

## Missouri Law Review

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Volume 75  
Issue 3 *Summer 2010*

Article 6

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Summer 2010

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#### Recommended Citation

Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 Mo. L. REV. (2010)

Available at: <https://scholarship.law.missouri.edu/mlr/vol75/iss3/6>

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# Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads

Peter A. Joy\*

*The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with [a] crime has to face his accusers without a lawyer to assist him.*<sup>1</sup>

*You can't give me too many cases, too many clients, too many prosecutors, and then tell me I have to conduct a farce of a trial when you know I am not ready. A system that will force me to betray my client by failing to represent him adequately at trial, is a system I won't play along with. You can't make me fail my client.*<sup>2</sup>

## I. INTRODUCTION

The lack of adequate indigent defense funding at the state and local levels has caused a crisis. In state after state, public defenders face overwhelming caseloads that inevitably make quality legal representation for clients much more of a dream than a reality.<sup>3</sup> Regardless of the promises in the U.S.

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\* Vice Dean, Professor of Law and Co-Director of the Criminal Justice Clinic, Washington University in St. Louis, School of Law. I wish to thank the staff of the *Missouri Law Review* and Professor Rodney Uphoff for the invitation to participate in this Symposium, and Norman Lefstein for his helpful comments. Some of the ideas in this Article were first expressed in an ethics column I co-authored for the American Bar Association (ABA) publication *Criminal Justice*. Peter A. Joy & Kevin C. McMunigal, *Has Gideon's Promise Been Fulfilled?*, CRIM. JUST., Summer 2003, at 46.

1. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

2. Public Defender Revolution!, <http://pdrevolution.blogspot.com/> (Feb. 19, 2010). I located the blog, Public Defender Revolution!, while researching this article. The postings to this blog provide insights into how defenders on the front line experience case overloads and inadequate resources.

3. The problem of excessive caseloads in state courts leading to poor legal representation is an endemic problem for other forms of indigent defense providers, such as lawyers and law firms that contract with, or are appointed by, courts or other governmental entities to represent defendants unable to pay for retained counsel. The focus of this Article, however, is on public defender systems in which lawyers providing direct client representation, commonly known as line public defenders, have one

federal and state constitutions, poor persons charged with crimes are increasingly unequal before the law. As the title of this Symposium simply states, indigent defense systems are “broke and broken.” The criminal justice system is not functioning fairly, ethically, and within constitutional mandates.

While there are several potential reforms that would fix the problem of excessive caseloads for public defenders, inadequate indigent defense systems have been widespread and chronic. This Article contends that current conditions will not change until and unless there is greater focus on the ethical obligation of the legal profession to ensure quality representation for the poor. In addressing the ethical dimensions of the crisis in indigent defense services, this Article focuses on the ethical responsibilities of supervising attorneys and managers of public defender programs to ensure quality representation of clients in the face of crushing caseloads.

This Article is divided into three substantive parts. First, I begin with a short discussion of the most important criminal justice right guaranteed to each of us under the Bill of Rights – the Sixth Amendment right to assistance of counsel.<sup>4</sup> For most Americans, the right to counsel is obtained through indigent defense providers,<sup>5</sup> and the quality of the representation is inextricably tied to three lesser known rights, or perhaps wishes, found in the Public Defender Bill of Rights: “[t]he right to meaningful, weighted caseload standards”; “[t]he right to judges who understand my [the public defender’s] role in the [justice] system”; and “[t]he right to a boss who will back me up.”<sup>6</sup> Next, I focus on the ethical implications for line public defenders,<sup>7</sup> their supervising attorneys, and managers of public defender programs. Finally, I conclude by discussing strategies for public defender supervising attorneys and managers to consider as tools to fulfill their ethical obligations and to advance the right to counsel for their clients.

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or more layers of lawyers above them in some supervisory or managing capacity. This Article does not discuss indigent defense at the federal level, where excessive caseload issues are less pronounced. *See, e.g.*, THE CONSTITUTION PROJECT, NAT’L RIGHT TO COUNSEL COMM, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/man-age/file/139.pdf> [hereinafter JUSTICE DENIED] (identifying the problem of excessive caseloads at the state and local levels as more serious than at the federal level).

4. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

5. Indigent defense service providers represent the accused in approximately 80% of criminal cases. *See infra* note 22 and accompanying text.

6. Public Defender Bill of Rights (A Work in Progress, Please Submit Suggestions), Public Defender Revolution!, <http://pdrevolution.blogspot.com>. Of course, there is not an officially recognized Public Defender Bill of Rights. If there were such a bill of rights, there would also be adequate funding for indigent defense services.

7. *See supra* note 3.

## II. THE RELATIONSHIP BETWEEN THE RIGHT TO COUNSEL AND A REASONABLE CASELOAD FOR PUBLIC DEFENDERS

The right to counsel was a revolutionary concept when it was made part of the U.S. Constitution. Early English common law prohibited the accused facing charges that carried the penalty of death, including felonies such as murder, robbery, or treason, from hiring a lawyer to assist with the defense.<sup>8</sup> Denying the accused counsel led to swift prosecutions and certain punishment and left the authority of the state unquestioned.<sup>9</sup> The accused could hire counsel only if facing minor charges, which included misdemeanors such as libel or battery, for which the penalties were merely incarceration or loss of property.<sup>10</sup> The Treason Act of 1695 modified this common law arrangement and permitted those accused of treason representation by counsel.<sup>11</sup> By the time the framers of the U.S. Constitution inserted the Sixth Amendment into the Bill of Rights, the right to counsel in England was still limited to misdemeanor and treason cases, though in practice English judges often permitted retained counsel to play some limited role in felony cases after the passage of the Treason Act.<sup>12</sup>

