



EXECUTIVE SUMMARY AND RECOMMENDATIONS

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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2012

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Preface

The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) represents the American Bar Association's longstanding support for systems providing high quality defense services to indigent persons in need of legal representation in criminal and juvenile delinquency proceedings. SCLAID strives to foster innovation and reforms to improve indigent defense systems, and occasionally publishes reports and analyses regarding this vital subject.

The Committee is pleased to serve as the publisher of this supplement to *Securing Reasonable Caseloads: Ethics and Law in Public Defense*. This work by Professor and Dean Emeritus Norman Lefstein provides a summary of the key points in Professor Lefstein's prior book, and sets forth a number of suggestions – some provocative – designed to address serious structural problems in existing systems.

SCLAID is grateful to Professor Lefstein for his extensive record of scholarship in this area. The perspectives expressed in this publication are those of Professor Lefstein, and do not necessarily reflect the views of either the Association or SCLAID. We urge that his ideas be carefully considered by all who advocate indigent defense improvements.

Lisa C. Wood

Chair, ABA Standing Committee on Legal Aid and Indigent Defendants

Explanatory Note about This Publication

In November 2011, the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) published my book, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*. This abridged publication consists of two sections: Part I contains summaries of the book's first seven chapters and a brief explanation of the eighth chapter. Part II contains recommendations derived largely from Chapter 9, the book's final chapter.

The recommendations in Part II are primarily mine and do not necessarily reflect the views of the ABA, ABA SCLAID members, or the members of the Indigent Defense Advisory Group of ABA SCLAID. Therefore, my recommendations should not be cited as Association policy.

Parts I and II are based upon much more extensive discussion and analysis of the same subjects in the book itself. In addition, the text of the book contains more than 1,200 footnotes, whereas this publication has none. Readers interested in source material in support of statements in this publication and an in-depth treatment of indigent defense caseloads are encouraged to consult the book, which is available online at www.indigentdefense.org.

Unlike the book, the recommendations in Part II are set forth as succinct statements followed in each instance by an "Explanation" section. Although the book contains either identical or similar suggestions, Part II offers more precision.

Persons familiar with ABA policy respecting indigent defense may be most surprised by my first recommendation, namely, my belief that several important changes should be made to the ABA Ten Principles of a Public Defense Delivery System and to the ABA Standards for Criminal Justice: Providing Defense Services, upon which the former are substantially based. While these ABA policies have contributed to significant advancements in public defense, I no longer believe that they alone are adequate to achieve the promise of the *Gideon* decision and to chart the course of indigent defense improvement over the next several decades. I reached this conclusion reluctantly, especially since I was deeply involved in shaping current ABA policy concerning indigent defense services. During the 1970's, I served as reporter for the second edition of ABA Standards for Criminal Justice: Providing Defense Services, approved by the Association in 1979, and I chaired the ABA Section of Criminal Justice Task Force responsible for the third and current edition of these standards approved in 1992. I also was a member of the ABA Standing Committee on Legal Aid and Indigent Defendants when the ABA Ten Principles were approved by the Committee and recommended to the ABA House of Delegates for adoption.

In addition to summaries of the book's first eight chapters and recommendations, this publication includes the following additional sections: (1) a Preface by Lisa C. Wood, Chair of ABA SCLAID; (2) the Foreword to the complete book written by William S. Sessions, a former Chief United States District Court Judge and former director of the Federal Bureau of Investigation; (3) my Introduction from the complete book (without footnotes); and (4) the book's Contents, which are reprinted as an appendix to this publication.

Norman Lefstein
December 2012

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

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, 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.

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. 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.”

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

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. 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. Because the 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.

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 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. 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, 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 tasks, are given short shrift. 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.

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.

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 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.”

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.

PART I

Summaries of Chapters 1-8

Chapter 1

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

The Constitutional Right to Counsel

Indigent persons have a Sixth Amendment right to a lawyer when charged with criminal and juvenile offenses in state courts. The most famous of the Supreme Court's landmark decisions establishing the right to counsel is *Gideon v. Wainwright*, decided in 1963. Clarence Earl Gideon was charged with a felony, asked for a lawyer, and was denied legal representation. Since *Gideon*, the Court has extended the right to counsel to all adults charged in criminal cases that result in a loss of liberty and to juvenile delinquency cases. Today, there are thousands of public defenders and private lawyers engaged in providing legal representation to persons unable to afford a reasonable attorney's fee and thus unable to retain private counsel.

Excessive Workloads: A Pervasive National Problem

The requirement to provide lawyers for the indigent accused derives from Supreme Court decisions, not legislation accompanied by an appropriation. And the nation's 50 states have struggled to provide adequate funding for systems of indigent defense in order to fulfill the unfunded mandate imposed upon them. Repeatedly, national studies and reports of state and local jurisdictions have documented the pervasive nature of excessive caseloads among public defenders and sometimes among private assigned counsel and contract lawyers who represent the indigent. Additional problems include lack of sufficient support services, such as investigators, social workers and paralegals, and insufficient compensation for public defenders and private lawyers who provide indigent representation.

Why the Caseload Problem Is So Extremely Difficult to Solve

While the lack of sufficient funding is the leading cause of excessive caseloads, it is not the only reason why the problem has been so difficult to solve. The usual practice of judges appointing lawyers to provide representation in indigent defense cases is also sometimes a contributing factor. All too often, judges appoint counsel without sufficient regard for the lawyers' workloads. This is different from the private practice of law and in commerce generally, because retained counsel can readily decide whether they are capable of supplying the requested service or must decline to do so because of too much work.

In addition, many of the statutes governing public defense anticipate that public defender programs will provide virtually all of the required representation. Moreover, the private bar's involvement in providing defense services for the indigent is often quite modest, and thus there is sometimes an insufficient supply of private lawyers available to accept assignments when the public defender is overloaded. This development contrasts sharply with what the American Bar Association has long recommended: "Every system [for legal representation] should include the active and substantial participation of the private bar."

Also, public defense lawyers faced with excessive caseloads are in a different situation than civil legal aid lawyers when confronted with 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, which is exactly what ethics opinions have urged that they do. In contrast, public

defenders and even private lawyers cannot as easily object when judges appoint them to new cases. The problem is often exacerbated by a lack of political independence, in which those who head public defense programs are answerable to politicians who want defense services to be provided as cheaply as possible.

Thus, unlike prosecutors, those who defend the indigent accused frequently have little or no control over the intake of new cases. In addition, appropriations for public defense do not necessarily increase just because prosecutors file additional cases and/or more serious charges against more persons. As the Missouri Supreme Court observed in a 2009 decision, “[t]he state’s vast increases in criminal prosecutions have not included commensurately increasing resources for the public defender.”

Chapter 2

The Duty of Defense Programs and Lawyers to Avoid Excessive Caseloads

Rules of Professional Conduct

Under state rules of professional conduct applicable to lawyers throughout the country, lawyers who defend the indigent have a duty to avoid excessive workloads in order to provide competent and diligent representation. Excessive caseloads also present conflict of interest problems for lawyers, as they must sometimes limit their efforts on behalf of one or more clients in order to devote themselves to the most urgent needs of other clients.

