutors who oppose defense efforts to reign in their caseloads are seeking to weaken the capability of their adversary to mount a defense on behalf of the accused. While this is not a conflict of interest under rules of professional responsibility,¹⁴² arguably, a court should treat prosecution opposition to reductions in defender caseloads as tantamount to a conflict.

The blackletter of the ABA Standards Related to the Prosecution Function provide that the “[t]he duty of the prosecutor is to seek justice, not merely to convict.”¹⁴³ And that “[i]t is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.”¹⁴⁴ The commentary to the foregoing standards stresses that “the prosecutor’s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused, as well as to enforce the rights of the public.”¹⁴⁵

Prosecution opposition to defense efforts to reduce their caseloads, especially when the evidence of excessive caseloads is compelling, violates the spirit of the foregoing provisions. Because the language quoted above has not restrained the conduct of prosecutors, an additional blackletter provision should be added to the Prosecution Function Standards or even to rules of professional conduct, to read as follows: “Prosecutors should not seek to exploit weaknesses in the delivery of indigent defense services.”¹⁴⁶

¹⁴¹ See, e.g., *Drumgo v. Super. Ct.*, 506 P.2d 1007, 1009 (Cal. 1973) (indigent defendant’s constitutional and statutory guarantees not violated by appointment of attorney other than one requested even though requested counsel had indicated his willingness and availability to act); *Brewer v. State*, 470 S.W.2d 47, 49 (Tenn. Crim. App. 1970) (finding no error in trial judge’s refusal to appoint lawyer whom defendant requested, even though requested lawyer expressed willingness to serve as appointed co-counsel).

¹⁴² The ABA MODEL RULES R. 1.7 through R. 1.11 is concerned with conflicts of interest, but none of these provisions pertain to the kind of situation under discussion here. The provisions of Rule 3.8 pertain to Special Responsibilities of a Prosecutor, but none of these directly apply either. However, one of the provisions of Rule 3.8 deals with assuring that the accused is notified about the right to counsel and afforded an opportunity to obtain legal representation. See *infra* note 150 and accompanying text.

¹⁴³ See ABA PROSECUTION FUNCTION, *supra* note 68, Chapter 1, at Std. 3-1.2 (c).

¹⁴⁴ *Id.* at 3-1.2 (d).

¹⁴⁵ *Id.* at 5.

¹⁴⁶ The proposed rule finds support in an article dealing with systemic neglect in indigent defense: It is wrong for prosecutors to exploit systemic neglect by pressuring defendants to plead guilty quickly. Rather, prosecutors should seek ways to call attention to the problem and ameliorate it. A prosecutor is said to be “a minister of justice and not simply ... an

This language complements current language in the ABA's Model Rules, which includes several provisions aimed at securing procedural justice for the accused.¹⁴⁷ Thus, the ABA Model Rules prohibit prosecutors from proceeding with cases that are not supported by probable cause¹⁴⁸ and admonish prosecutors to "not seek to obtain from an unrepresented accused a waiver of important pretrial rights"¹⁴⁹ Prosecutors also are required to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."¹⁵⁰

But quite aside from rules of professional conduct, ABA Criminal Justice Standards, and conflict of interest considerations, in most jurisdictions there is likely a serious question about whether prosecutors have standing to oppose defense motions respecting caseloads. For this reason, I believe the defense should resist efforts by prosecutors to be heard on the issue of whether a defense program or one of its lawyers has a reasonable caseload.

The concept of "standing consists of an entity's sufficient interest in the outcome of the litigation to warrant consideration of its position by a court."¹⁵¹ Merely because the prosecutor represents the state in a criminal or juvenile proceeding does not in itself

advocate." Prosecutors must "seek justice," which includes an obligation "to see that the defendant is accorded procedural justice." Given prosecutors' role, it has been recognized that they are obligated to call the courts' attention to defense lawyers' professional lapses, such as impermissible conflicts of interest that undermine the fairness of criminal proceedings. Similarly, if there is a systemic failure of defense lawyers in the jurisdiction to represent their clients as diligently as ethics rules demand, prosecutors should call public attention to the problem and encourage the legislature to take steps, including appropriating sufficient funds, to address it.

Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L. J. 1169, 1192–1193 (2003).

¹⁴⁷ The proposed language is also broad enough to cover various kinds of prosecutorial practices, which are described in Professor Green's article cited at *supra* note 146:

Far from compensating for defense lawyers' inadequacies, prosecutors seek in various ways to exploit them. Prosecutors often pressure defendants to plead guilty soon after they are arrested, before their attorneys have had an opportunity to conduct an investigation, by making offers of leniency that will be taken off the table if not quickly accepted. Some prosecutors couple the short deadline with a requirement that the defendant relinquish the constitutional right to receive disclosures from the prosecution, a practice that the Supreme Court recently upheld. These so-called "fast-track" policies take advantage of defendants whose appointed defense lawyers do not investigate as soon as a case is assigned and who are reluctant to try cases. Prosecutors thereby preserve time and resources while denying indigent defendants an opportunity to learn of possible weaknesses in the prosecution's case.

Id. at 1191–1192.

¹⁴⁸ ABA MODEL RULES R. 3.8 (a).

¹⁴⁹ *Id.* at 3.8 (c).

¹⁵⁰ *Id.* at 3.8 (b).

¹⁵¹ 1A C.J.S. *Actions* § 101 (2005).

confer standing on the prosecutor to object to *all* motions of the defense. To illustrate, a prosecutor's claim of standing was rejected in a case in which an apartment's renter did not oppose a defendant's motion to inspect and photograph the apartment that was the site of a crime scene.¹⁵² The court noted that the prosecutor was "apparently laboring under the unfounded misapprehension that by virtue of a district attorney's mandate and authority to prosecute those charged with crimes ... "¹⁵³ it had the right to be heard on the defense motion.

In two of the cases in which hearings were held concerning defense challenges about caseloads, trial court judges concluded that the prosecutors lacked standing to participate in the proceedings. When the public defender sought to withdraw from certain cases in Kingman, Arizona, the prosecutor appreciated that it would be awkward for him to take a position on the ultimate issue before the court, but still the prosecutor claimed a right to participate fully in the hearing.¹⁵⁴ The court disagreed, as revealed in the following colloquy:

The Court: [Addressing the prosecutor, Mr. Zack]. Are you here as an observer or are you taking the position that you have the right to a more active involvement in this hearing.

Mr. Zack: Your Honor, I view the State's role in this hearing as assisting the Court in whatever fact-finding determinations it believes it has to make to make a ruling in this case. I'm not here to dictate who represents each defendant. I recognize that is an issue we're not involved in I do think that we do have some role to play in this case, in this situation to make sure that the Court gets the facts it needs to make the ruling it needs to make

The Court: ... Are you ... reserving the right to cross-examine witnesses that are present?

Mr. Zack: Yes.

¹⁵² *People v. Davis*, 647 N.Y.S.2d 392, 396 (N.Y. Co. Ct. 1996):

In sum, neither the permission, acquiescence or cooperation of the District Attorney is required because the District Attorney does not have possession, control nor any property interest in the apartment and, to date, has not made any factual allegations based upon which the People would even have standing to oppose, or to be heard in opposition to, defense counsel's inspection thereof. Consequently, the District Attorney lacks standing to be heard in opposition to this branch of defendant's application

¹⁵³ *Id.* at 396.

¹⁵⁴ For discussion of the Kingman, Arizona, case, *see supra* notes 26–35 and accompanying text, Chapter 7.

The Court: Are you reserving the right to call witnesses and have the evidence presented yourself?

Mr. Zack: I reserve the right ...

The Court: All right. Are you reserving the right to present argument to me as to whether I should grant the Public Defender's Office ... motions to withdraw?

Mr. Zack: I'm not going to take a position on those. Again, I'm just here to assist in whatever fact finding the Court wants to make.