In the United States, initially the right to counsel under the Sixth Amendment was confined to federal cases, and the right guaranteed only that the accused could retain counsel.<sup>13</sup> The right to counsel began to expand in the early 1930s when the Supreme Court decided *Powell v. Alabama*, which guaranteed the right to government-provided counsel in capital cases in state courts.<sup>14</sup> Six years later, in *Johnson v. Zerbst*, the Court extended the right to appointed counsel for all federal crimes where incarceration is a possible punishment.<sup>15</sup> In *Johnson v. Zerbst*, the Court reasoned that assistance of counsel is “an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”<sup>16</sup>

The next major step toward recognizing the importance of counsel for the accused was the Supreme Court’s decision nearly thirty years after *Johnson v. Zerbst* in *Gideon v. Wainwright*, which guaranteed an appointed lawyer

8. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-9 (1955); JAMES J. TOMKOVICZ, THE RIGHT TO ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2-3 (2002).

9. See TOMKOVICZ, *supra* note 8, at 3-4. Some commentators have also argued that the common law practice to deny counsel to the accused was in part justified by the more active role judges played in trials of that era. *Id.* at 5.

10. BEANEY, *supra* note 8, at 8-9; TOMKOVICZ, *supra* note 8, at 3.

11. BEANEY, *supra* note 8, at 9; TOMKOVICZ, *supra* note 8, at 6-7.

12. See TOMKOVICZ, *supra* note 8, at 8-9.

13. *Betts v. Brady*, 316 U.S. 455, 461-62 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963); see also TOMKOVICZ, *supra* note 8, at 20-21.

14. 287 U.S. 45, 71 (1932).

15. 304 U.S. 458, 469 (1938).

16. *Id.* at 467.

to the accused facing felony charges in state court when the defendant is unable to pay for legal representation.<sup>17</sup> Subsequent to *Gideon*, a series of Supreme Court decisions found that the right to counsel for the poor also applied when one faced possible deprivation of liberty through a jail or prison sentence in misdemeanor cases,<sup>18</sup> juvenile matters,<sup>19</sup> other cases involving possible incarceration,<sup>20</sup> and in the first state appeal as a matter of right.<sup>21</sup>

Today, thanks to *Gideon*, public defenders or court-appointed private attorneys represent those unable to afford a privately retained lawyer – consisting of approximately 80% of criminal cases.<sup>22</sup> While *Gideon* established that an indigent person has the right to appointed counsel, the key question that has emerged is what will be the quality of representation that appointed counsel provides to the poor?

### A. Constitutional Standard for Adequate Assistance of Counsel

When *Gideon* was decided, the standard for ineffective assistance of counsel in federal courts was very limited. Using a Due Process Clause and Fifth Amendment analysis, federal circuits required that “the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice.”<sup>23</sup>

This “farce and mockery” standard began to change in 1970, when the Supreme Court stated in dicta that “the right to counsel is the right to the effective assistance of counsel,”<sup>24</sup> and the Fifth Circuit held “counsel to mean

17. *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).

18. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). In *Scott v. Illinois*, the Supreme Court emphasized that the Sixth Amendment right to counsel is limited to cases involving actual loss of liberty through imprisonment and not from cases resulting in a fine, even if there was a possibility of imprisonment. 440 U.S. 367, 373-74 (1979).

19. *In re Gault*, 387 U.S. 1, 30-31 (1967).

20. Cases dealing with possible incarceration include those in which the defendant is placed on probation. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

21. *Douglas v. California*, 372 U.S. 353, 356-57 (1963). *Douglas* was a companion case to *Gideon* decided on the same day, March 18, 1963. *Id.* at 353; *Gideon*, 372 U.S. at 335.

22. This estimate is based upon a study of indigent defense systems that found public defenders and appointed counsel representing 82% of the more than 4.2 million state felony cases in the 100 most populous counties in the United States. See Carol J. DeFrances & Marika F. X. Litras, *Indigent Defense Services in Large Counties, 1999*, 2000 BUREAU OF JUST. STAT. BULL. 1. There are approximately 3,100 counties and independent cities in the United States, and the 100 most populous accounted for 42% of the population in 1999. *Id.* at 2.

23. *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945). See *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983) (citing to cases from all circuits adopting the “farce and mockery” standard).

24. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.”<sup>25</sup> More circuits abandoned the “farce and mockery” standard. Ten years after *Gideon*, Judge Bazelon, writing for a panel of the U.S. Court of Appeals for the District of Columbia Circuit in 1973, held in *United States v. DeCoster* that “a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.”<sup>26</sup> By 1983, all of the circuits had adopted this new standard.<sup>27</sup>

In addition to articulating the reasonably competent assistance of counsel standard, the *DeCoster* decision outlined ways both to measure whether counsel was competent and to allocate the burden of proof.<sup>28</sup> Judge Bazelon’s decision held that courts should measure the competency of defense counsel according to the American Bar Association (ABA) Standards for Criminal Justice.<sup>29</sup> Upon finding a substantial violation of any of the Standards, *DeCoster* shifted the burden of proof to the government to show lack of prejudice to the defendant.<sup>30</sup>

The proper allocation of the burden of proof is critical to a meaningful effective assistance of counsel standard,<sup>31</sup> and Judge Bazelon reasoned that shifting the burden to the government to prove lack of prejudice once substandard representation took place was necessary for two reasons.<sup>32</sup> First, the government has the burden of proving guilt, and requiring a defendant to prove prejudice would be tantamount to requiring the defendant to prove in-

25. *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970) (per curiam) (emphasis added).

