

Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?

by NORMAN LEFSTEIN*

Introduction

There is undeniable evidence that throughout much of the country defense lawyers who furnish legal representation in criminal and juvenile cases for the indigent have excessive workloads. This undermines the quality of the representation lawyers provide, often severely eroding the Sixth Amendment's guarantee of counsel and impairing their ability to deliver competent and diligent services as required by rules of professional conduct. The problem, moreover, has existed for many years, probably in most jurisdictions since efforts were first made by states and counties to implement the Supreme Court's right to counsel decisions.¹

* Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis. LL.B. 1961, University of Illinois; LL.M., 1964, Georgetown University Law Center. Professor Lefstein served as co-reporter for the National Right to Counsel Committee's report on indigent defense cited in this paper and also as reporter for the second edition of ABA CRIMINAL JUSTICE STANDARDS, PROVIDING DEFENSE SERVICES and the DEFENSE FUNCTION. This paper contains content from the author's book, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, to be published by the American Bar Association in 2011.

1. See, e.g., NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50-64 (The Constitution Project 2009) [hereinafter JUSTICE DENIED], available at <http://2009transition.org/justicedenied/>. This citation is to a section in Chapter 2 of JUSTICE DENIED titled, "The Need for Reform Is Decades Old." While this paper was being drafted, the New York Times carried a front page article dealing with problems in indigent defense. See Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. TIMES, Sept. 9, 2010, at A1 ("Concerns about a deteriorating, overwhelmed public defender system in this country have been around for decades, but they have ballooned recently as state budgets shrink and more defendants qualify for free legal counsel."), available at <http://www.nytimes.com/2010/09/10/us/10defenders.html>. The words "workload" and "caseloads" are used throughout this paper; for the distinction between the two, see *infra* note 13.

In 2009, two national reports were released dealing with indigent defense in the United States. The first of these—*Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*—was from the National Right to Counsel Committee and published by the Constitution Project.² The second report, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, was published by the National Association of Criminal Defense Lawyers and focused on representation in misdemeanor cases and other lesser offenses.³ Both reports devoted considerable attention to the issue of excessive caseloads.

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

Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.⁴

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

Almost 40 years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision. Legal representation for indigent defendants is absent in many cases. Even when an attorney is

2. JUSTICE DENIED, *supra* note 1. The National Legal Aid & Defender Association also served as a sponsor of the National Right to Counsel Committee and its report.

3. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DOMINO, NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009) [hereinafter *MINOR CRIMES*], available at www.nacdl.org/misdemeanor.

4. JUSTICE DENIED, *supra* note 1, at 7.

provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties. Frequently, judges and prosecutors are complicit in these breaches, pushing defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client.⁵

These two reports are part of a long line of national, state, and local studies, as well as other publications, that have complained about the enormous caseloads of those who furnish defense services and the adverse impact of such caseloads on the quality of the representation provided.⁶ The reports quoted above imply that excessive caseloads are confined to public defender programs. While the most frequent and worst examples of out-of-control caseloads are among public defenders, private attorneys who provide indigent defense services sometimes take on way too much work as well.⁷ They do so in an effort to maximize their incomes because they are poorly compensated on a per case basis for their services.⁸ Similarly, those responsible for funding indigent defense sometimes award

5. MINOR CRIMES, *supra* note 3, at 14.

6. The second of the two reports contained extremely troublesome data respecting the caseloads of defenders handling misdemeanor cases. For example, in three major cities—Atlanta, Chicago, and Miami—the defenders were described as handling more than 2,000 cases per year, and in a number of other jurisdictions the caseloads per year were exceedingly high. *See id.* at 21. These caseloads were contrasted with the recommendation of an earlier federal commission report that recommended that misdemeanor caseloads not exceed more than 400 cases per year. *See* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS (1973) [hereinafter NAC STANDARDS].

7. The total number of lawyers engaged in indigent defense representation nationwide has not been reliably estimated. However, a recent report suggests that there are more than 17,000 public defenders in the U.S. *See* Lynn Langston & Donald J. Farole, Jr., *Public Defender Offices, 2007 – Statistical Tables*, Bureau of Justice Statistics, U.S. Dep’t of Justice at 1 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf> (last visited on March 17, 2010).

8. The ABA has recommended that “[a]ssigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.” ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES, Standard 5-2.4 (1992) [hereinafter ABA PROVIDING DEFENSE SERVICES]. The reality, however, is that “compensation of assigned counsel is often far from adequate.” JUSTICE DENIED, *supra* note 1, at 64.

contracts to lawyers who have furnished the lowest bid due to their willingness to accept an excessive number of cases.⁹ A government commissioned report summed up the difficulty of caseloads among private defense lawyers: “[t]he problem is not limited to public defenders. Individual attorneys who contract to accept an unlimited number of cases in a given period often become overwhelmed as well. Excessive workloads even affect court-appointed attorneys.”¹⁰

The ABA Standards for Criminal Justice related to the Defense Function and Providing Defense Services address the problem of excessive workloads. Similar language appears in the ABA Ten Principles of a Public Defense Delivery System. Additionally, in 2009, the ABA House of Delegates adopted Eight Guidelines of Public Defense Related to Excessive Workloads, which are much more detailed than the workload provisions contained in either the ABA Ten Principles or ABA Criminal Justice Standards. The ABA’s Model Rules of Professional Conduct also have a number of provisions related to defense lawyers who are confronted with excessive workloads. Finally, in 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion on excessive workloads in public defense. Although ABA ethics opinions do not constitute ABA policy, the opinion is highly relevant to the subject under consideration here.

The purpose of this paper is twofold: (1) to review the foregoing ABA sources related to excessive workloads; and (2) to consider whether any additional policies related to excessive workloads may be suitable for inclusion in ABA Criminal Justice Standards related either to the prosecutorial function or the function of the defense bar.

I. ABA Sources Related to Excessive Workloads

A. ABA Criminal Justice Standards

The current edition of ABA Standards for Criminal Justice related to the Defense Function contains a single sentence concerning the duty of counsel pertaining to workload:

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

10. BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT’ OF JUSTICE, NO. 4, KEEPING DEFENDER WORKLOADS MANAGEABLE 2 (2001).

Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.¹¹

The commentary to the foregoing black-letter provision elaborates on the meaning of the standard:

Although lawyers, like other people, vary in their capacity for effective performance, there is a limit to how much work any one lawyer can perform. . . . [T]he lawyer has a duty to accept no more employment than can be effectively performed without unreasonable delay. Moreover, it is improper for defense counsel to accept so much work that the quality of representation or counsel's professionalism is in any way diminished for that reason.¹²

In addition to advising lawyers not to carry excessive workloads, a black-letter standard in ABA Providing Defense Services advises lawyers what to do if faced with too many existing cases:

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

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

11. ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.3(e) (1993) [hereinafter ABA DEFENSE FUNCTION STANDARDS].

12. *Id.*

lead to the furnishing of representation lacking in quality or to the breach of professional obligations.¹³

The above standard uses the word “*must*” in referring to the need to “take appropriate action” when a breach of professional obligations will occur. However, elsewhere in ABA Providing Defense Services, the word “*should*” is used in the chapter’s 27 other black-letter standards. “*Must*” apparently was used because a lawyer has a mandatory duty to take action if continued representation will result in the breach of a professional duty.

B. ABA Ten Principles

The policy contained in the foregoing standard is also reflected in the ABA Ten Principles of a Public Defense Delivery System approved by the ABA in 2002. The Principles “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”¹⁴ The black-letter of Principle 5 is as follows:

Defense counsel’s workload is controlled to permit the rendering of quality representation.¹⁵

The “commentary” to Principle 5 importantly states that “national caseload standards” should never be exceeded.¹⁶ ABA Providing Defense Services and the ABA Defense Function Standards, both of which are quoted above, for the basis of Principle 5.