The Court: ... All right. Well, I think we need to clarify this ahead of time ... I believe the authority that I'm familiar with would suggest to me that this is not an issue that the County Attorney's Office has standing to involve itself in ...¹⁵⁵

The judge then explained that he understood that the prosecutor had "an interest in decisions that could affect funding for the County,"¹⁵⁶ as well the timely prosecution of cases, and making certain that persons did not languish in jail. But he still was "not going to allow the County Attorney's Office to participate ... other than simply being present."¹⁵⁷

Similarly, in litigation in Miami where the public defender's office sought an order seeking to halt appointments in felony cases, the trial court judge ruled that "the State Attorney does not have standing as a matter of right."¹⁵⁸ The court based its decision in part on prior Florida Supreme Court decisions that also involved motions of public defenders seeking relief from excessive caseloads. On two prior occasions, the court had ruled that in deciding such cases trial court judges were not required to permit "the

¹⁵⁵ Transcript of Record, *State of Arizona v. Wayne O. Hall et al.*, County of Mohave, Cause No. CR-2007-1492, December 13, 2007.

¹⁵⁶ *Id.* at 11.

¹⁵⁷ *Id.* The prosecutor in this Arizona case approached his role in response to the public defender's motion with considerably more restraint than exercised by the prosecutors in the Knoxville and Miami litigation. But even his more restrained approach was rejected by the trial court judge.

¹⁵⁸ *In re Reassignment and Consolidation of Public Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases*, Section CF 61, Administrative Order 08-14, In the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, at 3 (Blake, J., Sept. 3, 2008). Judge Blake's decision in this case, both on the issue of standing and on the merits, was reversed by an intermediate Florida appellate court. Reversal on the issue of standing was based upon an interpretation of a state statute and a change in Florida law related to the financing of indigent defense in Florida, from county to state funding. *See State v. Public Defender*, Eleventh Judicial Circuit, 12 So.2d 798, 801 (Fla. Dist. Ct. App. 2009). The Public Defender appealed the Third District Court of Appeals decision, and on May 19, 2010, the Florida Supreme Court accepted jurisdiction of the case. For further discussion of caseload litigation in Miami, *see supra* notes 51–62 and accompanying text, Chapter 7.

county an opportunity to be heard before the appointment of [private] counsel, even though it will be the responsibility of the county to compensate private counsel.”¹⁵⁹

C. Conclusion

Soon the nation will celebrate the fifty-year anniversary of the Supreme Court’s great *Gideon* decision. Since 1963 there has been much progress in providing representation to the indigent accused. Today, across the country there are thousands of public defenders and private lawyers actively engaged in defending indigent persons in criminal and juvenile cases. Yet, in state courts, lawyers cannot provide adequate representation due to overwhelming caseloads and numerous other problems, such as a lack of sufficient support staff and access to experts.

Not only is additional funding essential at a time when the financial difficulties of state and local governments are enormous, but significant structural problems in the delivery of indigent defense services must be addressed. There need to be strong mixed systems of defense representation involving not only public defenders but also substantial numbers of private lawyers who are screened, trained, supervised, and well compensated. To avoid excessive caseloads, defense programs need to be empowered to designate private lawyers to provide representation without requiring prior judicial approval. And judges should not be involved in appointing lawyers to cases and overseeing the operation of indigent defense systems. There also should be experiments in which clients are permitted to choose their own lawyers from among public defenders and private lawyers who are certified as qualified to provide effective defense services. Finally, absent the reforms mentioned, when confronted with too much work and no other available choices, defense programs and their lawyers must formally object to caseloads that require them to give short shrift to their clients and make a mockery of both rules of professional conduct and the Sixth Amendment. Alternatively, they should simply refuse to proceed with representation to avoid violating their duties as members of the bar.

More broadly, legislatures should focus on the intake issue. As discussed earlier,¹⁶⁰ defense programs do not control the number of new cases to which they are assigned, and the tendency to constantly authorize jail time for relatively minor offenses has contributed to the massive caseloads of defense programs. Caseloads could be reduced if serious efforts were made to reclassify offenses as infractions and remove the potential for incarceration, especially in cases where it is rarely imposed anyway. The benefit of

¹⁵⁹ *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1138 (Fla. 1990). *See also* Escambia County v. Behr, 384 So.2d 147, 150 (Fla. 1980).