Lawyers are personally responsible for the quality of representation they provide. Carrying an excessive caseload pursuant to directions of a superior does not excuse lawyers if they provide substandard representation. Professional conduct rules do not recognize a so-called “Nuremberg defense.” Similarly, those with supervisory and managerial authority have a duty to ensure that lawyers for whom they are responsible provide defense services consistent with their duties under professional responsibility rules.

When lawyers are faced with too many cases, rules of professional conduct require that lawyers seek to avoid additional appointments and, if necessary, move to withdraw from cases to which they have been appointed. Lawyers, therefore, are often in the difficult position of asking judges to grant withdrawals from representation or to discontinue new appointments. In general, when relief is not granted, lawyers must comply with court orders rather than make private determinations of the law and risk contempt.

Performance Standards for Defense Representation

Professional conduct rules apply to lawyers generally and do not address the specific 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 and in standards approved in various states. Because these standards are recommendations, violations of them do not lead to disciplinary or other sanctions. Performance standards, moreover, do not normally deal with public defense caseloads.

Ethics Opinions

In 2006, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued an opinion in which it addressed the duty of defense lawyers confronted with excessive caseloads. The opinion emphasized that “[t]he Rules [of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.” The opinion also explained that if a lawyer deems a supervisor’s resolution of a caseload dispute to be unreasonable, the lawyer must continue up the chain of command and, if necessary, bring the matter to the head of the defender program and perhaps even to the program’s governing board. Further, the opinion directs lawyers to seek relief through an appeal when their request to withdraw is rejected in the trial court. State bar ethics committees and the American Council of Chief Defenders, a unit of the National Legal Aid & Defender Association, have issued substantially similar ethics opinions.

Recommendations Related to Caseloads

The ABA’s House of Delegates also has adopted several policy statements fully consistent with the ethics opinion of the Association’s Standing Committee on Ethics and Professional Responsibility. These statements are contained in ABA Criminal Justice Standards, the ABA’s Ten Principles of a Public Defense Delivery System, and in the ABA’s Eight Guidelines of Public Defense Related to Excessive Workloads. The most recent of these pronouncements is the Eight Guidelines, approved in 2009, which in several important respects extended the ABA’s policies on lawyers with excessive caseloads. For instance, the Guidelines challenge indigent defense 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 organizations and the lawyers who furnish representation accept exceedingly high caseloads as normal, perhaps because this is all they have ever known. Other guidelines urge that those in charge of public defense programs monitor continuously the workloads of their lawyers and instruct them to inform those in charge when they conclude that their workload has become unreasonable. The Eight Guidelines also cover both non-litigation and litigation options for dealing with excessive caseloads. (For discussion of caseload standards published in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, *see* the Explanation section related to Recommendation 5 in Part II of this publication.)

Occasionally caseload standards are contained in court rules, court decisions, and in contracts of private lawyers. But the standards often are not observed and rarely, if ever, are there any real consequences when they are exceeded. For some lawyers, the caseload standards may be too high, because whether lawyers have too many cases requires an individualized assessment of each lawyer’s situation.

Chapter 3

The Detrimental Effects and Risks of Excessive Caseloads

Supervision and Mentoring

Lawyers who represent persons in criminal and juvenile cases need to be trained, mentored, and supervised. This is especially true of lawyers who lack experience in providing defense services. Rules of professional conduct, moreover, specifically require that those in charge of other lawyers provide supervision of their work. But when caseloads are excessive, meaningful supervision is virtually impossible. Lawyers do not have adequate time to discuss their cases in depth with supervisors or even to ask meaningful questions. And those designated to supervise frequently lack time to do so.

Disciplinary Sanction

Occasionally courts have disciplined those in charge of law firms for failing to oversee the work of associates. As one court noted, supervision requires more than just having a lawyer available to answer questions. Among both private law firms and public defense programs, the failure to provide careful supervision is a distinct handicap in recruiting new lawyers.

Subordinate and supervisory lawyers employed by public defense programs are rarely disciplined because of excessive caseloads, but the risk of discipline cannot be eliminated. For example, several years ago three overworked assistant public defenders employed by a state public defender agency were called before disciplinary authorities for neglecting cases. While the defenders' disciplinary complaints were settled informally, reported disciplinary cases have rejected claims of private lawyers who argued that their mistakes in representing clients were because of having too much work. Several of these cases involved lawyers who provided indigent defense services either as assigned counsel or pursuant to contracts.

Ineffective Assistance of Counsel

Under the Supreme Court's *Strickland* decision, a lawyer fails to provide the effective assistance of counsel required by the Sixth Amendment if the representation was below "an objective standard of reasonableness" and was "prejudicial to the defense." Obviously, excessive public defender caseloads can lead to a failure to deliver effective legal assistance. Arguably, based upon the Supreme Court's decision in *United States v. Cronin*, prejudice to the defendant does not need to be shown when a defense lawyer who is overwhelmed with cases fails to conduct an adequate investigation and thus does not carry out a meaningful challenge to the prosecution's evidence.

In a California case, after a juvenile was convicted of serious sex offenses and later challenged his defense representation at trial, his assistant public defender acknowledged that his excessive caseload made it impossible for him to thoroughly review and investigate his client's case, as well as others. The California appellate court found that the client was prejudiced and held that the lawyer not only failed to conduct an adequate investigation but also was deficient in failing "to move for a substitution of counsel knowing he was unable to devote the necessary time and resources" to defend the case. The decision appears to be the first 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 for finding counsel's representation "deficient" under the *Strickland* standard.

Section 1983 Liability

In addition to being held ineffective under the Sixth Amendment, those engaged in providing indigent defense services also face possible liability under Title 42 U.S.C. Section 1983 (hereinafter § 1983). Pursuant to § 1983, a civil suit can be brought 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.

Subject to certain limitations, 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 to persist; and (3) city, county, or other jurisdictional authorities responsible for providing defense services. States, however, are not “persons” under § 1983 and thus cannot be sued, although state officials can be sued in their official capacity.

However, in a 1981 case, the Supreme Court imposed an important limitation on the liability of defenders under § 1983, 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.” But the Supreme Court did not hold that a lawyer, head of an agency, or governmental unit could never be liable under § 1983. The Court suggested that if a public defender was “performing certain administrative and possibly investigative functions,” the conduct might properly be regarded as actions “under color of state law.” The distinction between “traditional” versus “administrative” functions is one of the major teachings of the Court’s decision.

The above distinction is illustrated by the decision of a federal circuit court of appeals, which held that both a chief public defender and the county that employed him could be held liable under § 1983 when the chief defender based the extent of services provided to defendants on whether they successfully passed polygraph examinations. If the polygraph suggested the client was likely guilty, the office committed only minimal time and resources to the defense representation. In the court’s view, the agency’s chief was not engaged in the “traditional” practice of law, but instead made an “administrative” decision about how to allocate scarce resources.

While the issue has not been litigated, arguably, the failure to file motions to withdraw, despite a clear duty to do so under rules of professional conduct, is wholly inconsistent with “traditional” functions of defense representation. Thus, the failure of an individual defender or chief defender to seek to reduce an excessive caseload is an “administrative” or “policy” decision, which is actionable under § 1983.