13. ABA PROVIDING DEFENSE SERVICES, *supra* note 8, at Standard 5-5.3 (emphasis added). The History of Standard section following the black-letter quoted in the text provides definitions for both “workload” and “caseload.” Workload refers to “the sum of all work assigned to an attorney at a given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which the attorney is responsible.” *Id.* Caseload refers to “the number of cases assigned to an attorney at a given time.” *Id.*

14. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Introduction (2002) [hereinafter ABA TEN PRINCIPLES].

15. *Id.* at 1.

16. The reference is to the NAC Standards approved in 1973. *See supra* note 6 and accompanying text.

C. ABA Eight Guidelines

In August 2009, the ABA House of Delegates adopted a comprehensive policy dealing with the problem of excessive workloads, titled “Eight Guidelines of Public Defense Related to Excessive Workloads.”¹⁷ Each of the Guidelines begins with a black-letter statement followed by commentary. Both constitute ABA policy and may be cited as policy of the Association, since the ABA House of Delegates was asked to approve both the black-letter Guidelines *and* the commentary.¹⁸

The Guidelines build upon the ABA’s policy statements on public defense workloads, including an ABA ethics opinion on the subject,¹⁹ and suggest necessary steps that public defense programs should take in order to address excessive workloads. While the Guidelines are consistent with what the ABA has said in the past—in a few instances simply reiterating what the ABA has said—they also contain recommendations not previously approved by the ABA. The Guidelines are summarized below, focusing primarily on material that constitutes new ABA policy:

The Guidelines contain terminology not previously used in the ABA Criminal Justice Standards or in the ABA Ten Principles. The Guidelines refer to “public defense provider” or “provider,” which includes “public defender agencies and . . . programs that furnish assigned lawyers and contract lawyers.” Furthermore, the Guidelines apply “to members of the bar employed by a defender agency, and those in private practice who accept appointments to cases for a fee or provide representation pursuant to contracts.” The obvious goal was to cover all organizations and persons involved in public defense representation.

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

18. The resolution proposed to the ABA when the Guidelines were approved reads as follows: “Resolved, that the American Bar Association adopts the black letter (and introduction and commentary) *Eight Guidelines of Public Defense Related to Excessive Workloads*, dated August 2009.” The commentary that accompanies ABA Criminal Justice Standards is not policy of the Association since not approved by the House of Delegates, although this distinction is rarely noted when commentary is cited.

19. See *infra* notes 48–66 and accompanying text.

In addition to declaring that public defense providers should avoid excessive workloads, Guideline 1 challenges providers to consider the wide range of their performance obligations in representing clients (e.g., “whether sufficient time is devoted to interviewing and counseling clients”), as a means of determining whether their caseloads are excessive. This Guideline derives from concern that too often public defense providers and the lawyers who furnish representation accept as normal exceedingly high caseloads, perhaps because that is all that they have ever known.

Similar to Guideline 1, Guidelines 2, 3, and 4 contain recommendations that are not in either the ABA Criminal Justice Standards or the ABA’s Ten Principles. Guideline 2 states that public defense providers should have “a supervision program that continuously monitors workloads of its lawyers;” Guideline 3 states that lawyers providing representation should be trained respecting their “professional and ethical . . . responsibilities . . . to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable;” and Guideline 4 reminds programs that furnish public defense that they need to make conscious decisions about whether or not “excessive lawyer workloads are present.”

Guideline 5 lists a range of non-litigation options for dealing with excessive workloads, while acknowledging in the “comment” to the Guideline that the alternatives listed are “appropriate to pursue *only in advance* of the time that workloads actually have become excessive.”

The options in Guideline 5 include, *inter alia*, reassigning cases to different lawyers (whether public defenders or private lawyers), arranging for appointments to private lawyers in return for reasonable compensation, seeking emergency resources, negotiating informal arrangements with those making appointments, and “urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate”²⁰

When no other viable options are available and excessive caseloads exist, Guideline 6 makes clear that the public defense

20. For citations related to reclassifying some petty misdemeanors as infractions or violations, thereby avoiding the need to appoint defense counsel, see ABA EIGHT GUIDELINES, *supra* note 17, at 11 n.39.

provider or individual lawyer should make a motion in “court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate” However, a comment to Guideline 5 suggests that a “separate civil action” may be an appropriate way to proceed, presumably when the lawyers believe that motions to withdraw from representation and to stop appointments are not likely to succeed.

Guideline 7 is new and deals with the concern of many public defenders that motions to stop assignments and to withdraw from cases will lead, inevitably, to judges delving into the internal operations of public defense provider programs, thereby interfering with “professional and ethical duties [of lawyers] in representing their clients.” To confront this potential problem, the Guideline urges “Public Defense Providers and lawyers [to] resist judicial directions regarding the management of Public Defense Programs

Finally, Guideline 8, consistent with the ABA’s ethics opinion,²¹ states that lawyers, as well as public defense providers, should appeal decisions of courts that reject motions to withdraw or to halt the assignment new cases. However, the second sentence of the comment to this Guideline adds something new to the ABA’s policy in this area, because it states that “a writ of mandamus or prohibition should properly be regarded as a requirement of ‘diligence’ under professional conduct rules.” This language was included because the denial of a motion to withdraw or to stop new assignments is normally not a final order subject to appeal as a matter of right.²²

Finally, there is an additional black-letter non litigation option listed in Guideline 5 for avoiding excessive caseloads, namely, “[n]otifying the courts or other appointing authorities that the Provider [of defense services] is unavailable to accept additional appointments.” The commentary to Guideline 5 explains: “[a] declaration of ‘unavailability’ has sometimes been used successfully, such as in some counties in California. This approach is seemingly based on the implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant

21. See *infra* note 57 and accompanying text.

22. See Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, 30 CHAMPION 10, 12 (2006) [hereinafter Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*], available at www.indigentdefense.org.

violating their ethical duties pursuant to professional conduct rules.” Declaring “unavailability” is undoubtedly the most simple and straightforward way of dealing with the excessive caseload problem, assuming the court accepts the defense claim.

D. ABA Model Rules of Professional Conduct

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

[E]very attorney who practices law in the United States, including all who represent indigent clients, are subject to their respective states’ rules of professional conduct. In each state, these rules were approved by the state’s highest court and, virtually everywhere, the states’ rules are substantially similar in both form and substance to the ABA Model Rules. . . . In all states, moreover, failure to comply with the state’s rules of professional conduct can lead to disciplinary sanctions, such as reprimand, suspension, or even disbarment.²³

Excessive caseloads among lawyers representing indigent criminal and juvenile clients implicate a number of state rules of professional conduct. The most important of these are the requirements to be “competent” pursuant to Rule 1.1 (“provide . . . the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”)²⁴ and to be “diligent” pursuant to Rule 1.3 (“act with reasonable diligence and promptness in representing a client”).²⁵ The comment to Rule 1.3 contains an explicit admonition: “[a] lawyer’s work load must be controlled so that each matter can be handled competently.”²⁶ Also, when a lawyer

23. JUSTICE DENIED, *supra* note 1, at 35.

24. MODEL RULES OF PROF’L CONDUCT R. 1.1.

25. *Id.* at R. 1.3.

26. *Id.* at R. 1.3 cmt. 2. Comment 1 to Rule 1.3 states that “[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” This is similar to the ABA’s former ethics code: “A lawyer should represent a client zealously within the bounds of the law.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980). Not all state rules of professional conduct have adopted the comments recommended by the ABA Model Rules. As of June 2009, the following ten states had not adopted any comments to their states’ rules of professional conduct: California, Illinois, Louisiana, Minnesota, Montana, Nevada, New Jersey, New York, Oregon, and South Dakota.

has too many clients to represent simultaneously, a “concurrent conflict of interest exists” because “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client”²⁷ According to Rule 1.16 (a)(1), if a lawyer’s acceptance of a client’s representation, or continued representation of a client, will lead to a violation of the rules of professional conduct, the lawyer shall either decline the representation or seek to withdraw.²⁸ However, a comment to Rule 1.16 acknowledges, that when “a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority.”²⁹ Moreover, Rule 1.16 (c) recognizes an exception to 1.16 (a): “[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”³⁰

If the defense lawyer believes the court has erred and should have permitted withdrawal, the lawyer’s first option is to seek a stay and try to appeal the court’s ruling.³¹ Refusal to represent the client, even if the defense lawyer believes competent representation is impossible, risks a contempt finding.³² As the Supreme Court noted some years ago, “all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.”³³

A corollary to Rule 1.16 is Rule 6.2, which provides that “[a] lawyer shall not seek to avoid appointment by a tribunal to represent

27. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2).