26. 487 F.2d 1197, 1202 (D.C. Cir. 1973).

27. The Second Circuit was the last federal circuit to adopt the “reasonably competent assistance” of counsel standard in place of the “farce and mockery” standard. *Trapnell*, 725 F.2d at 155.

28. *DeCoster*, 487 F.2d at 1197.

29. *Id.* at 1203. The ABA Criminal Justice Standards were first issued in 1968. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, (3d ed. 2006) (1968), available at <http://www.abanet.org/crimjust/standards/home.html> [hereinafter ABA CRIMINAL JUSTICE STANDARDS]. At that time, Chief Justice Warren Burger described them as “the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.” *Id.* The ABA Standards for Criminal Justice are relied upon by judges, prosecutors, defense counsel, and legal commentators frequently. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 10 (2009). The Criminal Justice Standards are cited in more than 120 United States Supreme Court opinions and in approximately 700 federal circuit court opinions. *Id.* at 11.

30. *DeCoster*, 487 F.2d at 1204.

31. Placing the burden of proof on the defendant would require the defendant to establish innocence when counsel has most likely failed to create a sufficient record from which the reviewing court could make such a determination. *Id.*

32. *Id.*

nocence.<sup>33</sup> “Second, proof of prejudice may well be absent from the record precisely because counsel has been ineffective.”<sup>34</sup> Bazelon’s decision pointed out that many failures to act, such as failure to investigate the case, interview witnesses, or call witnesses, are absent from the record when counsel renders inadequate assistance.<sup>35</sup>

Some federal circuits followed Judge Bazelon’s approach, while other federal circuits required the defendant to show prejudice when making an ineffective assistance of counsel claim. In *Strickland v. Washington*, the Supreme Court settled the debate by holding that Sixth Amendment ineffective assistance of counsel claims require the defendant to prove objectively unreasonable performance by the lawyer and prejudice – a reasonable probability that the lawyer’s inadequate performance adversely affected the outcome of the case.<sup>36</sup> This two-part standard, particularly the requirement that the lawyer’s inadequate performance must be proven to have adversely affected the outcome of the case, is, as Judge Bazelon opined, a very difficult, and at times impossible, standard to meet when counsel has provided inadequate representation.<sup>37</sup>

The prejudice requirement also raises a number of serious public policy concerns. If poor lawyering is present and no prejudice is found, the poor lawyering is left unremedied when a new trial is denied. This result means that our criminal justice system tolerates less than competent lawyering and permits poor lawyering to go undeterred, calling into question whether the Sixth Amendment guarantees a meaningful right for the poor. This systemic tolerance for poor lawyering erodes the faith of the defendant and the public in the fairness and integrity of the criminal justice system. A prejudice requirement also assumes we can accurately assess, after the fact, the impact of bad lawyering on the outcome of the case. But such an assessment can be quite difficult. For example, if the lawyer failed to conduct an investigation, how is one to know after the fact what the investigation would have turned up

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33. *Id.*

34. *Id.*

35. *Id.*

36. 466 U.S. 668, 687-88.

37. See *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973). Although extremely difficult for a defendant to meet, a prejudice requirement reflects a number of pragmatic concerns. Requiring a showing of prejudice reflects a realist view that lawyers cannot perform perfectly in every trial. The high bar set by requiring a showing of prejudice also avoids spending time and money on a second trial likely to arrive at the same result as the first trial. The prejudice requirement is consistent with the justice system’s interest in finality of judgments. One finds similar requirements in the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. For example, the “harmless error” standard provides that erroneous rulings admitting or excluding evidence will not trigger reversal unless there is a showing that “a substantial right of the party is affected.” FED. R. EVID. 103(a). In federal criminal procedure, any error “that does not affect substantial rights must be disregarded.” FED. R. CRIM. PROC. 52(a).

and how it would have affected the outcome of the case? In his dissent in *Strickland*, Justice Marshall echoed Judge Bazelon's concerns, noting that "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer" and that "evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."<sup>38</sup>

In commenting upon why judges are reluctant to reverse convictions on grounds of inadequate assistance of counsel, Judge Bazelon pointed to the widely held belief "that most criminal defendants are guilty anyway" – what he termed the "‘guilty anyway’ syndrome."<sup>39</sup> As many of the DNA exonerations demonstrate,<sup>40</sup> one of the costs of ignoring inadequate representation is sometimes the conviction of innocent persons whose lives are ruined because they were unable to afford competent lawyers.

The prejudice standard and resulting reluctance to reverse convictions when defendants have poor lawyers also facilitate the placement of unrealistic caseload demands on public defenders. Because poor lawyering will not lead to a new trial unless the client is able to demonstrate that the lawyer's poor performance adversely affected the outcome of the case, the criminal justice system functions in a way that accepts excessive caseloads that lead to poor lawyering. In effect, the criminal justice system operates in the shadow of a lie where judges, prosecutors, and defense lawyers collectively pretend that indigent defendants have the same constitutional rights as defendants able to retain effective private counsel.