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, i.e., below what can be expected of a reasonably prudent attorney. High defense caseloads, moreover, undoubtedly prevent clients from being represented as they should, thereby increasing the risk of malpractice liability.

However, malpractice lawsuits 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 ruled out, public defender programs and private attorneys who represent indigent clients should almost certainly be insured for malpractice.

The Supreme Court has held that a lawyer appointed in federal court to represent an indigent defendant in a criminal trial, is not, as a matter of federal law, entitled to immunity in a state malpractice suit brought against him by his former client. Despite the Supreme Court's decision, 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. However, the majority of courts that have considered the issue have rejected any immunity for public defense providers.

But even when complete or partial immunity is unavailable 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," which requires a defendant obtain either post-conviction relief or establish actual innocence of the crime for which he or she was convicted. A few states, however, have rejected this prevailing view and have held that successful post-conviction relief or a showing of innocence is not a prerequisite for maintaining a legal malpractice claim based upon negligent representation.

Despite obstacles in bringing malpractice lawsuits, occasionally defendants succeed in successfully suing their former defense lawyers. For example, financial recoveries have been awarded when defendants were locked up for conduct that did not constitute a crime, but defense counsel negligently failed to determine this. Sometimes defense counsel's negligence has related 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 convicted defendants are later found to be innocent of the underlying offense and defense counsel negligently handled the client's case in the trial court. The chapter concludes with examples of cases in which malpractice cases were successfully litigated or the defense chose to settle the case.

Chapter 4

Understanding Lawyer Behavior: Why Leadership Matters

The vast majority of defenders do not challenge their caseloads even when they are clearly excessive and despite a duty to do so under professional responsibility rules. Principles of social psychology and organizational culture help to explain why they do not.

Social Psychology

A prominent researcher has observed "that . . . lawyers will too often obey obviously unethical or illegal instructions or fail to report the wrongdoing of other lawyers Studies on conformity and obedience suggest that professionals . . . 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."

The researcher also observes 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.” Young lawyers especially often “feel a powerful, though perhaps unconscious, urge to conform, especially given . . . trouble finding a job and . . . significant financial burdens.”

If disciplinary sanction were a real possibility, defenders probably would be less likely to accept excessive caseloads. But 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.

Organizational Culture

Organizational culture is defined as “the tacit assumptions shared by the members of the group.... When asked why they behave a certain way the response might simply be ‘that’s how things are done around here.’” 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.

To illustrate, in 2006, just after the ABA’s ethics committee issued its opinion declaring that defenders had a duty to comply with rules of professional responsibility when caseloads are too high, a news reporter interviewed several public defenders and asked about their caseloads and whether the ABA’s opinion would impact them. The defenders, who had exceedingly high caseloads, revealed the culture of their office: “To be perfectly honest, we’re not at liberty to reject any cases.” In other words, that’s how things are done in the public defender program, and the ethics opinion would make no difference.

Change from the Top

Just as in business organizations, change in public defender programs can occur when leaders have a clear vision. As several noted business school professors have explained, “[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.”

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. The leaders of one defender program explain it this way: “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.”

If excessive caseloads are present, change will only occur when those in charge of the defense program understand the problem and actively address it. However, too often defenders fail to appreciate fully their duties in providing defense representation, and thus they are willing to accept excessive caseloads as a permanent part of the program’s organizational culture.

The adoption of standards for defense services can help change the organization's prevailing view about caseloads, because standards advise defenders of their responsibilities in representing clients. To achieve this result, the standards need to be used regularly in training programs and frequently consulted on other occasions. 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 and undermine the Sixth Amendment.

A change in culture also can be facilitated if defender programs encourage their lawyers to assess their caseloads and to determine whether they have too much work or, conceivably, can take on additional cases. Thus, the ABA Eight Guidelines of Public Defense Related to Excessive Workloads recommend that “[t]he 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.” Lawyers themselves know better than anyone else whether they can handle their workload. When they cannot, defenders need to communicate this to the appropriate officials so that management can assess whether an overload exists and determine if alternative arrangements are possible.

Chapter 5

Remedies for Defenders Terminated Due to Caseload Challenges

Chapter Overview

Although most lawyers employed by public defense organizations seldom complain to their supervisors about excessive caseloads, occasionally some lawyers do so or, at the least, are prepared to inform those in charge 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, such as filing motions in court without management's permission to withdraw from some of their cases.

If a public defender has an excessive caseload 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? In other words, can the fired defender claim wrongful termination or retaliatory discharge? *The answer is vitally important not only for public defenders overwhelmed with cases and wanting to challenge their caseloads but also for those in charge of defense programs who insist their lawyers accept overwhelming caseloads or face dismissal.*

This chapter focuses 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 authorization. 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 do so.

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 non-profit corporation. 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 contains 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.

In addition, some defenders belong to a union and, just like with other kinds of contracts, persons covered by union contracts are not at-will employees. Courts consistently treat 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.

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. 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,” grievances based on excessive caseloads are rare.

Historically, employers were able to terminate at-will employees for good cause, no cause, or even for a morally bad cause. This is because 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. 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.” 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.

Employment At-Will and Its Exceptions

The most widely adopted exception to the at-will doctrine is the public policy exception, which now appears to have been adopted in the vast majority of states. As implied by its name, 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.

Several court decisions have accepted ethical rules pertaining to the professions, including rules of professional conduct applicable to lawyers, as expressions of public policy. Although none has involved public defenders, wrongful termination or retaliatory discharge suits have been brought by in-house corporate lawyers fired by corporate employers. The lawyers in these cases acted in ways that they believed was required by professional conduct rules. 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 a formal opinion on the subject.

A frequently cited case in this area is a 1994 decision of the California Supreme Court. The lawyer-plaintiff claimed that he was fired because he reported to company officials “widespread drug use among the . . . work force, a refusal to investigate the mysterious ‘bugging’ of the office of the company’s chief of security, and the displeasure of company officials over certain legal advice . . .” 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 caseload as for an in-house lawyer terminated for disclosing corporate misconduct:

[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.

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. Only the following twelve states, as of 2001, had not adopted the exception in some form: Delaware, Florida, Georgia, Indiana, Louisiana, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia.

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, personnel manuals, or memoranda.” 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 some other standard.

At least one court has applied the implied contract exception based on rules of professional conduct. The case involved a lawyer-plaintiff, who claimed that he was terminated for wanting to report one of the firm’s associates to disciplinary authorities because the associate had violated rules of professional conduct. His claim for wrongful termination was based on the public policy exception to the at-will employment doctrine or, alternatively, a breach of the employment relationship (i.e. the implied contract exception).

Although the court rejected plaintiff’s claim based on the public policy exception, concluding that the matter is best left to the legislature to decide, the court reached a different conclusion respecting plaintiff’s “legal claim for breach of contract.” The court explained its decision regarding the law firm’s former associate in language equally applicable to public defenders burdened with excessive caseloads:

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 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 position of having to choose between continued employment and his own potential suspension and disbarment.

The implied covenant of good faith and fair dealings exception is a third exception to the at-will employment doctrine, which has been adopted in at least eight states. The exception is predicated on the existence of an at-will contract between employee and employer. Essentially, courts imply certain contractual protections for the employee that are not expressly contained in the agreement of the parties. 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. 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 and implied contract exceptions.