28. *Id.* at R. 1.16(a)(1).

29. *Id.* at R. 1.16 cmt. 3.

30. *Id.* at R. 1.16(c).

31. However, the court’s decision will not likely be subject to appeal as a matter of right. *See* Lefstein and Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 22, at 12.

32. *See, e.g.,* *People v. McKenzie*, 668 P.2d 769, 776 (Cal. 1983) (court may hold public defender in contempt when defender refuses to proceed due to belief that trial court’s rulings rendered effective representation impossible); *In re Galloway*, 389 A.2d 55, 55–57 (Pa.1978) (finding of contempt proper when defense lawyer’s request to withdraw was denied and defense lawyer refused to proceed).

33. *Maness v. Meyers*, 419 U.S. 449, 458 (1975). *But see* discussion at *infra* notes 67–96 and accompanying text.

a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct”³⁴ A comment to this rule refers the reader back to the duty to deliver “competent” representation: “Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1”³⁵

The ABA Model Rules also has provisions governing the relationship between subordinate and supervisory lawyers, and these have a bearing on the responsibilities of each when there is an issue respecting excessive caseloads. As for the subordinate lawyer, Rule 5.2 states that the “lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”³⁶ This is a bedrock principle of the legal profession, the importance of which is not always well understood and repeatedly overlooked in the area of public defense. What it means is that, except in the situation discussed below, *every lawyer is responsible individually for providing competent and diligent legal representation*. Here is how one writer has explained the duty of each member of the legal profession:

All attorneys, including subordinate attorneys, are responsible for their own misconduct even if it occurred at the direction of a supervisor, and even if the attorney acquiesced from a fear of loss of employment. This rule unequivocally disposes of any “Nuremberg” defense in which a subordinate attempts to deny responsibility because he or she was merely acting in accordance with the orders of a superior. In a larger sense, however, this rule of independent responsibility simply states an obvious and paramount duty of professional conduct: each lawyer is ultimately responsible for his or her own actions.³⁷

But Rule 5.2 also contains an exception: “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”³⁸ Thus, if there is “an

34. MODEL RULES OF PROF’L CONDUCT R. 6.2(a).

35. *Id.* at R. 6.2 cmt. 2.

36. *Id.* at R. 5.2(a).

37. Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 295-97 (1994). See also Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449, 463 (2003). See generally Robert F. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 SO. TEX. L. REV. 279 (1998).

38. MODEL RULES OF PROF’L CONDUCT R. 5.2(b).

arguable question” whether the subordinate lawyer has an excessive caseload, and the subordinate lawyer continues to provide representation at the direction of the supervisor notwithstanding concerns whether “competent” and “diligent” representation can be provided, no violation of professional conduct rules has occurred. Conversely, if the situation is not arguable because, for example, the size of the caseload clearly interferes with providing competent and diligent representation, the subordinate lawyer is guilty of professional misconduct unless a good faith effort is made to avoid additional assignments and the lawyer seeks to withdraw from one or more existing cases.³⁹ What the rules do not—and cannot decide—is when a matter of disagreement about caseload is “an arguable question.” This is a matter of judgment among professionals and, at least theoretically, there could be a reasonable disagreement on the subject between the supervisor and subordinate lawyer.⁴⁰

What about the applicability of professional conduct rules to the heads of public defense programs and to supervisors when subordinate lawyers with excessive caseloads are permitted to represent clients? The answer is contained in Rule 5.1, which spells out the duties of those with “managerial” and “supervisory authority.”⁴¹ Although the rule uses the term “law firm,” the terminology section of the Model Rules makes clear that the term is intended to include public defense programs.⁴² According to Rule 5.1, persons with “managerial authority” are required “to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”⁴³ And those with “direct supervisory authority over another lawyer” have a duty to “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”⁴⁴

39. See *supra* notes 28–30 and accompanying text.

40. “If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly.” MODEL RULES OF PROF’L CONDUCT R. 5.2(b) cmt. 2.

41. MODEL RULES OF PROF’L CONDUCT R. 5.1(a)-(b) (2007).

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

43. *Id.* at R. 5.1(a).

44. *Id.* at R. 5.1(b).

Rule 5.1 spells out several situations in which one lawyer “shall be responsible for another lawyer’s violation of the Rules of Professional Conduct.”⁴⁵ The first is where a lawyer “orders or, with knowledge of the specific conduct, ratifies the conduct involved.”⁴⁶ The second is where a lawyer with “managerial authority” or “direct supervisory authority . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”⁴⁷ These rules are not especially difficult to apply to situations where lawyers furnishing public defense services have excessive caseloads. In all likelihood, there are many such programs throughout the country where managers and supervisors are subject to charges of professional misconduct because they are well aware of the excessive caseloads of their lawyers and fail to take appropriate actions to prevent them.

E. ABA Formal Ethics Opinion 06-441

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”) issued Formal Opinion 06-441 dealing with excessive caseloads and public defense representation.⁴⁸ The effort to persuade the ABA’s Ethics Committee to issue an opinion on the subject of caseloads was a joint undertaking of the ABA Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”) and the National Legal Aid & Defender Association (“NLADA”).⁴⁹ Because ABA ethics opinions must be based on ABA Model Rules, there was never any real doubt about what the opinion would say concerning excessive public defense caseloads. As discussed in the preceding section, when caseloads are excessive, the rules of professional conduct are clear respecting the duties of those with managerial and supervisory authority, as well as the duty of lawyers providing direct client services.

45. *Id.* at R. 5.1(c).

46. *Id.* at R. 5.1(c)(1).

47. *Id.* at R. 5.1(c)(2).

48. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006) [hereinafter ABA Formal Op. 06-441].

49. See Lefstein & Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 22, at 11.

The most important points in the opinion can be summarized as follows.⁵⁰

The opinion applies not only to public defenders, but to all lawyers who represent indigents in criminal cases pursuant either to court appointments or to government contracts.⁵¹

“The Rules [of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.”⁵²

All lawyers who furnish defense representation on behalf of the indigent must provide services that are competent and diligent. “A lawyer’s primary ethical duty is owed to existing clients.”⁵³

If competent and diligent representation is not possible due to an excessive workload, or if a workload soon will become excessive, a lawyer cannot accept new clients.⁵⁴

If cases are assigned by courts or through some other form of appointment system, the lawyer should request a stop to new appointments.⁵⁵

If a lawyer represents a client and cannot provide competent and diligent representation and the problem cannot be resolved through a request to the court, the lawyer must move to withdraw from a sufficient number of cases in order that representation can be furnished in compliance with the Rules of Professional Conduct.⁵⁶

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

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

52. *Id.* at 3.

53. *Id.* at 4.

54. *Id.* at 5.

55. Among options listed are the following: “requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer’s existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation.” *Id.* Thus, before filing a motion in court, the ethics opinion recognizes that a lawyer’s initial approach to the problem should be by making a “request” to the court. The opinion does not address the way this should be communicated, i.e., whether via email, letter, informal personal conversation, *etcetera*.