### *B. Crisis in Defense Systems*

The present systems for providing indigent defense at the state level fail in many ways. Most commentators and bar leaders agree that the major factors contributing to poor quality of defense services are excessive caseloads, lack of funds for expert witnesses and investigators, and extremely low pay rates for court-assigned lawyers and contract defense services.<sup>41</sup> These fac-

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38. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

39. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973).

40. See, e.g., TIM JUNKIN, *BLOODWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* (2004) (documenting the first death row DNA evidence exoneration). A study of the first sixty-two DNA evidence exonerations showed that bad lawyering was the cause or contributing cause of wrongful conviction in seventeen of the cases. BARRY SHECK ET AL., *ACTUAL INNOCENCE* app. at 263 (2000).

41. See JUSTICE DENIED, *supra* note 3, at 52-70; Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 10, 10-12; James M. McCauley, *Excessive*



tors contribute to defense systems in which clients rarely see their lawyers. Some clients are simply processed through the system, receiving what some have called “assembly-line justice.”<sup>42</sup> Of the three causes of the crisis, the problem of excessive caseloads is the most pernicious.

A lawyer can be smart, dedicated, and experienced, but too much work will prevent even the best lawyer from providing clients with ethical, effective assistance of counsel. Understanding this critical need for an appropriate caseload, the National Advisory Commission on Criminal Justice Standards and Goals set the following caseload guidelines for full-time public defenders: a maximum of 150 felonies, or 300 misdemeanors, or 200 juvenile cases, or 200 mental health matters, or 25 appeals per year.<sup>43</sup> Although these standards have been in place for more than thirty years, almost every jurisdiction in the United States exceeds them,<sup>44</sup> despite the fact that, some years after their adoption, the ABA Special Committee on Criminal Justice concluded: “Emphasis should be placed on the fact that *these guidelines set the maximum conceivable caseload* that an attorney could reasonably manage. These numbers are unrealistic in the absence of ideal support conditions or if the attorney is carrying any number of serious or complex cases or death penalty cases.”<sup>45</sup>

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*Workloads Create Ethical Issues for Court-Appointed Counsel and Public Defenders*, VA. LAWYER, Oct. 2004, at 2-3.

42. The phrase “assembly-line justice” is used in many different contexts to explain the unequal treatment the poor often receive in the criminal justice system. The Kerner Report, investigating the causes of civil rights disturbances in the mid-1960’s, stated: “The belief is pervasive among ghetto residents that the lower courts in our urban communities dispense ‘assembly-line’ justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent . . . .” NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (1968).

43. THE NAT’L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973); AM. BAR ASS’N SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 43 (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS]. The National Legal Aid and Defender Association (NLADA) adopted these guidelines. See NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-6 cmt. (1984).

44. Testimony at hearings the ABA conducted in 2003 stated that public defender caseloads in many states exceeded maximum caseload limits at times by more than 150%. See AM. BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 17-18 (2004). Since 2003, the excessive caseloads have gotten worse. JUSTICE DENIED, *supra* note 3, at 67-70. In Tennessee, six attorneys handled over 10,000 misdemeanor cases in 2006, and the average caseload for public defenders in Dade County, Florida was nearly 500 felonies and 2,225 misdemeanors per lawyer in 2008. *Id.* at 68.

45. CRIMINAL JUSTICE IN CRISIS, *supra* note 43, at 43, 68 n.87 (emphasis added).

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Anyone who has worked in, or with, or who has studied public defender systems knows that most offices operate with minimal support conditions, making these caseload guidelines unrealistically excessive for even the best defense attorneys to represent all clients effectively. Indeed, the number of factors that affect the amount of time a lawyer must spend on cases varies so much that, after a three-year study to develop national caseload standards for prosecutors handling state adult and juvenile criminal cases, the National Association of District Attorneys' research arm, the American Prosecutors Research Institute, concluded that "it was impossible for such standards to be developed."<sup>46</sup>

Inevitably, this forces a public defender with a crushing caseload to cut corners. She may fail to investigate the facts and law of her cases thoroughly, forget to file important pretrial motions, neglect to understand and explain collateral consequences of conviction with clients when discussing plea negotiations, and fail to prepare adequately for trials. Each and every corner cut leads to substandard assistance of counsel even if it does not rise to the level of prejudice required to demonstrate ineffective assistance of counsel. What should a public defender with crushing caseloads do? As the next section discusses, the public defender, her supervising attorney, and public defender system managers each have ethical obligations to ensure that each client receives competent representation and a full defense.

### III. ETHICAL RESPONSIBILITIES OF PUBLIC DEFENDERS FACING CASE OVERLOADS

The Supreme Court has long held that "the constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed."<sup>47</sup> Similarly, prevailing ethics rules impose the same obligations on public defenders and privately retained defense lawyers. Ethically, each lawyer "shall provide competent representation to a client,"<sup>48</sup> "shall act with reasonable diligence and promptness in representing a client,"<sup>49</sup> and "should not accept representa-

46. AM. PROSECUTORS RESEARCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NAT'L WORKLOAD ASSESSMENT PROJECT 27 (2002).

47. *Evitts v. Lucey*, 469 U.S. 387, 395-96 (1985); *see also Cuyler v. Sullivan*, 446 U.S. 335, 342-45 (1980). The American Bar Association Standards for Criminal Justice amplify these case decisions: "Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program." ABA CRIMINAL JUSTICE STANDARDS., *supra* note 29, at 4-1.2(h).

48. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006) [hereinafter MODEL RULES]. The duty of competence includes "adequate preparation." *Id.* at R. 1.1, cmt. 5.