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. 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. There do not appear to be any cases decided by Montana courts involving public defenders and the MWDEA.

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's due process clause. Thus, persons discharged from public employment (e.g., a public defender with civil service protection) have a protected property interest in continued public employment. As the U.S. Supreme Court has explained, due process requires that before a person is deprived of life, liberty, or property, such action must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." At a minimum, 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." Further, the Court has held that the employee must be furnished "the opportunity to present reasons, either in person or in writing, why proposed action should not be taken."

Summing Up Due Process, Excessive Caseloads, and Exceptions to Employment At-Will

If a public defender is terminated because of protesting an excessive caseload, and the public defender is a "public employee" with a protected property interest, the procedural due process protections

discussed in the preceding section will apply. However, if the employer complies with the duty to provide notice and an opportunity to be heard, termination will still be possible if it complies with statutory and common law protections, such as “just cause.” However, if a public defender is an employee at-will and not considered a “public employee,” procedural due process protections will not apply; however, one or more of the several exceptions to the employment at-will doctrine likely will be available, assuming dismissal is based on a public defender’s challenge to a genuinely excessive caseload.

Chapter 6

Determining Costs and Staffing Needs

This chapter explains the methodology of weighted caseload studies and discusses their validity. It also suggests alternative approaches for determining appropriate caseload levels and justifying the number of staff needed to provide competent and effective defense services.

Weighted Caseload Studies

The goal of a weighted caseload study is to determine the average amount of time 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). 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.

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 ($540 \div 90 = 6$).

Weighted caseload studies have rarely, if ever, been conducted of defense programs in which the lawyers have sufficient time to spend on their cases or have adequate support staff, which requires an adjustment to the number of hours to account for the time that should have been spent. 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 ($60 \text{ cases} \times 30 = 1800$).

The National Center for State Courts (NCSC), which has conducted weighted caseload studies of several statewide defender programs, refers to this final stage of the study as a “quality adjustment process.” In one such study, in an effort to determine barriers to the provision of quality legal representation, a Web-based “sufficiency of time survey” was sent to all public defenders. The survey “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.” For each of the separate areas listed in the survey, public defenders were asked whether they had sufficient time to perform the activity. For example, on 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.”

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,” 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.”

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.” 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.” The final standards approved represented 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. These adjustments in the number of required minutes demonstrated that the number of lawyers in the statewide public defender program was not sufficient and that staff size needed to be increased.

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.” The technique is recommended when a problem does not lend itself to precise measurement and can benefit from collective judgments, which is precisely the situation when a defense program considers how much additional time its lawyers need to spend on a whole range of activities involving different kinds of cases.

Admittedly, 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. It also would be helpful to know at the outset 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 invested.

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, 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.

An experiment of the kind proposed is apt to yield data that is highly reliable, which is why it is worth serious consideration in large defender programs capable of its implementation. 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 time differences as necessary to yield competent, diligent, high-quality defense services.

To illustrate, assume that lawyers in the control group are devoting, on average, only 30 minutes to preparing for pretrial release hearings while lawyers in the experimental group are spending an average of 120 minutes. 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 this kind 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. It should also be possible to measure the extent of loyalty, trust, and overall client satisfaction between those clients represented by experimental and control group lawyers. Such comparisons are not possible with weighted caseload studies because all of the defense lawyers are laboring under the same or similar caseloads.

Alternative Proposal: Tracking Public Defender Time

Time keeping among public defense agencies is relatively unusual. 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. And in the same way that private law firms justify their expense to private clients, public defense programs need to demonstrate to funders the level of effort expended by their staff to justify why additional financial support is needed. Moreover, among private law firms, time records serve certain management functions.

If a public defense program decided to track the time of its lawyers, a computerized system to handle the task would need to be purchased and fine-tuned for the particular program. In addition, the public defense lawyers would need instruction in how to use the new system and their likely reluctance to commit to the new system would need to be overcome. The potential advantages of a time-keeping system, such as those listed below, should make the effort worthwhile:

- 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. 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 able 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 previously unavailable data would exist. In prior litigation about caseloads, however, quantitative data on the amounts of time that public defenders work and are able to devote to various client activities has typically been absent. Instead, the evidence introduced has focused on the numbers and types of cases simultaneously represented by public defenders and buttressed by anecdotal stories.
- If the public defender program used a self-reporting system of the kind used by some private law firms, in which lawyers are asked whether or not they can take on additional work, had too much work, etc., compelling data could demonstrate 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.

Blinded by Numbers

Several years ago, 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." 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.* The ABA's 2006 ethics opinion dealing with excessive workloads emphasizes this point.

In addition, the judge's statement, at best, was 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 and appreciated.

Chapter 7

Reducing Excessive Caseloads through Litigation

The ABA's ethics opinion and the ABA's Eight Guidelines recognize that when no other remedies are available, lawyers have a duty to seek relief when faced with excessive caseloads. Although caseloads are far too high throughout much of the country, relatively few court challenges have been filed seeking redress. But a few cases have been brought since the ABA's ethics opinion issued in 2006, and this chapter focuses primarily on these lawsuits.

In several states, defense programs have asked that 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 action and in another as a petition seeking a writ of prohibition. Also, in two states systemic lawsuits were begun seeking various kinds of indigent defense reform, including reductions in lawyer caseloads. At the end of this chapter, the possibility of litigation by the federal government to reform indigent defense in state courts is discussed.

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. 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 2006, the Orleans Public Defender (OPD) filed a motion seeking caseload relief on behalf of a public defender assigned to felony cases. During a trial court hearing in March 2007, the defender testified that his active caseload consisted of 167 cases involving 164 different clients. The defender also explained his failure to perform a wide variety of necessary defense tasks on behalf of his clients was due to his caseload and the absence of sufficient time.

The trial court judge, relying in part on the ABA's ethics opinion and expert testimony, concluded that the representation being provided by the defender was neither effective nor in compliance with ethical rules. Accordingly, the judge authorized the defender 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 Orleans Public Defender to represent indigent defendants in his court. In addition, the judge ordered the release from custody of the forty-two defendants from whose cases the defender was permitted to withdraw; and, further, he ordered that the prosecution of the cases be halted "until further notice."

However, shortly afterwards the Orleans Parish prosecutor obtained a stay of the trial judge's order from a Louisiana Court of Appeals and the appellate court reversed, concluding that the judge had failed to conduct "individualized hearings for . . . defendants as mandated" by a prior Louisiana Supreme Court decision. Ultimately, the litigation did not achieve its desired purpose and public defenders in Orleans Parish continue to carry extremely heavy caseloads.

- **Kingman (Mohave County), Arizona**

In 2007, the Public Defender of Mohave County, Arizona, filed a motion to withdraw from a number of felony cases to which the office had been appointed. To assist in presenting his case, the chief public defender arranged for pro bono legal representation to be furnished by a Phoenix law firm, which filed a prehearing memorandum in support of the defender's withdrawal motion and attached nearly 200 pages of exhibits. Data presented to the court showed that for the most recent year assistant public defenders had weighted caseload equivalents of 267 felony cases each, far exceeding the 150 felony caseload maximum of the National Advisory Commission on Criminal Justice Goals and Standards (NAC). 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." 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.