56. *Id.*

If a lawyer's motion to withdraw is rejected by a court, the lawyer should appeal, if possible; but if an appeal is either unavailable or unsuccessful,⁵⁷ the lawyer must continue with the representation and make the best of the situation, "while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant."⁵⁸

Heads of defender programs, lawyer supervisors, and others "with intermediate managerial responsibility, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct."⁵⁹

Lawyer supervisors must monitor the workloads of subordinate lawyers to ensure that they do not prevent the delivery of competent and diligent services.⁶⁰

Lawyers may consider standards respecting caseload limits in deciding whether the workload of a lawyer is excessive, but standards cannot be the "sole factor;"⁶¹ whether a workload is excessive "depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational responsibilities."⁶²

When a lawyer receives cases as a member of a public defender's staff or law firm, and supervisors are aware that the lawyer's workload is excessive, the supervisor has a duty to take remedial action, such as transferring non-representational duties to others, not assigning new cases to the lawyer, and possibly transferring cases to others within the public defender's office or law firm.⁶³

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

58. *Id.* at 6.

59. *Id.* at 7.

60. *Id.*

61. *Id.* at 4.

62. *Id.*

63. *Id.* at 5.

If supervisors “know” of a lawyer’s excessive caseload and do not take “reasonable remedial action,” supervisors are themselves responsible for the lawyer’s violation of the Rules of Professional Conduct.⁶⁴

If a lawyer and supervisor disagree about whether workload is preventing the lawyer from providing competent and diligent services, the lawyer may rely on the decision of the supervisor if it constitutes a “reasonable resolution of an arguable question of professional duty.”⁶⁵

If the lawyer deems the resolution of the supervisor to be unreasonable, the lawyer must continue up the chain of command, which may lead to taking the matter to the head of the defender program and even to the program’s governing board, if there is one.⁶⁶

II. Should There Be Additional Commentary or Black-Letter Criminal Justice Standards Related to Excessive Indigent Defense Workloads?

The question whether ABA Criminal Justice Standards pertaining to excessive workloads in indigent defense should contain additional commentary or black-letter rules may seem surprising since the ABA has dealt with the subject so extensively. Not only are excessive workloads addressed in two Criminal Justice Standards (i.e., the Defense Function and Providing Defense Services), but there are various provisions of the ABA Model Rules that apply to the subject. Also, there is an ABA ethics opinion that explains how the Model Rules pertain to excessive workloads, and there are Eight Guidelines and commentary that deal at length with the subject. In fact, there are few subjects about which the ABA has had more to say. Nevertheless, I believe there may still be two issues related to excessive public defense workloads deserving of additional attention in ABA Criminal Justice Standards, one to be dealt with in

64. *Id.* at 8.

65. *Id.* at 6.

66. *Id.* The requirement that a lawyer take his or her complaint to the program’s governing board if the lawyer concludes that the supervisor and head of the agency have reached an “unreasonable” decision about whether the lawyer’s workload is excessive is based upon MODEL RULES OF PROF’L CONDUCT R. 1.13 (b)-(c) (2007). See Lefstein & Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 22, at 13–14.

commentary and the other in a black-letter standard and accompanying commentary.

A. Refusing to Provide Representation in New Cases

Should a defense lawyer or defense program consider refusing to represent clients when convinced that it cannot provide competent and diligent legal services consistent with their duties under professional conduct rules? Assume that the defense is being appointed by the trial court, which is what typically occurs, and the defense explains to the court, either orally or in an informal written communication (e.g., an email, memorandum or letter), that additional appointments cannot be accepted due to excessive workload. Thus, the defense declares that it is “unavailable” for additional court appointments, providing such information about the situation as deemed appropriate, and making clear that it will not provide representation in new cases. This course would be in lieu of filing a formal written motion with the court asking that new case assignments be stopped. For reasons explained below, I believe it may be appropriate for this issue to be discussed in commentary to any revised Criminal Justice Standard dealing with excessive workloads.

1. ABA Authority Related to Refusing Court Appointments

As noted earlier, in explaining the meaning of ABA Model Rule 6.2, comment 2 states that “[f]or good cause a lawyer may seek to decline to represent a person who cannot afford to retain counsel. . . . Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1.”⁶⁷ The rule is silent about whether the defense should file a motion asking that new court appointments be stopped. Arguably, Rule 6.2 is satisfied if a defense lawyer or defense program informs the court either orally or in a written communication, other than a formal written motion, that additional cases cannot be accepted due to an inability to provide competent and diligent legal services for additional clients.

Of the two ABA Criminal Justice Standards that deal with excessive workloads, ABA Providing Defense Services discusses the subject in much more detail than the ABA Defense Function. Also, as noted previously, the relevant standard informs lawyers and their

67. MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt (2007). See also *supra* notes 34–35 and accompanying text.

defense programs that they “must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments.”⁶⁸ But neither in the black-letter standard nor in the accompanying commentary is any mention made of filing a written motion asking that the trial court not appoint the defense lawyer or defense program to additional cases. Instead, the commentary states only that “[i]n the case of a defender program with excessive workload, additional cases must be refused and, if necessary, pending cases transferred to assigned counsel.”⁶⁹

Filing a motion with the court is mentioned in the 2006 ABA ethics opinion on excessive workloads, but only in connection with withdrawal from representation, not in relation to stopping the assignment of new cases. Thus, the ethics opinion states that if a lawyer is receiving appointments directly from the court and the lawyer’s “workload will become, or already is, excessive,”⁷⁰ appropriate action may include “requesting that the court refrain from assigning the lawyer any new cases.”⁷¹ While this request presumably could be in the form of a motion, the ethics opinion, consistent with Model Rule 6.2, does not mention filing a formal written motion with the court seeking to avoid new appointments.

The one ABA source that mentions filing motions to stop new assignments is the Eight Guidelines. The black letter of Guideline 5 suggests that public defense providers take “prompt actions”⁷² when workloads are or are about to become excessive, including “[n]otifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.”⁷³ However, the commentary to Guideline 5 suggests that “[w]hen a Provider cannot reduce excessive lawyer workloads, a motion filed with the court, aimed at stopping case assignments and/or permitting lawyers to withdraw from cases (see Guideline 6 *infra*), or conceivably the filing of a separate civil action, will be necessary.”⁷⁴ Moreover, Guideline 6, unlike ABA Model Rule 6.2, ABA Providing Defense Services, and the ABA’s ethics opinion is explicit about the possibility of filing “motions asking a court to stop the assignment of new cases and to

68. PROVIDING DEFENSE SERVICES, *supra* note 8, at 5-5.3(b).

69. *Id.* at 74.

70. ABA Formal Op. 06-441, *supra* note 48, at 5.

71. *Id.*

72. ABA EIGHT GUIDELINES, *supra* note 17, at 9.

73. *Id.*

74. *Id.* at 11.

withdraw from new cases, as may be appropriate.”⁷⁵ In addition, the commentary to Guideline 6 contains information about how to litigate such motions, suggesting that the indigent defense provider “may deem it advisable to present statistical data, anecdotal information, as well as other kinds of evidence.”⁷⁶ The Eight Guidelines, however, do not preclude the other possible option, i.e., refusing to represent clients if the court rejects the defense announcement that it is “unavailable” to accept additional clients.

2. *Difference Between Filing a Motion and Declaring “Unavailable”*

Why does it matter whether a defense lawyer or defense program files a formal written motion asking that additional cases not be assigned to the defense versus notifying a court of its “unavailability” to accept new appointments? If a motion is filed, the defense is the moving party in a formal court proceeding and thus responsible for establishing that it cannot provide competent and diligent representation to new clients due to its workload. And, as noted previously, 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 that the defense may be unable to avoid accepting the new court appointments.⁷⁷ But even if the trial court grants the defense motion, the court’s order will likely be stayed and the defense ordered to continue to provide representation on behalf of new clients despite its conclusion that competent and diligent representation is impossible. Currently, for example, there is a case on appeal in Florida in which the public defender in Dade County filed motions to stop the assignment of new cases to its felony lawyers. After a two-day hearing before a trial court judge, the public defender’s motion was substantially granted, but the trial court’s order was stayed and the matter appealed by the State of Florida. Meanwhile, the public defender’s office has had to continue to accept literally thousands of additional felony cases while litigation has dragged on in the appellate courts.⁷⁸

75. *Id.* at 12.