49. *Id.* at R. 1.3. The ABA Standards for Criminal Justice explain:

tion in a matter unless it can be performed competently, promptly . . . and to completion.”<sup>50</sup> In addition, “[a] lawyer’s work load must be controlled so that each matter can be handled competently.”<sup>51</sup> When the lawyer has so many clients that her “representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client,” a conflict of interest exists.<sup>52</sup> But, unlike a private lawyer or law firm that has control of the number of clients they accept, the individual public defender and the public defender system may have little control over their caseload.

This lack of control over caseloads places a public defender in an ethical bind because having too many cases is not a recognized excuse for violating ethical obligations.<sup>53</sup> As one Arizona ethics opinion stated: “There can be no

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

ABA CRIMINAL JUSTICE STANDARDS, *supra* note 29, at 4-3.6(a).

50. MODEL RULES, *supra* note 48, at R. 1.16 cmt. 1.

51. *Id.* at R. 1.3 cmt. 2. Another comment to Rule 1.3 provides, “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” *Id.* at R. 1.3 cmt. 1.

52. *Id.* at R. 1.7(a)(2). See, e.g., *In re Order on Prosecution of Criminal Appeals*, 561 So.2d 1130, 1135 (Fla. 1990) (per curiam) (“When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”).

53. In a discipline case involving a contract lawyer with a public defender office who received a suspension from practice, the New Mexico Supreme Court reasoned:

As licensed professionals, attorneys are expected to develop procedures which are adequate to assure that they will handle their cases in a proficient fashion and that they will not accept more cases than they can manage effectively. When an attorney fails to do this, he or she may be disciplined even where there is no showing of malicious intent or dishonesty. The purpose of attorney discipline is not to punish the attorney but to insure [sic] that members of the public can safely assume that the attorney to whom they entrust their cases is worthy of that trust.

*In re Martinez*, 717 P.2d 1121, 1122 (N.M. 1986); see also *State ex rel. Neb. State Bar Ass’n v. Holscher*, 230 N.W.2d 75, 80 (Neb. 1975) (being “extremely busy with criminal prosecutions” does not excuse a failure to know and follow the law).

Unlike indigent defense systems, civil legal service providers have a history of controlling their caseloads to ethical practice levels by refusing to accept new cases and clients. The ABA Standing Committee on Ethics and Professional Responsibility has approved of this approach reasoning that “[a] lawyer’s obligations to provide competent and diligent representation under Model Rules 1.1 and 1.3 imposes a duty

question that taking on more work than an attorney can handle adequately is a violation of a lawyer's ethical obligations."<sup>54</sup> The fact that most or all public defenders in a jurisdiction have excessive caseloads leading to substandard representation also is not an excuse.<sup>55</sup> A lawyer may be disciplined for failing to research the law, perform an investigation, advise a client on possible defenses, or take other necessary steps to provide competent representation.<sup>56</sup> Waiving a client's right to a speedy trial as a way of balancing the demands of too many cases also is not an option, unless the waiver is "supported by the express or implied consent of the client himself."<sup>57</sup>

Ultimately, some state courts and bar ethics authorities have recognized that the only ethical solution to excessive caseloads is for public defenders to decline cases. One of the first such cases is *State v. Peart*, in which the Louisiana Supreme Court found that, due to "excessive caseloads and the insufficient support," indigent clients of a public defender in New Orleans were "generally not provided with effective assistance of counsel . . . ."<sup>58</sup> In response, the Louisiana Supreme Court adopted "a rebuttable presumption" that the indigent defendants in New Orleans were receiving constitutionally insufficient assistance of counsel.<sup>59</sup> This rebuttable presumption placed the burden on the state to prove that defense counsel was effective before the trial judge could permit a case awaiting trial to proceed. Not surprisingly, the ruling prompted the Louisiana legislature to increase spending on indigent defense in order to remove the presumption of ineffective assistance of counsel.<sup>60</sup>

State bar ethics opinions also support the view that an overburdened public defender should decline to accept new cases. A Wisconsin Bar ethics opinion held: "When faced with a workload that makes it impossible for a lawyer to prepare adequately for cases and to represent clients competently, the staff lawyer should, except in extreme or urgent cases, decline new legal matters and should continue representation in pending matters only to the

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to monitor workload, a duty that requires declining new clients if taking them on would create a 'concomitant greater overload of work.'" ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

54. Ariz. Ethics Op. 90-10 (1990).

55. At least one court has found that the customary unethical practice among other lawyers is not an excuse to violate the ethics rules. Ky. Bar Ass'n v. Hammond, 619 S.W.2d 696, 699 (Ky. 1981).

56. *See, e.g.*, Fla. Bar v. Morales, 366 So.2d 431, 433 (Fla. 1978) (per curiam) (disbarring defense lawyer for negligent and incompetent representation of a client); *In re Lewis*, 445 N.E.2d 987, 990 (Ind. 1983) (disbarring lawyer for, among other reasons, inadequate preparation in the representation of two defendants); Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62, 64-65 (Tenn. 1983) (suspending lawyer for mishandling cases).

57. *People v. Johnson*, 606 P.2d 738, 744 (Cal. 1980).

58. 621 So.2d 780, 790 (La. 1993).

59. *Id.* at 791.