- **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." During a hearing on the public defender's motion before the jurisdiction's five misdemeanor judges, 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 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 Tennessee law firm, which devoted many hours to the case.

Because the local prosecutor did not participate in the hearing, none of the witnesses who testified in support of the public defender's motion were cross-examined. Despite substantial uncontroverted evidence of excessive caseloads presented during the hearing, the judges of the General Sessions Court ruled neither promptly nor favorably for the public defender. After a delay of more than eight months, the judges issued a two and one-half page order denying the public defender all relief. Appellate review of the trial judges' decision was similarly unsuccessful.

- **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, claiming that they were much too high and thus preventing the delivery of competent and effective defense services. 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. At the time of this publication, the two cases were pending review before the Florida Supreme Court, which heard oral arguments in June 2012. Because of the potential importance of the cases to indigent defense, the American Bar Association, among other organizations, filed an amicus brief in the Florida Supreme Court in support of the public defender.

Other Important Litigation

In cases filed in Kentucky, Missouri, Michigan, and New York, the defense claimed that the representation provided to the indigent accused was deficient due in whole, or in part, to excessive caseloads. A judge dismissed the Kentucky case and no appeal was taken. The Missouri case was decided during the summer of 2012; but the Michigan and New York cases were filed in 2007 and have not yet had hearings on the merits.

- **Kentucky – Declaratory Judgment**

In June 2008, the Kentucky Department of Public Advocacy (DPA) and the Louisville and Jefferson County Public Defender Corporation filed a declaratory judgment action against various legislative and executive branch defendants. 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;” 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. 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.

Defendants moved to dismiss the complaint based upon principles of separation of powers, standing, and ripeness for adjudication. 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” Although the

trial court therefore dismissed 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. The Governor’s office explained it was “committed to finding funding to address the budget needs of both the prosecutors and the DPA next fiscal year.” 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. While high caseloads continue to be common among Kentucky public defenders, the caseloads almost surely would be worse had there been no lawsuit.

- **Missouri—Caseload Rules and Supervisory Authority**

Relying upon a prior Missouri Supreme Court decision and its caseload protocol authorized by Missouri law, the Missouri State Public Defender Commission (MSPDC) declared that one of its district court offices was unavailable to accept additional cases due to case overload that had persisted for three consecutive months. Nevertheless a circuit court judge appointed a public defender to a person charged with several felony offenses. In response, the MSPDC filed a petition for a writ of prohibition in the Missouri Supreme Court, asking that the trial court’s order be set aside because it was issued in violation of the Supreme Court’s earlier decision. On July 31, 2012, the Missouri Supreme Court issued an opinion supporting the authority of the state’s public defender to decline new appointments when its caseload protocol is exceeded, although the validity of the agency’s current protocol was not determined.

- **Michigan and New York—Systemic Litigation**

Michigan and New York are two of the most dysfunctional indigent defense systems in the country. 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. 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. Attached to the complaint was the report of the New York State Commission on the Future of Indigent Defense Services, 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.” Specifically, the complaint claims that the state’s indigent defense deficiencies include “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; [and] no attorney caseload or workload standards” A separate section of the complaint

deals with excessive caseloads and workloads. 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.”

Duncan v. Michigan is a class action lawsuit filed in Michigan similar to *Hurrell-Harring*. The complaint emphasizes indigent defense deficiencies in three Michigan counties and, much like the complaint in the New York case, alleges 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.” Also, like the complaint in the New York case, the complaint claims that “many indigent defense providers [in the three counties] have too many cases.” 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, and 42 U.S.C. § 1983.

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 systems 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.

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.” DOJ already is authorized to file lawsuits against state officials who systematically deny juveniles their due 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. 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.

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. 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.

Chapter 8

Case Studies: Public Defense Programs and Control of Caseloads

Although much has been written about excessive caseloads in public defense, some defense programs manage to avoid the problem. This chapter focuses on three impressive programs that I visited in preparation for writing the book, all of which have reasonable caseloads for their lawyers. Two of the programs consist of full-time public defenders and private lawyers, whereas the third is an assigned counsel program that relies solely upon private lawyers.

The three programs differ from one another in significant ways, but each program illustrates important lessons about the delivery of defense services. One of the programs is a statewide public defense agency that furnishes representation through both public defenders and private counsel (the Massachusetts Committee for Public Counsel Services). A 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 – the book's final chapter – I offer a summary of the three programs and the most critical factors they have in common.

The three programs featured in Chapter 8 are undoubtedly 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.

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. Also, while I did 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 achieve the same success in controlling caseloads or in providing the level of services that they do.

PART II

Recommendations

As stated at page v in my Explanatory Note about This Publication, the recommendations in this section are mine and do not constitute ABA policy unless otherwise indicated. This distinction is crucial since recommendations that have not been adopted by the ABA should not be cited as Association policy.

Recommendation 1: Need to Update and Revise ABA Policy

Although the ABA Standards for Criminal Justice: Providing Defense Services (3d ed. 1992) and the ABA Ten Principles of a Public Defense Delivery System (2002) contain important and well considered recommendations for indigent defense representation, each can be improved in order to ensure that the nation’s criminal and juvenile justice systems continue to make progress in delivering legal services in criminal and juvenile cases. The ABA should update and revise the black letter or commentary of these influential policy statements consistent with the recommendations below.

Explanation

The ABA Ten Principles of a Public Defense Delivery System and the ABA Criminal Justice Standards on Providing Defense Services upon which the ABA Ten Principles are based contain highly influential policy statements that have contributed to the improvement of indigent defense services throughout the country. Both documents have put the weight of the ABA behind such significant principles as securing the independence of the defense function, the need for the control of caseloads, and the importance of defense training.

Nevertheless, there is widespread dissatisfaction with the current state of affairs. Virtually everywhere caseloads are too high, there is a lack of adequate funding, and a host of related problems persist, as detailed in two national reports of indigent defense published in 2009. The reform recommendations set forth below are aimed at improving indigent defense and some of them might actually prompt governments to respond more favorably to the financial needs of defense service providers.

Recommendation 2: “Mixed Systems” of Public Defense

In order to ensure reasonable caseloads of public defenders, it is essential that private lawyers remain actively and substantially involved in providing indigent defense representation through programs that are independent of judges and politics. Such defense programs should provide (1) mandatory training for all participating lawyers; (2) adequate compensation for their services; (3) mentoring of inexperienced lawyers; (4) close supervision of the representation provided by all lawyers; and (5) appointments to types of cases for which the lawyers are qualified by training and experience. Before private lawyers and public defenders begin to provide criminal and juvenile defense services, an independent authority should certify that the lawyers are qualified to do so.

Explanation

In its Providing Defense Services standards, the ABA recommends that “every system [of public defense] should include the active and substantial participation of the private bar.” 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 and necessary revenues, making quality legal representation exceedingly difficult.

Unfortunately, over time, the ABA’s recommendation about the need for “mixed systems” 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 described in Chapter 8 – the defense programs in Washington, D.C., Massachusetts, and San Mateo County, California – have heeded the ABA’s warning about what happens when the private bar is not sufficiently engaged in providing defense representation.