76. *Id.*

77. See Lefstein & Vagenas, *Restraining Excessive Defender Caseloads*, *supra* note 22, at 12 (“However, an interlocutory appeal from a trial court’s denial of a defender’s motion for relief based upon an excessive caseload appears not to be available anywhere as a matter of right. Invariably, when an appellate court hears an appeal in such a case, it is because the court has decided to do so in the exercise of its discretion.”).

78. The Miami Dade County Public Defender has been litigating two “excessive workload” cases that as of April 2011 are pending before the Florida Supreme Court. In

On the other hand, suppose the defense does not proceed with a motion to stop new cases, but instead advises the trial court that it is “unavailable” to accept new cases and explains its reasons. What possible outcomes may ensue? One possibility is that the trial court accepts the defense position and arrangements are made for other lawyers to be appointed to the excess cases. The other possibility is that the trial judge becomes angry, objects to the position of the defense, and orders the defense either to accept the new case assignments or be held in contempt.⁷⁹

How likely is it that the trial court will hold either a defense lawyer or head of a defense program in contempt for refusing to provide representation of new clients? A search of appellate decisions does not reveal *exact* precedents for defenders or the leaders of defense programs being held in contempt for refusing to provide representation in *multiple* cases due to excessive workloads.⁸⁰ This is not surprising, as there are relatively few reported decisions in which either defense lawyers or programs have sought to withdraw

each case, the litigation was begun with motions filed in trial courts, in one case seeking to have other counsel appointed in new felony cases, and in the other case seeking to be permitted to withdraw as counsel in certain felony cases. Favorable rulings were obtained in both cases from trial court judges, in the first case on September 3, 2008, and in the second case on October 29, 2009. However, in each case the Florida Third District Court of Appeal stayed the trial court judges’ rulings, later reversed the trial court judges’ orders, and thus cases have continued to be assigned to the Miami Dade County Public Defender just as they were before the litigation was begun. Now, more than two years after the first case was filed in the trial court, the Florida Supreme Court has decided to hear the first of the two cases. The extensive pleadings, briefs, and the record in the two cases is on the website of the Miami Dade County Public Defender. MIAMI-DADE PUBLIC DEFENDER, *Excessive Workload Litigation*, http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm (last visited March 1, 2011). I testified as an expert witness in both of these cases on behalf of the Miami Dade County Public Defender. In the first of the two cases, my affidavit states that I calculated the average number of new felony noncapital cases per attorney per annum to be 387, and the average number of new misdemeanor and criminal traffic cases per attorney per year to be 2,232. See also *infra* note 125.

79. See *supra* notes 32–33 and accompanying text. Even if a motion is filed by the defense asking that new appointments be halted, the defense could still, at least theoretically, refuse to proceed with representation in new cases if the motion were unsuccessful. However, courts in this situation are apt to be especially unsympathetic to a defense refusal to accept new appointments since, by filing a motion seeking caseload relief, the defense seemingly implies that it is willing to abide by judicial orders entered in response to its motion.

80. However, there are cases in which both public defenders and other defense lawyers have been held in contempt for refusing to proceed in providing defense services on behalf of a *single* indigent accused in a criminal case. See J. W. Thomey, *Attorney’s Refusal to Accept Appointment to Defend Indigent, or to Proceed in Such Defense*, 36 A.L.R.3d 1221 (1971). See also cases cited at *supra* note 32.

from cases and/or to stop appointments. In reported cases, when the defense has complained of excessive workloads and sought to refuse new appointments, they have filed motions in trial courts seeking relief.⁸¹

Surely some judges will empathize when a defense lawyer or defense program refuses to proceed based upon concerns for their professional responsibility duties and will be reluctant to hold well-intentioned defense lawyers in contempt. My one personal experience with this issue occurred in the 1970s when I was the director of the Public Defender Service (“PDS”) in Washington, D.C. Private lawyers who had been accepting many of the indigent defense cases went on “strike” due to their concern that the government’s appropriation for assigned counsel would likely be inadequate to compensate them when vouchers for their representation were submitted for reimbursement. Accordingly, the chief judge of the D.C. Superior Court informed me that PDS lawyers would need to increase their caseloads substantially in order to handle the cases that private lawyers were unwilling to accept. When I told the chief judge that PDS would refuse his request and that holding me in contempt would not change my mind about the matter, the chief judge backed down, essentially saying that if the agency would not “assist” the court with its caseload problem, the court would have to find an alternative solution.⁸²

81. JUSTICE DENIED, *supra* note 1, at 121–26 reviews litigation in which defense programs have challenged their caseloads based upon professional responsibility rules: “Now, with increasing frequency, defenders are claiming not only that the constitutional rights of their clients are jeopardized by excessive caseloads, so, too, are their responsibilities as members of the legal profession pursuant to rules of professional conduct, which require that competent and diligent representation be provided. This relatively new approach has undoubtedly been fueled by the 2006 ethics opinion of the ABA Standing Committee on Legal Ethics and Professional Responsibility . . .” *Id.* at 121. The report then discusses four well-publicized cases in which public defender programs filed motions in trial courts challenging their caseloads, i.e., in Kingman, Arizona; Knoxville, Tennessee; Miami, Florida (*see also supra* note 78 and accompanying text); and New Orleans, Louisiana. In each of these cases, I served as an expert witness on behalf of the public defender agencies. Except in the Arizona case, either part or all of the relief sought by the defender programs included a request that the courts stop the assignment of new cases to which the defense would otherwise be appointed.

82. In cooperation with the court, PDS agreed to recruit and train private members of the bar from large law firms to accept indigent cases temporarily on an emergency pro bono basis. In 1983, a similar “strike” of private assigned counsel led the Federal Trade Commission to claim that the lawyers were engaged in a conspiracy to fix prices and to conduct a boycott that constituted unfair methods of competition. The case ultimately was decided by the U.S. Supreme Court, which held in favor of the FTC and against the lawyers. *See FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

3. *The Case for Declaring “Unavailable” and Refusing to Proceed*

There are potential advantages to the defense (and admittedly some risk) in forcing the court to be the moving party when there is a dispute about the defense accepting new appointments. Not only must the court prove that the conduct of the defense is contemptuous,⁸³ 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 standard of *Strickland v. Washington*,⁸⁴ which requires that prejudice be demonstrated.⁸⁵ Thus, the harm visited upon clients

83. The exact route pursuant to which a defense lawyer or head of a defense program might actually be held in contempt is difficult to predict. Here is one possible scenario: Assume that a court is notified by either a defense lawyer or head of a defense program that additional appointments cannot be accepted due to excessive workload, but the court nevertheless enters orders appointing the lawyer or defense program to new cases. Upon receipt of the order of appointment, assume further that the defense lawyer or head of the defense agency again informs the court of its “unavailability” to represent clients in the new cases to which they have been appointed, and therefore the defense does not plan to enter appearances for the new clients because of its duties under rules of professional conduct. Now, assume that the court holds the defense lawyer or head of the defender program in contempt. Whether this would be criminal or civil contempt is unclear, especially since the same conduct can sometimes be treated as either. Arguably, under the foregoing scenario, the defense conduct would not qualify as direct contempt, which can be punished summarily, since it did not occur in the presence of the court. More likely, the defense conduct would be regarded as “[i]ndirect or constructive contempt beyond the presence of the court . . . ; punishment for such contempt usually requires the observance of all elements of due process of law. . . . Due process requires that an individual charged with an indirect contempt be given full and complete notification and a reasonable opportunity to meet the charges by asserting a defense or providing an explanation.” 17 C.J.S. *Contempt* § 77 (1999). In contrast to the hypothetical scenario, in *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009 (Ohio App. 11th Dist. 2008), a public defender was denied a continuance and, in the presence of the court, refused to proceed. The defendant was held in “direct criminal contempt” since the conduct occurred in the court’s presence. However, the appellate court reversed the contempt conviction, as explained in the discussion of the *Jones* case that follows in the text of this paper. See *infra* notes 86-92 and accompanying text.

84. *Strickland v. Washington*, 466 U.S. 668 (1984).