60. JUSTICE DENIED, *supra* note 3, at 120 n.79.

extent that the duty of competent, nonneglectful representation can be fulfilled.”<sup>61</sup> A South Carolina bar ethics opinion echoes this view that all lawyers, including public defenders, have ethical obligations not to have caseloads that lead to violating their ethical obligations.<sup>62</sup>

Many state court cases and ethics opinions share the view that there is a limit to the number of cases a lawyer can ethically handle.<sup>63</sup> But many individual public defenders are still placed in a difficult, if not untenable, position, especially if they practice in a jurisdiction that has not recognized their right to a reasonable caseload that permits ethical client representation.

Recognizing the dilemma public defenders face in attempting to provide ethically mandated, competent representation to clients when defenders have unrealistic caseloads, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion to provide guidance to the increasing number of states facing escalating excessive workloads.<sup>64</sup> The opinion parallels the state court and state ethics opinions that have addressed this issue and concludes, “If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.”<sup>65</sup> The opinion explains that, because a lawyer’s ethical duty is owed to existing clients, the

61. Wis. Prof’l Ethics Comm. Formal Op. E-84-11 (1984), *reaff’d* Wis. Prof’l Ethics Comm., Formal Op. E-91-3 (1991).

62. S.C. Ethics Advisory Comm. Op. 04-12 (2004).

63. For example, a Virginia ethics opinion held that all attorneys, including prosecutors, may not take on more cases than they are ethically able to handle. Va. Comm. on Legal Ethics Op. 1798 (2004). This holding is broad enough to apply to public defenders as well. Other ethics authorities and state courts have similarly held that lawyers, including public defenders, may not take on more clients than they can represent ethically. *See, e.g.*, Ariz. Ethics Op. 90-10 (1990) (holding that a public defender office must take action to ensure the workloads of attorneys so that they can “competently and diligently represent the number of persons assigned”); Ariz. Ethics Op. 01-06 (2001) (holding that a lawyer may not enter into an indigent defense contract that might induce the lawyer to curtail services due to compensation structure); Nat’l Legal Aid & Defender Ass’n Ethics Op. 03-01 (2003) (holding that a public defense agency is prohibited from accepting cases beyond capacity of agency’s lawyers to provide competent representation); *State v. Alvey*, 524 P.2d 747, 751-53 (Kan. 1974) (disciplining lawyer for violating the ethics rules by taking on more legal work than can be handled); *State v. Gasen*, 356 N.E.2d 505, 506-08 (Ohio Ct. App. 1976) (reversing contempt against criminal defense lawyers who refused appointments due to inability to effectively represent defendants); *Zarabia v. Bradshaw*, 912 P.2d 5, 8 (Ariz. 1996) (en banc) (finding excessive caseload for contract attorney raised colorable question concerning ability to provide ethical representation to clients).

64. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006).

65. *Id.*

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lawyer must decline new cases rather than withdraw from existing ones if a new case would result in an excessive workload.<sup>66</sup>

The ABA opinion also discusses what a defender should do when receiving excessive appointments through a public defender office, and the ethical responsibility of a lawyer who supervises other public defenders or has managerial responsibilities for a public defender office or indigent defense system.<sup>67</sup> The next section will discuss these aspects of the ABA ethics opinion and how they inform strategies to keep caseloads within ethical limits.

## IV. STRATEGIES FOR KEEPING CASELOADS WITHIN ETHICAL LIMITS

The vast majority of public defenders are on the front lines representing clients in courts at the trial and appellate levels.<sup>68</sup> Most of these public defenders are accountable to supervisory lawyers who are usually called managing attorneys or district defenders, and these supervisory lawyers are typically supervised by and accountable to some higher level of attorney management within a public defender system.

For the purposes of ethics rules, a public defender office or system is the equivalent of a law firm.<sup>69</sup> The ethics rules require a supervised, or “subordinate lawyer,” to comply with the ethics rules even if acting under the direction of another.<sup>70</sup> The rules provide, however, that a subordinate lawyer may act “in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”<sup>71</sup> But this “following orders’ defense depends on the reasonableness of the order.”<sup>72</sup> As one commentator

66. *Id.*

67. *Id.*

68. In my experience working with and studying public defender offices, most offices operate with a ratio of one supervisor to approximately ten lawyers. Most of the supervisory lawyers continue to carry their own reduced caseload. The effective ratio usually results in most supervisors carrying a greater supervisory load than recommended standards. See, e.g., NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.”).

69. “‘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.” MODEL RULES, *supra* note 48, at R. 1.0(c).

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

71. *Id.* at R. 5.2(b).

72. Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 294 (1994); see also MODEL RULES, *supra* note 48, at R. 5.2, cmt. 2 (stating that “if the question is reasonably arguable” the authority to decide the course of action normally rests with the supervisor).

has observed, the ethics rules require that “each lawyer is ultimately responsible for his or her own actions.”<sup>73</sup>

The ethics rules also require that lawyers with managerial authority employ “reasonable efforts” to ensure that the lawyers in the firm comply with their ethical obligations.<sup>74</sup> Lawyers with “direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms” to the ethics rules.<sup>75</sup>

Against this backdrop, the ABA ethics opinion states that, when a lawyer with an excessive caseload receives case appointments as a member of a public defender’s office, the lawyer should seek the approval of his or her supervisor to transfer cases to another, request excusal from non-representational duties in the office, or refuse to accept new cases.<sup>76</sup> If the supervisor does not provide sufficient relief, the lawyer should “advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender’s office.”<sup>77</sup> Where a supervisor reasonably addresses the caseload issue, the line public defender may rely on that resolution.<sup>78</sup> When the supervisor’s resolution is not reasonable, the ethics opinion states, “the public defender must take further action,” such as appealing to the public defender governing board or, if there is still no relief, “filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.”<sup>79</sup>