In all three jurisdictions, an elastic or expandable supply of lawyers is present, thereby avoiding excessive caseloads among those providing defense services. If private lawyers were not present in adequate numbers to provide defense services in Massachusetts and in Washington, D.C., the public defenders in these jurisdictions would surely be overrun with cases just as they are in much of the country. Similarly, the panel of private lawyers organized by the San Mateo County Bar Association is large, and there always are more private lawyers who want to become part of the program than there are openings available. 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.

Beyond requiring the “active and substantial” involvement of the private bar, the policy respecting private lawyers must go further. For example, while training is recommended for defense lawyers in both ABA Providing Defense Services and the ABA Ten Principles, training should be a mandatory requirement, not something that is simply available. Similarly, the ABA’s policies dealing with compensation, mentoring, and supervision need to be stronger. Although the ABA Ten Principles states that lawyers should never be appointed to cases for which they lack the requisite experience and training, the policy should also require certification by an independent agency of the ability of lawyers, including public defenders, to provide defense services for specific levels of offenses. In other words, there should be a parallel requirement to the ABA’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, in which an independent agency is endorsed to approve lawyers as qualified to represent defendants in capital cases.

Recommendation 3: Client Selection of Counsel

Indigent persons eligible for legal representation should be permitted to select their own defense counsel from among private lawyers and public defenders certified as qualified to provide the level of defense services requested. Independent authorities should assign private lawyers or public defenders to furnish representation only when indigent persons decide not to select their own defense counsel.

Explanation

Although the ABA has urged for many years that the defense function should be independent and that judges should not appoint lawyers or approve their compensation, these practices remain widespread. Permitting indigent clients to select lawyers for defense representation makes enormous good sense, especially if the lawyers are “certified as qualified to provide the level of defense services requested,” as set forth in this recommendation. Although client selection of counsel has never been considered as an alternative to judges appointing lawyers in the United States, it has been used successfully in other countries (e.g., Australia, Canada, England, New Zealand, and Scotland), to secure the independence of the defense function and provide a powerful incentive for lawyers to serve the best interests of their clients.

In countries where “client selection” is permitted, lawyers are chosen just as persons of financial means select their own lawyer, medical professional, plumber, and countless other persons who provide services for compensation. Because there is competition to provide representation, lawyers understand that they must provide first-rate quality representation if they want to continue to be selected by clients, their relatives, and friends. In short, satisfied clients are the essential prerequisite for future business. However, in the United States, the same incentive structure is simply not present, because neither private lawyers nor public defenders are wholly dependent upon their performance and reputations in order to obtain future indigent defense assignments.

The “accountability of the marketplace” also means that lawyers avoid excessive caseloads that will interfere with their providing effective defense representation. The absence of caseload standards in the United Kingdom, for example, presents no concerns because lawyers do not attempt to represent too many clients. Lawyers realize they simply must provide high quality representation for their clients, which means controlling their caseloads.

The rationale of having lawyers compete for clients also applies to public defender agencies. In the United Kingdom, for example, the several public defender offices must compete for their clients with private solicitors approved to provide defense services for the indigent. Moreover, in Edinburgh, Scotland, initially the public defender agency was assigned to cases, but the law was changed at the public defender’s request because the agency concluded that client trust and loyalty of its lawyers would be substantially enhanced if they were chosen by clients rather than appointed by judicial officers.

No decision of the Supreme Court has recognized an indigent defendant’s constitutional right to select his or her counsel of choice. However, for the defendant with the financial means to retain counsel, the Court has embraced a distinctly different approach. In a 2006 decision, 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, noting that “[w]here the right to be assisted by counsel of one’s choice is wrongly denied . . . 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. . . .”

Despite the importance 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.” But even if indigent defendants lack the

constitutional right to a lawyer of their choosing, jurisdictions are free to establish programs that allow clients to select their own counsel. And, given the advantages of such systems, jurisdictions should consider adopting this approach.

Recommendation 4: Referral of Cases to Private Lawyers

When faced with excessive caseloads, public defender programs should have the authority to refer clients directly to private lawyers who are qualified to provide representation to indigent persons in criminal and juvenile cases.

Explanation

As discussed in Chapter 7, lawsuits sometimes have been instituted by public defender programs seeking relief from excessive caseloads. However, litigation is not always successful, is invariably time consuming, and an inefficient means of addressing the caseload problem. And, even when some relief is obtained, the favorable result is rarely a permanent solution to the problem.

The need for litigation respecting excessive caseloads can be eliminated if defender programs are empowered to refer cases directly to private lawyers who are qualified to accept them. This approach removes judges from the middle of a problem for which they are not responsible. Public defender programs with excessive caseloads are in that position because they have not received adequate funds from the state and/or local governments that support them. The successful implementation of this recommendation requires sufficient numbers of private assigned or contract lawyers who are trained, supervised, and reasonably compensated for their services, as urged in Recommendation 2.

The problem of excessive caseloads in indigent defense exists in 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, 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 assignments under the federal district court's CJA plan. 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. In fact, nationwide in the federal courts panel lawyers receive nearly 40% of the cases and are far better compensated than private lawyers assigned to handle indigent cases in state courts.

Allowing defender programs to direct cases to private lawyers as in federal courts is uncommon in state courts but not completely unknown. In several states, statutes empower statewide defender programs to assign cases to private lawyers or the practice exists even though not specifically authorized by law. However, this empowerment of public defenders in state courts is often ineffective in restraining defender caseloads because adequate funds have not been provided to compensate private lawyers willing to accept referrals of indigent cases.

Recommendation 5: Determining Excessive Caseloads

Public defender agencies and programs that furnish private lawyers to provide indigent defense representation should not rely upon “national caseload standards” published in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals. In lieu of such standards, public defender agencies and programs that furnish private lawyers should recognize that caseloads of lawyers must be assessed on an individual basis consistent with the ABA Eight Guidelines of Public Defense Related to Excessive Workloads. (*See also* Recommendation 6, which pertains to weighted caseload studies and time records.)

Explanation

In 1973, caseload standards were published by the National Advisory Commission on Criminal Justice Standards and Goals (hereinafter “NAC.”) 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.” No other national caseload numbers have ever been recommended.

Although the foregoing recommendations were not based on empirical research and the NAC warned about dangers in relying on their caseload standards, the NAC’s suggested numbers are often referred to as “NAC national caseload standards.” They also are often attributed to the ABA, apparently because of a footnote in the ABA Ten Principles of a Public Defense Delivery System, which states that the NAC numbers should never be exceeded.

Given the age and origin of the NAC caseload standards, and the NAC’s 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 recommended the NAC’s caseload numbers and given them an aura of respectability to which they are not entitled. Admittedly, however, the NAC standards have sometimes been useful to public defender programs in helping them to restrain genuinely excessive caseloads.

The NAC’s caseload standards were derived from a committee report of the National Legal Aid & Defender Association, which the NAC simply “accepted” since they did no research of the subject and had no numbers of their own to suggest. In contrast, the research arm of the National Association of District Attorneys, after several years of study, declared that for state prosecutors, because of “external, and internal, and individual case factors . . . [respecting] . . . overall workload . . . it was impossible for [national] . . . standards to be developed”

Nevertheless, in 2007 the American Council of Chief Defenders (ACCD) adopted a resolution based on the NAC standards, 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.” 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 black-letter standards or commentary.