85. As the National Right to Counsel Committee noted in *JUSTICE DENIED*, *supra* note 1, at 40-41: “Since *Strickland* was decided, commentators have been virtually unanimous in their criticisms of the opinion. Some have echoed views of Justice Marshall, whereas others have accused the Supreme Court of being insensitive to the very serious problem of adequate representation. Most of all, the decision has been criticized due to

when the defense labors under excessive caseloads is often irreparable.

State v. Jones,⁸⁶ decided in 2008 by an Ohio appellate court, illustrates why the defense should consider declaring unavailability instead of acquiescing in the acceptance of new cases when it is unable to provide representation as required by rules of professional conduct. An assistant public defender was assigned to represent a client charged with misdemeanor assault, and the case was set for trial the following day. However, the public defender did not actually receive the client's file until the morning of trial, and prior to its receipt the public defender met with six of his other clients. Then, for twenty minutes, the public defender had a meeting with the client in question. When the defender advised the trial judge that his client wanted a jury trial, the judge informed the defender that the case would be tried that afternoon. The defender explained that he could not be ready by the afternoon because he needed to interview witnesses, but the judge warned the defender that he would be held in contempt if he refused to proceed, stating that "if a conviction resulted, the defendant could file an appeal on the basis of ineffective assistance of counsel."⁸⁷ Ultimately, when the defender refused to proceed, he was held in contempt and ordered taken into custody. Soon afterwards the judge ordered a bond of 10% of \$1,000, the requisite fee on the bond was posted, and the public defender was released.

On appeal, the appellate court reversed the finding of contempt, concluding that "a continuance was warranted" and that its denial "was an abuse of discretion."⁸⁸ As the appellate court further explained:

Under these circumstances, effective assistance and ethical compliance were impossible as appellant was not permitted sufficient time to conduct a satisfactory investigation as required by . . . [rules of ethics] and the Sixth Amendment . . .

the exceedingly difficult burden of proof placed on defendants in challenging counsel's representation and because it has led appellate courts to sustain convictions in truly astonishing situations." As a result of its dismay with the *Strickland* standard, the committee called for a new test for ineffective assistance of counsel, which would be "substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation." *Id.* at 212.

86. *Jones*, 2008 WL 5428009.

87. *Id.* at *1.

88. *Id.* at *4.

It would have been unethical for appellant to proceed with trial as any attempt at rendering effective assistance would have been futile.⁸⁹

The appellate court also concluded that the trial judge had “improperly placed an administrative objective of controlling the court’s docket above its supervisory imperative of facilitating effective, prepared representation of a fair trial.”⁹⁰ Further, the court noted that “[d]irect appeal is not a reliable remedy to fix an obvious error.”⁹¹ If the defendant had been convicted, “the presumption of innocence would have been unfairly replaced by a burden on appeal to demonstrate a ‘reasonable probability’ that the result of the proceeding would have been different if . . . [the defense] had been prepared.”⁹²

I appreciate that refusing to proceed with representation due to excessive defense workloads and thus intentionally risking the possibility of contempt may seem to some to be irresponsible behavior in violation of professional conduct rules.⁹³ In response, I suggest that the idea is no different in principle from what the public defender did in the *Jones* case, except that in *Jones* the public defender was seeking to vindicate the rights at trial of a single defendant, whereas the rights of many more defendants, both during the pretrial stage and at trial, are at stake when a defense lawyer or defense program seeks to avoid new appointments due to excessive workloads. In defending his position, the public defender in *Jones* cited to the trial court an earlier Ohio decision in which the facts were similar. The appellate court in the prior case put the matter succinctly: “Defense counsel should not be required to violate his duty to his client [under the Sixth Amendment and ethics rules] as the price of avoiding punishment for contempt.”⁹⁴ Yet, that is precisely what defense programs do when they file motions for judicial relief that are denied despite truly astonishing caseloads that prevent

89. *Id.*

90. *Id.* at *5.

91. *Id.* at *6.

92. *Id.*

93. See MODEL RULES OF PROF’L CONDUCT R. 1.16(c); see also *supra* notes 30-33 and accompanying text.

94. *In re Sherlock*, 525 N.E.2d 512 (Ohio App. 2d Dist. 1987) (quoting par. 3 of Appellate Court’s syllabus).

competent and diligent representation under rules of professional conduct.

To underscore what sometimes transpires when public defenders seek caseload relief through motions, consider a 2008 case from Knoxville, Tennessee. Public Defender Mark Stephens filed a motion asking five trial court judges to suspend appointments temporarily to his office in misdemeanor cases. The office operated under a “zone representation” system in misdemeanor cases in which clients were not actually assigned to specific lawyers because there were too many clients and too few lawyers. The trial court judges granted Stephens an evidentiary hearing during which he presented substantial statistical data and numerous witnesses testified, including experts. After a delay of about eight months, the five judges finally issued a two and one-half page order denying all relief while completely ignoring the record developed during the hearing.⁹⁵ During the hearing on his motion in 2008, Mr. Stephens explained the difficulty his office confronted in providing defense services:

[S]o there’s [no time] . . . to do any on-scene investigations. There’s [no time] . . . to do any contacting of [police] officers There’s . . . [no] time to interview any witnesses. You just go into court you fly by the seat of your pants to see what you can accomplish The caseloads that currently exist in my office, in my view, prohibit my lawyers from fulfilling their ethical obligations and duties that they owe to their client And, consequently, the constitutional right of the accused to have a lawyer who is meeting his or her ethical responsibility to that client is not being fulfilled, and it’s because of caseload, it’s not as a result of the commitment or effort on the part of the lawyers.⁹⁶

B. Role of the Prosecutor When Defense Seeks Caseload Relief

In the several cases in recent years in which public defender agencies filed motions seeking relief from excessive caseloads, the

95. In re: Pet. of Knox County Public Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, February 20, 2009.

96. In re: Pet. of Knox Cnty. Pub. Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, filed March 26, 2008, Transcript of Record, 27–31 (June 10, 2008). For copies of pleadings, petitions and related documents pertaining to this litigation, see website of the Public Defender for the Sixth Judicial District, Knoxville, TN, COMMUNITY LAW OFFICE, *Caseload Litigation*, <http://www.pdknox.org/caseloads> (last visited March 1, 2011).

quality of legal representation furnished by the defenders can only be described as marginal at best, if not woefully inadequate.⁹⁷ In my judgment, it is simply impossible for an objective observer to regard the representation provided by the defenders in these cases as competent and diligent as required by rules of professional responsibility. The testimony of Mark Stephens, the Public Defender in Knoxville, quoted immediately above, is typical of what chief defenders have said about the representation furnished by their lawyers. Flying by the “seat of your pants,” as Stephens characterized the representation of his lawyers, is the antithesis of “competence,” which requires . . . thoroughness and preparation reasonably necessary for the representation.”⁹⁸ Yet, in the cases filed by the public defenders in Miami and Knoxville, the local prosecutor, attorney general’s offices, or both, opposed defense claims about their caseloads at the trial level and on appeal.⁹⁹

The position typically adopted by prosecutors when public defenders complain about their caseloads is further illustrated by what is occurring now in Missouri. For many years, studies have documented that the Missouri State Public Defender (“MSPD”) program is underfunded and constantly struggling with exceedingly

97. The jurisdictions to which I refer are Kingman, Arizona; Knoxville, Tennessee; Miami, Florida; and New Orleans, Louisiana. In each of the jurisdictions I was an expert witness for the defense. *See also supra* note 81. My characterization of the representation provided by the lawyers in those jurisdictions is based upon my knowledge of the evidence presented in those cases. It is not intended as a criticism of the lawyers, because in each of the jurisdictions the lawyers were burdened with far too many cases and had inadequate support services.

98. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2007).