¹⁶⁰ *See supra* note 68 and accompanying text, Chapter 1.

such action is explained in the report of the National Right to Counsel Committee: “Not only does such action reduce crowded court dockets, freeing up the time of judges and prosecutors to devote to more serious matters, but it also decreases jail costs. Moreover, it lightens defender caseloads, permitting savings to be used to fund other defense expenses.”¹⁶¹

Because I believe that improvements in indigent defense will continue, just as they have for the past nearly fifty years, I am optimistic about the future. But the struggle for adequate funding and fundamental, structural changes in the delivery of defense services will surely continue. And success will prove elusive unless the legal profession and others who care about the quality of justice are relentless in pursuing defense service improvements.

¹⁶¹ JUSTICE DENIED, *supra* note 2, Chapter 1, at 199. *See also* *supra* note 79, Chapter 2. Similarly, the report of the National Association of Criminal Defense Lawyers recommends that offenses not involving significant risk to public safety be decriminalized and that pretrial diversion programs be expanded. *See* MINOR CRIMES, *supra* note 17, Chapter 1, at 27–29.

APPENDICES

Appendix A

Public Defender Service for D.C.

Clients' Bill of Rights

General Rights

Article One

Every client of the Trial Division is entitled to continuity of representation. That means that a client is entitled to have all information about a case's history and future proceedings, deadlines, dates, etc., reflected on and in the PDS case jacket so that readily discernible from the client's jacket are the procedural history of the case, any action needed to be taken immediately, and all other information necessary to advocate effectively on the client's behalf, including how to locate the client, the name and phone number of the prosecutor, judge and any other persons relevant to the case. **Every client is entitled to** have his/her lawyer appear in court on time.

Article Two

Clients in both juvenile and adult cases are entitled never to have their attorney raise their **mental competency in open court** without the attorney having first discussed the issues, including the advantages and disadvantages of raising it, with a supervisor.

Article Three

Within a few days of their cases being picked up, **clients can reasonably expect** their lawyer to issue subpoenas and write investigative memoranda, and can reasonably expect that supplemental investigative memoranda will be written as the case progresses. Clients also are entitled to have their lawyers view all evidence in the case, including visiting the scene(s) of the alleged offense(s).

Article Four

Clients of lawyers who are within the first several months of practice **can expect** that the lawyer will meet with the lawyer's supervisor as soon as possible after picking up a case.

Article Five

All Clients Are Entitled To In-Person Meetings With Their Lawyers, including promptly after their initial appearance in court. At an initial meeting a client can expect an in-depth interview, regarding his/her life and the facts and circumstances of the case, as well as an explanation of the attorney-client privilege, how the criminal/juvenile case will proceed, the stages of the case, the discovery and motions process, what a trial is and how long it may take for a trial to commence, the investigation process, the need for the client's cooperation in the case, including the identification of witnesses, etc.

After the initial client visit, **incarcerated clients are entitled to** be seen any time there is a significant development in the case, such as the provision of discovery, the filing of motions, developments in the investigation, the offering of a plea bargain, the disclosure of the Pre-Sentence Report. Clients are entitled to have notes of the topics covered during the attorney-client visits taken and dated.

Article Six

Clients are entitled to have notes taken at court hearings and during visits with them and to have those notes contained within the PDS case jacket. Clients may expect that discussions and conversations with prosecutors are noted and documented with the substance of any such discussions set forth in the client's PDS file.

Article Seven

Clients are entitled to be involved in their own cases. Clients are entitled to be kept abreast of what is happening in their cases and to be used as investigative resources. Clients are entitled to have copies of their files since files belong to clients, not to lawyers. Unless there are very strong strategic reasons otherwise, clients are entitled to receive copies of all documents relating to their case, including, but not limited to discovery, police reports, transcripts, pleadings, motions, oppositions, orders, etc. Clients have a right to have bond review motions and motions to reduce the level of detention filed if they are incarcerated pre-trial (if only as an act of solidarity with the client).

Article Eight

Clients are entitled to:

- written sentencing advocacy filed on their behalf in a timely fashion to permit meaningful reflection and consideration by the Court prior to the disposition/sentencing hearing;
- written appellate memoranda after a conviction at trial; and

- Rule 35 motions to reduce sentence whenever the client is sentenced to any period of incarceration.