Despite the ACCD's acceptance of the NAC's recommended maximum caseload numbers, the extensive commentary in support of the ACCD resolution effectively undermines the endorsement, making it clear that the NAC's maximum caseload numbers per attorney per year are almost surely too high. As the ACCD's commentary 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 convictions. Moreover, since the ACCD's resolution was adopted, the Supreme Court's decision in *Padilla v. Kentucky* has made it clear that defenders cannot ignore the impact of criminal convictions on deportation proceedings and potentially other collateral consequences as well.

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." The commentary 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"

Given the lack of empirical data to support the NAC's recommended caseloads and the need for caseload numbers to be jurisdiction specific, the Missouri State Auditor recently rejected as invalid the Missouri State Public Defender's caseload crisis protocol based substantially on caseload numbers recommended by the NAC. See Thomas A. Schweich, Missouri State Auditor, Missouri State Public Defender, Report No. 2012-129, 11-21, October 2012, *available at* <http://auditor.mo.gov/Press/2012-129.pdf>.

Because the NAC maximum caseload numbers are sometimes far too high, especially for lawyers without adequate support staff, they present serious problems for defense programs seeking to maintain reasonable caseloads. For example, lawyers handling felony cases in several of the best public defender offices in the country are normally unable to represent as many as 150 defendants per year charged with felony offenses even with adequate support staff. Although the NAC caseload numbers are expressed as maximums, all too frequently they are deemed to be the norm, i.e., the number of cases that a defense lawyer should be able to represent over a twelve-month period. The NAC's warnings about relying upon the numbers have long been forgotten, and public defense programs are reluctant to seek financial support to enable their lawyers to handle caseloads at numbers below so-called "national standards," even though the NAC numbers were never intended to be used as a nationwide measure of how many cases an individual lawyer is able to represent every year. In the few jurisdictions in which public defender offices and their lawyers are below the "NAC national standards," the defense programs are understandably reluctant to admit it. The defender committee of NLADA was correct when it warned, even before the NAC standards were adopted, of "dangers" in having any national standards.

Consistent with rules of professional conduct and the Sixth Amendment, defense programs have a mandatory duty to monitor the current workloads of their lawyers and decide whether their lawyers have adequate time to do all that is necessary to represent their clients competently and effectively. This is spelled out in the ABA’s Eight Guidelines of Public Defense Related to Excessive Workloads. As stated in Guideline 4, “[p]ersons in Public Defense Provider programs who have management responsibilities [must] determine . . . whether excessive lawyer workloads are present.” In order for public defense programs to determine the number of cases that their lawyers can represent over the course of a year, the programs should consider the use of weighted caseload standards and time records, as discussed in the Explanation to Recommendation 6.

Recommendation 6: Weighted Caseload Studies and Time Records

Public Defender agencies and other programs that provide indigent defense services should consider use of weighted caseload studies and time records kept by their lawyers as a means to explain to their funding authorities the need for adequate financial support.

Explanation

Weighted caseload studies enable a public defense program 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, the defense agency must initially determine the number of work hours per year that defense lawyers have available (e.g., 1800 hours). The amount of time defense lawyers spend on different kinds of cases is collected and converted into “case weights.” Case weights represent the amounts of time, on average, that lawyers devote to handling particular types of cases, such as murders, nonviolent felonies, and misdemeanors. After these time records are compiled, a Delphi analysis must be undertaken to make “quality adjustments,” i.e., to determine the amounts of additional time that lawyers require in order to represent their clients adequately. Ultimately, the defense agency should be able to predict the amounts of time their lawyers need to provide quality representation in various kinds of cases and thus the amount of staff required to handle its caseload.

Conducting weighted caseload studies requires that lawyers maintain time records for an agreed upon period. By using time records, defense programs are able to demonstrate to funding authorities just how hard their lawyers are working and the relatively brief amounts of time they have available to spend on countless time-consuming tasks. The availability of time records also enable defense programs to update their weighted caseload studies periodically. However, given the many advantages of keeping time records irrespective of conducting caseload studies, defense programs should consider having their lawyers keep time records on a permanent basis.

For more complete discussion of the advantages of weighted caseload studies and keeping time records, please consult *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, Chapter 6, at pages 140-160, and the summary of Chapter 6 in this publication.

Recommendation 7: Motions Seeking Caseload Relief

When confronted with excessive caseloads, public defense programs should consider filing individual motions in as many cases as appropriate seeking to halt the assignment of new appointments and, if necessary, to permit withdrawal from cases to which lawyers have been assigned.

Explanation

An alternative to filing individual motions on multiple occasions, seeking caseload relief, as urged in this Recommendation, is for public defense programs to file a major “test” motion or lawsuit challenging their caseloads (see, e.g., discussion of cases in Chapter 7). However, this approach requires substantial advance preparation time by the heads of defense programs and senior staff similar to what is required in major civil litigation. Normally, statistical data on caseloads and other activities of lawyers has to be assembled, affidavits prepared, expert and non-expert witnesses lined up to testify, and litigation strategies formulated. Even if private pro bono counsel is recruited for the litigation, the lawsuits still require an enormous amount of time by all concerned. For this reason, as well as the uncertainty of success, busy leaders of public defense programs are likely discouraged from launching time-consuming caseload litigation.

In lieu of a test litigation approach, public defense programs should consider an alternative that requires far less time and advance preparation but holds at least as much promise of success. Thus, with each new case assignment or group of assignments, the chief public defender or an assistant public defender states in a motion that the acceptance of additional cases will result in a violation of the rules of professional conduct and requests that the new assignment(s) not be made. If necessary, the program or its lawyers could also seek to withdraw from cases as soon as possible after being appointed.

States throughout the country have approved ABA Model Rule 1.16 (a), which provides that lawyers “shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if the representation will result in violation of the rules of professional conduct” Accordingly, if “competent” representation as required by ABA Model Rule 1.1 is not possible because of excessive caseloads, a lawyer’s duty to seek to avoid the situation is absolutely clear. Similarly, ABA Model Rule 6.2 provides that “[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ,” which includes the “likely . . . violation of the Rules of Professional Conduct” In considering these provisions, it is important to understand that lawyers owe their primary obligation to clients who they already are representing, as emphasized in the ABA’s 2006 ethics opinion regarding excessive caseloads.

Pursuant to the foregoing professional conduct rules, if new cases are assigned to the chief public defender with representation to be furnished by a staff member, the chief defender should refuse the new assignment(s) and inform the court that acceptance of the new case(s) will mean that both the leaders of the agency and staff lawyers will violate their ethical duties. This could be done orally on the record or in a brief motion filed with the court. Whichever course is followed, a hearing on the motion could be requested. A similar course could be followed if staff lawyers are appointed directly to cases in their own names, except the record in those cases may need to be made by the agency’s staff member.

If the court grants the requested hearing, the leaders of the defender agency and its lawyer(s) will need to present testimony respecting their inability to accept additional cases. 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. The testimony should leave little doubt that competent and diligent representation cannot be provided; and that additional appointments will only make matters worse. While preparation for this hearing will take some time on the part of all concerned, it should not require nearly the time required of major test case litigation, which often requires months to prepare.