99. As noted previously, the pleadings in the Knoxville case are on the website of the city’s Public Defender agency. *See supra* note 96. In this litigation, the Public Defender has been opposed by the office of the Tennessee Attorney General, which successfully intervened on behalf of the Tennessee Administrative Office of Courts (“AOC”), pointing out that the AOC would be responsible for additional defense service costs if the Public Defender were successful in reducing his caseload. In Tennessee, all funding of indigent defense services is provided by the State. In the Miami litigation, the Public defender was opposed at the trial level by the State’s Attorney in Miami and also by the General Counsel of the Florida Prosecuting Attorneys Association. On appeal, before a Florida intermediate appellate court and the Supreme Court of Florida, the state is represented by the Florida Attorney General’s office. All funding of indigent defense is provided by the State of Florida. Pleadings and other documents related to the Miami litigation is on the website of the Miami-Dade County Public Defender. MIAMI-DADE PUBLIC DEFENDER, *Excessive Workload Litigation*, http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm (last visited March 1, 2011).

high caseloads.¹⁰⁰ In December 2009, the Missouri Supreme Court decided a case in which it acknowledged the overwhelming caseloads with which the MSPD was dealing and essentially conceded that the state's assistant public defenders were violating their responsibilities under rules of ethics.¹⁰¹ Further, the Missouri Supreme Court invited the agency to declare district state public defender offices "unavailable" to accept new cases when their caseloads had exceeded certain maximum numbers for three consecutive months.¹⁰² Accordingly, district offices of the MSPD are either beginning to refuse additional cases or to put courts on notice that they may start to refuse new cases in the near future.¹⁰³ In response, prosecutors in Missouri have vigorously complained about the conduct of the MSPD. In fact, a county prosecutor who serves as President of the Missouri Prosecuting Attorneys Association labeled the conduct of the MSPD as "reckless, self interested and irresponsible" and "attempting to hold the entire criminal justice system hostage."¹⁰⁴

100. See, e.g., The Spangenberg Group and The Center for Justice, Law and Society at George Mason University, *Assessment of the Missouri State Public Defender System* (October 2009), <http://members.mobar.org/pdfs/public-defender/2009-report.pdf>. The following is a partial summary of the report's conclusion: "For close to a decade, MSPD has received no substantial increase in its appropriations, despite the fact that year-by-year, MSPD has submitted budgets demonstrating that it is seriously underfunded and overloaded with cases. All three branches of government are on notice that Missouri has been operating a constitutionally inadequate system for some time now. MSPD has gone to the trial courts, to the courts of appeal, to the legislature, and to the governor. Yet the situation remains the same. And so each day in Missouri, the State places the lives of poor citizens into the hands of attorneys who are underpaid, overworked, and badly supervised. . . . Missouri's public defender system stands at the bottom of its sister states in terms of resources, and the results are alarming. Missouri's public defender system has reached a point where what it provides is often nothing more than the illusion of a lawyer." *Id.* at 66.

101. *Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 880 (2009) ("The excessive number of cases to which the public defender's offices currently are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned. The cases presented here to this Court show both the constitutional and ethical dilemmas currently facing the Office of the State Public Defender and its clients.").

102. *Id.* at 887.

103. See, e.g., *Missouri Public Defender Offices Face Caseload Crunch*, COLUMBIA MISSOURIAN, Aug. 15, 2010, available at <http://www.columbiamissourian.com/stories/2010/08/15/missouri-public-defender-offices-face-caseload-crunch/>; Kathryn Wall, *Christian County Judge: Public Defender's Office Must Represent Client*, SPRINGFIELD NEWS LEADER, Aug. 11, 2010, available at <http://www.news-leader.com/article/20100811/NEWS01/8110432/Christian-County-judge-Public-defender-s-office-must-represent-client>.

104. Heather Ratcliffe, *Public Defenders Say Criticism Based on Bad Information*, ST. LOUIS POST-DISPATCH, Aug. 19, 2010, available at http://www.stltoday.com/news/local/crime-and-courts/article_01e30ffd-ae92-504a-b91a-bc89a35e7e07.html.

What should be the role of prosecutors when defense lawyers or public defense programs challenge their caseloads? When it is clear that defense lawyers are overwhelmed with cases and indigent defense reform would enhance the administration of justice, is it appropriate for prosecutors to oppose defense concerns about their caseloads? Long ago the U.S. Supreme Court recognized that prosecutors have broader responsibilities than simply to obtain convictions,¹⁰⁵ whereas the frequent response of prosecutors when defense programs have challenged their caseloads suggests that this broader duty is often ignored.

Under the ABA Model Rules and those of most jurisdictions, the prosecutor is properly regarded as a “minister of justice,”¹⁰⁶ whose responsibility is more than that of an advocate. The prosecutor has a duty “to see that the defendant is accorded procedural justice.”¹⁰⁷ For prosecutors to oppose defense efforts in court to deal with excessive caseloads, or to speak out publicly against such efforts, is inconsistent with the duty of prosecutors to ensure that the justice system treats all accused persons fairly and in accord with due process.

It is widely accepted under American law that indigent persons charged with a crime or a juvenile offense have no choice about their defense lawyer,¹⁰⁸ and this rule applies even when the lawyer requested by the accused is qualified and willing to provide representation.¹⁰⁹ Consistent with this approach, defendants cannot

105. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”).

106. MODEL RULES OF PROF'L CONDUCT R. 3.8, cmt. 1 (2007).

107. *Id.*

108. *See, e.g., Wheat v. United States*, 486 U.S. 153, 159 (1988) (“[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom the he prefers.”); *Hickey v. State*, 576 S.E.2d 628, 630 (Ga. Ct. App. 2003) (“An indigent defendant is entitled to reasonably effective assistance of counsel, not counsel of his own choice.”); *State v. Jimenez*, 815 A.2d 976., 980 (N.J. 2003) (“[A]ccused is guaranteed the right to the assistance of counsel, but not the constitutional right to counsel of his choice.”).

109. *See, e.g., Drumgo v. Superior Court*, 506 P.2d 1007, 1009 (Cal. 1973) (indigent defendant's constitutional and statutory guarantees not violated by appointment of attorney other than one requested even though requested counsel had indicated his willingness and availability to act); *Brewer v. State*, 470 S.W.2d 47, 49 (Tenn. Crim. App. 1970) (finding no error in trial judge's refusal to appoint lawyer whom defendant

insist that their lawyers be replaced due to their excessive workloads. But when prosecutors are permitted to argue that the workloads of counsel are reasonable and hence no relief should be granted to the defense, the state of the law is truly quite remarkable—even though the accused has no right to be heard about the selection of his or her lawyer, the prosecutor does! In addition, regardless of motive, in opposing defense efforts to reign in their caseloads, prosecutors are seeking to weaken the capability of their adversary to mount a defense on behalf of the accused. While this is not an express conflict of interest under rules of professional responsibility,¹¹⁰ arguably, a court should treat prosecution opposition to reductions in defender caseloads as tantamount to a conflict.

The black-letter of the ABA Standards Related to the Prosecution Function provide that the “[t]he duty of the prosecutor is to seek justice, not merely to convict.”¹¹¹ 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.”¹¹² 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.”¹¹³

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. However, it is clear that the language quoted above has not restrained the conduct of prosecutors. Accordingly, I would propose that an additional black-letter provision be added to the Prosecution

requested, even though requested lawyer expressed willingness to serve as appointed co-counsel).

110. The RULES OF PROF’L CONDUCT R. 1.7 through 1.11 are concerned with conflicts of interest, but none of these provisions pertain to the kind of situation under discussion here. The provisions of Rule 3.8 pertain to Special Responsibilities of a Prosecutor, but none of these directly apply either. However, one of the provisions of Rule 3.8 is concerned with making certain that the accused is notified about the right to counsel and afforded an opportunity to obtain legal representation. *See infra* note 118 and accompanying text.

111. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, Std. 3-1.2(c) (3d ed. 1993) [hereinafter ABA PROSECUTION FUNCTION STANDARDS].

112. *Id.* at 3-1.2(d).

113. *Id.* at 5.