Article Nine

Clients are entitled to have all legal challenges raised on their behalf and to have their lawyers write original pleadings, do thorough legal research, and outline the factual, procedural, and legal arguments to be made orally at a hearing on all legal issues. This includes, but is not limited to, the client's right to have legal challenges made regarding pre-trial matters, such as motions to suppress, sever, for a bill of particulars, to compel discovery, etc., as well as mid-trial evidentiary issues (through motions in limine) and post-trial issues, such as motions for new trial and sentencing issues.

Article Ten

Clients are entitled to have their lawyers investigate their cases thoroughly including viewing evidence in the government's possession, visiting the scenes of offenses with which they are charged, and identifying and hiring experts if warranted by the case.

Article Eleven

Clients are entitled to their attorney's best efforts to secure a favorable plea offer, recognizing the client's right to make meaningful choices about her/his own future.

Trial Rights

Article Twelve

Clients are entitled to make two decisions that are their sole prerogative and over which the client has absolute veto power *over* the lawyer's advice: (1) whether to go to trial or to accept a plea offer (if there is one) and (2) whether to testify. Clients are entitled to make both decisions in consultation with counsel, but these are not judgment calls for the lawyer.

Article Thirteen

Clients are entitled to be involved in the preparation of their trial. Clients have a right to be prepared to testify, including, but not limited to, being cross-examined by other PDS lawyers. Clients are entitled to have this occur sufficiently in advance of the commencement of trial that it will inform the entire presentation of the case for the defense, from openings, through confrontation of the government's case, to presentation of a defense case.

Article Fourteen

With respect to trial, clients of non-Felony-One lawyers are entitled to have:

- the openings and closings in their case delivered orally in advance to at least one senior lawyer and other colleagues to reap the benefit of the PDS tradition that no one practices alone;
- witness examinations (cross-examinations of government witnesses, as well as direct examinations of defense witnesses) written and reviewed by their lawyer's supervisor prior to their trial; and
- all defense witnesses, including the client her/himself, and her/his PDS investigators, prepared for their testimony in court and put through a mock witness examination, including mock cross-examination by a fellow PDS staff attorney.

Article Fifteen

After an unsuccessful trial, **clients are entitled to** have their lawyer file a notice of appeal and write an appellate memorandum.

Sentencing Rights

Article Sixteen

Clients are entitled to zealous advocacy in pursuit of the least onerous possible sentence, with an attorney who explores every possible avenue, including offense mitigation, personal history mitigation, letters of support from family, employers, and community, offense-related programming, and individual-related programming.

Thus, in every case the client may expect written sentencing/disposition advocacy filed on their behalf in a timely fashion to permit careful judicial consideration. Moreover, within 120 days after sentencing, the client who is sentenced to any period of incarceration is entitled to have filed on her/his behalf, a motion to reduce sentence pursuant to Superior Court Criminal Rule 35. **The client is entitled to** be contacted about the motion and to have the opportunity to submit information in support of the motion. In serious cases where the client is serving a lengthy sentence, the motion should be filed within 120 days requesting that any ruling on it be held in abeyance so that a supplement may be filed months or years in the future providing the Court with meaningful alternatives to the lengthy term of incarceration initially imposed.

Appendix B

Public Defender Service for D.C.

Lawyer Development Plan

Lawyer: _____

Practice Level:

Supervisor: _____

Date of Report:

Lawyer Assessment: please rate the attorney in each category by circling the appropriate number and then provide comments.

(1 = poor, 2 = needs improvement, 3 = okay, 4 = good, 5 = outstanding)

■ Work Ethic & Client Centeredness 1 2 3 4 5
Comments:

■ Fact Analysis, Investigation, & Defense Theory Development 1 2 3 4 5
Comments:

■ Legal Analysis & Writing 1 2 3 4 5
Comments:

■ Courtroom Skills 1 2 3 4 5
Comments:

■ Sentencing Advocacy
Comments: I 2 3 4 5

■ Judgment
Comments: I 2 3 4 5

■ Other: _____
Comments: I 2 3 4 5

Improvement Plan:

■ At this time would you recommend or decline to recommend that the attorney move up?

■ What practical steps should the attorney take to improve? (be specific)

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