If motions of the kind suggested are successful, the trial court judge presumably will appoint private 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 repeated 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 because the defense can demonstrate that there was concern from the very beginning about whether there was sufficient time to represent the defendant adequately. Second, the defense will be able to document for its funding authorities the concern about the caseloads of its lawyers by showing that it has repeatedly advised trial court(s) that the lack of sufficient staff and resources renders it unable to provide competent and effective 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, or staff lawyers will protect themselves against possible disciplinary violation claims. 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 favorable reform climate.

Recommendation 8: Declaring “Unavailability” to Provide Representation

As an alternative to repeated requests or motions seeking relief from excessive caseloads and asking for hearings, public defender agencies should consider refusing to furnish representation in new cases and providing informal notification to the court of its decision.

Explanation

In the vast majority of jurisdictions, trial courts appoint to new cases either the head of the defense program or the program's staff lawyers. If the defense lawyers have too many cases, this recommendation suggests that the chief defender or the lawyers themselves inform 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 excessive caseloads. The defense thus declares that it is “unavailable,” providing sufficient information to support its claim. Whatever the precise communication to the court, the defense should inform the court that it will not proceed to represent new clients or perhaps certain classes of new cases such as misdemeanors or felonies where clients have been released from custody.

In support of their position, the chief defender or the lawyers can refer the court to the ABA Model Rules discussed in the preceding Explanation to Recommendation 7. Significantly, neither ABA Model Rule 1.16 (a) (1) nor Rule 6.2 require that formal motions be filed asking that assignments to new cases be halted. The Model Rules are satisfied if defense programs or its lawyers inform courts

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 foregoing approach also is consistent with ABA Criminal Justice Standard: Providing Defense Services, Standard 5-5.3, which states that defense programs and individual lawyers “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.” But neither the black-letter 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 to the standard 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.” Filing motions with courts is mentioned in the 2006 ABA ethics opinion on excessive workloads but only in connection with withdrawal from representation, undoubtedly because court rules normally require a formal motion when a lawyer seeks to withdraw from representation.

A crucial distinction exists between the defense declaring that it is “unavailable” and 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 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 new appointments. But even if the trial court grants the defense motion, the court’s order may 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.

On the other hand, if the defense does not file a motion to stop the appointment of new cases but instead advises the trial court that it is “unavailable,” the only real option available to the trial court is to hold the defense lawyer or the head of the defender program in contempt. Many judges are surely reluctant to hold heads of defense programs or its lawyers in contempt for refusing to proceed based upon concerns for their ethical duty to provide competent services. In a Pennsylvania case during 2012, a chief public defender did exactly what is recommended here, and the trial courts reluctantly accepted the chief defender’s position and did not seek to compel the defender to take cases that he declared his office was unable to accept.

Forcing the court to be the moving party in a dispute about the willingness of the defense to accept new appointments offers several important advantages for public defense programs. Not only must the court prove that the conduct of 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. 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 *Strickland v. Washington* standard, which requires that prejudice be demonstrated. Thus, the harm visited upon clients when the defense continues to labor with excessive caseloads while litigation proceeds slowly through the courts is often irreparable.

Recommendation 9: Prosecution Participation in Defense Efforts to Secure Reasonable Caseloads

Public defense providers should consider objecting when prosecutors oppose defense efforts to secure reasonable caseloads because (1) prosecution opposition is inconsistent with their duty to serve as ministers of justice; and (2) prosecutors lack standing to object to excessive defense caseloads.

Explanation

In cases in which public defenders have filed motions seeking relief from excessive caseloads, the quality of defense representation usually has been far less than competent and diligent, as required by rules of professional conduct. In one case, for example, a chief public defender characterized his lawyers as “flying by the seat of . . . [their] pants.” Obviously, this is the antithesis of “competence,” which requires “thoroughness and preparation reasonably necessary for the representation.” Yet, in cases like this, the local prosecutor, the state attorney general, or both, typically oppose defense claims about the existence of excessive caseloads.

Prosecutors should not 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 prosecutors have responsibilities for the system of justice beyond obtaining convictions. 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,” whose responsibility is more than that of an advocate. The prosecutor has a duty “to see that the defendant is accorded procedural justice. . . .” For prosecutors to oppose defense efforts in court to deal with excessive caseloads is inconsistent with their duty to ensure that the justice system treats all accused persons fairly and in accord with due process.

Most courts in the United States have held that indigent persons charged with a crime or a juvenile offense have no choice about their defense lawyer, even when the lawyer requested by the accused is qualified and willing to provide representation. Consistent with this approach, defendants cannot insist that their lawyers be replaced due to excessive caseloads and usually defendants are unaware of just how many cases are assigned to their lawyers. But the law is turned upside down if prosecutors are permitted to argue that the caseloads of counsel are reasonable and hence no relief should be available to the defense. Although the accused has no right to be heard about the selection of his or her lawyer, the prosecutor does. In addition, regardless of their motive, prosecutors who oppose defense efforts to reign in their caseloads are attempting 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, arguably, a court should treat prosecution opposition to reductions in defender caseloads as tantamount to a conflict.

The black-letter of ABA Standards Related to the Prosecution Function provide that the “[t]he duty of the prosecutor is to seek justice, not merely to convict.” 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.” The commentary to the foregoing standards stress 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.” 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.

Finally, aside from rules of professional conduct, ABA Criminal Justice Standards, and conflict of interest considerations, prosecutors arguably lack standing to oppose defense motions respecting caseloads in most jurisdictions. 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.” Merely because the prosecutor represents the state in a criminal or juvenile proceeding does not in itself 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 New York appellate 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. 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. . . ” it had the right to be heard on the defense motion.

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 thousands of public defenders and private lawyers actively engage 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 of financial difficulties for state and local governments, but significant structural problems in the delivery of indigent defense services must be addressed. Defense representation must involve 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. Experiments should allow clients to choose their own lawyers from among public defenders and private lawyers who are certified as qualified to provide effective defense services. Finally, absent these reforms, 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. 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. As 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."

Because I believe that improvements in indigent defense will continue, just as they have for the past nearly fifty years, I am hopeful 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.

APPENDIX

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SECURING REASONABLE CASELOADS:
ETHICS AND LAW IN PUBLIC DEFENSE

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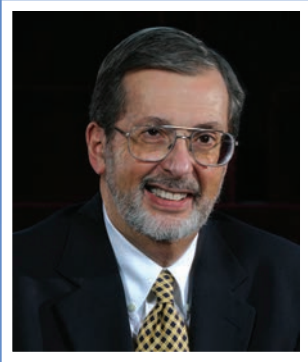
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About the Author

Norman Lefstein is Professor of Law and Dean Emeritus of the Indiana University Robert H. McKinney School of Law in Indianapolis. He was dean of the law school from 1988 until 2002. Previously, Professor Lefstein was a faculty member at the University of North Carolina School of Law at Chapel Hill, and he has held visiting or adjunct appointments at the law schools of Duke, Georgetown, and Northwestern.

Professor Lefstein has served as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney in D.C., and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice.

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 Aid 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 Defense Lawyers.