Function Standards: “Prosecutors should not seek to exploit weaknesses in the delivery of indigent defense services.”¹¹⁴ This language complements current language in the ABA’s Model Rules, which includes several provisions aimed at securing procedural justice for the accused.¹¹⁵ Thus, the ABA Model Rules prohibit prosecutors from proceeding with cases that are not supported by probable cause¹¹⁶ and admonish prosecutors to “not seek to obtain from an unrepresented accused a waiver of important pretrial rights.”¹¹⁷ Prosecutors also are required to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”¹¹⁸

But quite aside from rules of professional conduct, ABA Criminal Justice Standards, and conflict of interest considerations, in

114. The proposed standard finds support in the material quoted in this note (and from additional material quoted at *infra* note 115), which is from an article dealing with systemic neglect in indigent defense: “It is wrong for prosecutors to exploit systemic neglect by pressuring defendants to plead guilty quickly. Rather, prosecutors should seek ways to call attention to the problem and ameliorate it. A prosecutor is said to be ‘a minister of justice and not simply . . . an advocate.’ Prosecutors must ‘seek justice,’ which includes an obligation ‘to see that the defendant is accorded procedural justice.’ Given prosecutors’ role, it has been recognized that they are obligated to call the courts’ attention to defense lawyers’ professional lapses, such as impermissible conflicts of interest that undermine the fairness of criminal proceedings. Similarly, if there is a systemic failure of defense lawyers in the jurisdiction to represent their clients as diligently as ethics rules demand, prosecutors should call public attention to the problem and encourage the legislature to take steps, including appropriating sufficient funds, to address it.” Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L. J. 1169, 1192–93 (2003). In fairness, Professor Green’s article is not primarily about excessive caseloads in public defense; nor does his article propose a new ABA Prosecution Function Standard.

115. The proposed language is also broad enough to cover various kinds of prosecutorial practices, which are described in Professor Green’s article: “Far from compensating for defense lawyers’ inadequacies, prosecutors seek in various ways to exploit them. Prosecutors often pressure defendants to plead guilty soon after they are arrested, before their attorneys have had an opportunity to conduct an investigation, by making offers of leniency that will be taken off the table if not quickly accepted. Some prosecutors couple the short deadline with a requirement that the defendant relinquish the constitutional right to receive disclosures from the prosecution, a practice that the Supreme Court recently upheld. These so-called ‘fast-track’ policies take advantage of defendants whose appointed defense lawyers do not investigate as soon as a case is assigned and who are reluctant to try cases. Prosecutors thereby preserve time and resources while denying indigent defendants an opportunity to learn of possible weaknesses in the prosecution’s case.” *Id.* at 1191–92.

116. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2007).

117. *Id.* at 3.8(c).

118. *Id.* at 3.8(b).

most jurisdictions there is likely a serious question about whether a prosecutor has standing to oppose defense motions respecting their caseloads. 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.”¹¹⁹ 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. For example, a prosecutor’s claim of standing was rejected in a case in which an apartment’s renter did not oppose a defendant’s motion to inspect and photograph the apartment that was the site of a crime scene.¹²⁰ 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”¹²¹ it had the right to be heard on the defense motion.

In two of the cases in which hearings were held concerning defense challenges about caseloads, trial court judges concluded that the prosecutors lacked standing to participate in the proceedings. In a case in Kingman, Arizona, in which the public defender sought to withdraw from certain cases to which it had been appointed, the prosecutor appreciated that it would be awkward for him to take a position on the ultimate issue before the court, but still the prosecutor claimed a right to participate fully in the proceedings. The court disagreed, as revealed in the following colloquy:

The Court: [Addressing the prosecutor, Mr. Zack]. Are you here as an observer or are you taking the position that you have the right to a more active involvement in this hearing.

Mr. Zack: Your Honor, I view the State’s role in this hearing as assisting the Court in whatever fact-finding determinations it believes it has to make to make a ruling in this case. I’m not here to dictate who represents each defendant. I recognize that is an issue we’re not involved in I do think that we do have some role to play in this case, in this situation to make sure that

119. 1A C.J.S. *Actions* § 101 (2005).

120. *People v. Davis*, 647 N.Y.S.2d 392, 396 (N.Y. Co. Ct. 1996) (“In sum, neither the permission, acquiescence or cooperation of the District Attorney is required because the District Attorney does not have possession, control nor any property interest in the apartment and, to date, has not made any factual allegations based upon which the People would even have standing to oppose, or to be heard in opposition to, defense counsel’s inspection thereof. Consequently, the District Attorney lacks standing to be heard in opposition to this branch of defendant’s application . . .”).

121. *Id.* at 396.

the Court gets the facts it needs to make the ruling it needs to make

The Court: . . . Are you . . . reserving the right to cross-examine witnesses that are present?

Mr. Zack: Yes.

The Court: Are you reserving the right to call witnesses and have the evidence presented yourself?

Mr. Zack: I reserve the right. . . .

The Court: Alright. Are you reserving the right to present argument to me as to whether I should grant the Public Defender's Office . . . motions to withdraw?

Mr. Zack: I'm not going to take a position on those. Again, I'm just here to assist in whatever fact finding the Court wants to make.

The Court: . . . Alright. Well, I think we need to clarify this ahead of time. . . . I believe the authority that I'm familiar with would suggest to me that this is not an issue that the County Attorney's Office has standing to involve itself in. . . .¹²²

The judge then explained that he understood that the prosecutor had "an interest in decisions that could affect funding for the County,"¹²³ as well the timely prosecution of cases, and making certain that persons did not languish in jail. But he still was "not going to allow the County Attorney's Office to participate . . . other than simply being present."¹²⁴

Similarly, in litigation in Miami where the public defender's office sought an order seeking to halt appointments in felony cases, the trial court judge ruled: "the State Attorney does not have standing as a matter of right."¹²⁵ The court based its decision in part

122. Transcript of Record, *Arizona v. Wayne O. Hall et al.*, County of Mohave, Cause No. CR-2007-1492, Dec. 13, 2007.

123. *Id.* at 11.

124. *Id.*

125. *In re* Reassignment and Consolidation of Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, Section CF 61, Administrative

on prior Florida Supreme Court decisions that also involved motions of public defenders seeking relief from excessive caseloads. On two prior occasions, the court had ruled that in deciding such cases trial court judges were not required to permit “the county an opportunity to be heard before the appointment of [private] counsel, even though it will be the responsibility of the county to compensate private counsel.”¹²⁶

Conclusion

As the U.S. economy continues to struggle, the financial problems of state and local governments have become increasingly difficult. It is not surprising, therefore, that jurisdictions struggle to allocate adequate funds for indigent defense services and that lawyers and defense programs are often faced with inordinately high workloads. Although the ABA has developed policies related to defense workloads, there are still challenging issues that remain unaddressed, as suggested in this paper. In a larger sense, the foregoing discussion addresses how governments and courts deal with constitutional rights and duties of professionals when adequate funds are unavailable. Based upon my personal experience with the excessive workload issue, I have become convinced that the lawyers and programs that furnish defense services need to be vigorous in standing up for their clients’ right to counsel and in fulfilling their duties under rules of professional conduct.

Order 08-14, In the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, at 3 (Blake, J., Sept. 3, 2008). Judge Blake’s decision in this case, both on the issue of standing and on the merits, was reversed by an intermediate Florida appellate court. Reversal on the issue of standing was based upon an interpretation of a state statute and a change in Florida law related to the financing of indigent defense in Florida, from county to state funding. *See State v. Pub. Defender, Eleventh Judicial Circuit*, 12 So.3d 798, 801 (3d Dist. Ct. App. 2009). The Public Defender appealed the Third District Court of Appeals decision, and on May 19, 2010, the Florida Supreme Court accepted jurisdiction of the case. *See Pub. Defender, Eleventh Judicial Circuit v. State*, No. SC09-1181, 2010 WL 2025545 (Fla. May 19, 2010).

126. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So.2d 1130, 1138 (Fla. 1990). *See also Escambia County v. Behr*, 384 So.2d 147, 150 (Fla. 1980).