As the ABA ethics opinion makes clear, each public defender has an affirmative obligation to take steps to keep caseloads at levels that ensure ethical, effective representation of all clients. When caseloads become excessive

73. Miller, *supra* note 72, at 297.

74. MODEL RULES, *supra* note 48, at R. 5.1(a).

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

76. ABA Formal Op. 06-441, *supra* note 64.

77. *Id.* The requirement to advance up the chain of command to seek an ethical resolution of a problem is similar to the requirement for lawyers representing an organization as a client. Compare *id.* with MODEL RULES, *supra* note 48, at R. 1.13. When someone associated with the organization is engaged in or intends to act in violation of the law that may be imputed to the organization and that may injure the organization, the lawyer is obligated to act in the best interests of the organization, including referring the matter to a higher authority. MODEL RULES, *supra* note 48, at R. 1.13(b). The ethics rules provide that in such a situation the “the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.” *Id.*

78. ABA Formal Op.06-441, *supra* note 64 (citing MODEL RULES, *supra* note 48, at R. 5.2 cmt. 2).

79. *Id.*

and make ethical client representation impossible, the public defender must seek assistance of supervising and managing attorneys.<sup>80</sup>

The thrust of the ABA ethics opinion, as well as the state court and state ethics opinions that have addressed public defender case overloads, is that supervising and managing attorneys in turn must support the line public defender, who in good faith cannot accept additional cases and still provide ethically competent representation to existing clients.<sup>81</sup> This is the clear, unambiguous ethical obligation of supervising and managing attorneys.

The importance of supervisory and managing attorneys backing up the line public defenders cannot be underestimated. Not only does the individual public defender face possible professional discipline, but there is also the possibility of professional liability through malpractice.<sup>82</sup> Worse than either of these possible outcomes, there is the individual public defender's personal knowledge that she is failing to provide clients with the quality of representation they are entitled to receive. Without the support of supervising and man-

80. If the supervisory attorney turns a deaf ear to a line public defender and requires the public defender to represent so many clients that the quality of representation falls below ethical standards, Professor Monroe Freedman has argued, the supervisory attorney "has committed a serious ethical violation" under Model Rule 8.3(a). Monroe Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 921 (2005). Model Rule 8.3(a) provides: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." MODEL RULES, *supra* note 48, at R. 8.3(a).

81. The ethics opinion notes that "a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds," and "a public defender should not claim an excessive workload in an attempt to avoid new cases or to withdraw from current cases unless good cause objectively exists." ABA Formal Op. 06-441, *supra* note 64.

82. Although there is not a national database to track instances of professional discipline, it is believed that criminal defense attorneys are rarely disciplined for failing to provide competent representation. *See, e.g., JUSTICE DENIED*, *supra* note 3, at 36-37 & n.91 (citing a report from California that, of 1,500 disciplinary actions over a 5-year period, only 5% involved criminal defense attorneys). In addition, legal malpractice claims against criminal defense attorneys are very difficult to prove for several reasons, including the requirement in many jurisdictions that the client must first prevail on an ineffective assistance of counsel claim or have the case dismissed due to collateral estoppel. *See, e.g., Meredith J. Duncan, The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 30 ("Criminal defendants who have been victimized by negligent lawyering are too often collaterally estopped from bringing a criminal malpractice action at the civil level because courts erroneously conclude that ineffective assistance of counsel claims and criminal malpractice claims are equivalent actions."). For liability purposes, some jurisdictions treat public defenders the same as private attorneys, while other jurisdictions extend statutory immunity to protect public defenders from personal liability in malpractice actions. *See Lefstein & Vagenas, supra* note 41, at 18, 21 n.79.



aging attorneys, there is an extraordinary high turnover of line public defenders who seek other work rather than violate their professional obligations to clients on a daily basis. In addition, supervising and managing attorneys who do not support a line defender's need for a reasonable caseload may be subject to civil liability if the excessive caseload leads to a violation of a client's constitutional rights.<sup>83</sup> So, what strategies should supervising and managing attorneys employ to guarantee ethical, effective representation of clients?

### A. Monitor and Regulate Caseloads

The first responsibility for supervising and managing attorneys is to set reasonable caseload expectations and have a system in place to monitor and balance individual caseloads. This includes developing a uniform case definition that the system uses consistently.<sup>84</sup> In developing the case definition, it is usually best to adopt a definition that is consistent with the way that prosecutor offices and courts define cases or to consider how to make fair comparisons of competing ways of defining cases.<sup>85</sup> The uniform case definition is a necessary step in developing a caseload standard, which should be shared with bar leaders, prosecutors, judges, and legislators. Without caseload standards, it is unlikely that a judge will permit a public defender to refuse a case.<sup>86</sup>

Once a uniform case definition is developed, the public defender system should develop a method for accurately recording case information and monitoring individual lawyers' workloads. The ABA's Ten Principles of a Public

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83. If excessive caseloads are determined to be an "official policy" of a public defender system or office that lead to the violation of a client's constitutional rights there may be liability under a federal civil rights statute, 42 U.S.C. § 1983. *See, e.g.,* *Miranda v. Clark County*, 319 F.3d 465, 468-70 (9th Cir. 2003) (holding that head of public defender agency may be liable under § 1983 for "a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt"); *see also* Lefstein & Vagenas, *supra* note 41, at 18 (describing possible civil liability for supervising and managing attorneys).

84. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE 4 (2001) [hereinafter KEEPING DEFENDER WORKLOADS MANAGEABLE].

85. Compatible case definitions permit the fairest comparisons and are useful for budgeting purposes. *See id.* at 4, 25-26.

86. The necessity of having caseload standards is reflected in the debate over excessive caseloads in Nevada. A supervising public defender reported that, when she asked that one of her attorneys be permitted to decline to take a new case, "The district court judge said we need caseload standards before I can allow you to refuse a case." Alan Maimon, *Public Defender Caseload: State Panel Debates Limits*, LAS VEGAS REVIEW-JOURNAL, Sept. 9, 2009. Establishing a uniform case definition is not only useful for balancing caseloads but is often necessary for funding requests and other external uses. KEEPING DEFENDER WORKLOADS MANAGEABLE, *supra* note 84, at 4.

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Defense Delivery System recommend the adjustment of caseloads for factors such as “case complexity, support services, and an attorney’s nonrepresentational duties.”<sup>87</sup> The ABA’s Eight Guidelines of Public Defense Related to Excessive Workloads recommends: “The Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients . . . are performed.”<sup>88</sup>

The problem of excessive caseloads has been longstanding, and it is likely that most, if not all, public defender systems have devised such internal systems. As the ABA has repeatedly recommended, key to any effective system is a mechanism for rebalancing caseloads, usually through a combination of regulating initial case assignments, relieving line defenders of non-representational responsibilities, and reassigning cases if absolutely necessary.<sup>89</sup> Without such a mechanism, the public defender system is unable to ensure that each line public defender has sufficient time to devote to clients. As the ABA Model Rules state, “A lawyer’s workload must be controlled so that each matter can be handled competently.”<sup>90</sup>

But, the history of the crisis in state indigent defense systems has shown that the internal deployment of available resources in a public defender office or statewide system is rarely a suitable solution for the long run.<sup>91</sup> The only workable strategies must be ones that provide a mechanism that regulates the number of cases assigned to a public defender office or, when no such mechanism exists, provides additional lawyers in order to achieve the ethical representation of all clients. When state legislatures fail to provide such a mechanism or resources to public defender systems, supervising and managing attorneys must look outside the indigent defense system for relief.

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87. AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002).

88. AM. BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS, Guideline 2 (2009) [hereinafter EIGHT GUIDELINES].

89. *See supra* notes 84-88 and accompanying text. The ABA Standing Committee on Ethics and Professional Responsibility incorporated these factors in issuing its ethics opinion on excessive caseloads for lawyers providing indigent defense. *See* ABA Formal Op. 06-441, *supra* note 64.

90. MODEL RULES, *supra* note 48, at R. 1.3 cmt. 2

91. In 1990, an Arizona advisory ethics opinion noted that, after a public defender office has taken all other steps to balance caseloads among line public defenders to ethically acceptable levels, the public defender office may still have to “seek to decline appointments or withdraw from appointments already made until caseloads are manageable.” Ariz. Ethics Op. 90-10 (1990). The ABA’s commentary to the Eight Guidelines of Public Defense Related to Excessive Workloads explains that the problem of excessive caseloads for public defenders has long existed and is becoming more acute due to the sagging economy and “more restricted funding for public defense providers.” EIGHT GUIDELINES, *supra* note 88, at 24-25.

### B. The Missouri Approach

In a recent case, *State ex rel. Missouri Public Defender Commission v. Pratte*, the Supreme Court of Missouri considered three writ of prohibition proceedings brought by the Missouri Public Defender Commission seeking to refuse appointments from trial judges in certain categories of cases as contrary to Commission rules adopted to control its caseload.<sup>92</sup> Those rules sought to enable public defenders to decline cases where an indigent defendant had at some point retained private counsel or to decline cases involving probation violations when an office had exceeded its maximum allowable caseloads.<sup>93</sup> In denying two of the writs, the Supreme Court of Missouri acknowledged that the Commission had the authority to limit when an office was available to take cases, but “the rule cannot authorize the public defender to decline *categories* of cases that the statute requires the public defender to represent.”<sup>94</sup> The Supreme Court of Missouri made permanent a third writ involving a judge who sought to appoint a public defender “in his private capacity” in a probation violation case, reasoning that under state law a public defender does not have a “private capacity” as a lawyer and the judge could not require the public defender to take the case on that basis.<sup>95</sup>

After addressing each of the writs, the Supreme Court of Missouri reviewed the available remedies for excessive caseloads under state law. The court stated that once a public defender office exceeds its maximum caseload for three consecutive months the public defender is required to “notify the presiding judge and prosecutors” and attempt to “agree on measures to reduce the demand for public defender services.”<sup>96</sup> Such measures include prosecutors agreeing to limit the cases in which the state will seek incarceration, judges identifying cases or categories of cases in which private attorneys will be appointed, judges determining cases for which counsel will not be appointed resulting in dismissals, and, if no agreement is reached, “the public defender [making] the office unavailable for any appointments until the caseload falls below the commission’s standard.”<sup>97</sup>

The Missouri approach, like some of the more than twenty states with statewide public defender systems,<sup>98</sup> gives the public defender system the

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92. 298 S.W.3d 870, 881, 883, 885 (Mo. 2009) (en banc).

93. *Id.* at 873-74.

94. *Id.* at 884.

95. *Id.* at 885-86.

96. *Id.* at 886-87.

97. *Id.* at 887.

98. There is some disagreement over the number of state-based public defender programs. A special report on the right to counsel stated that there are twenty-seven states with a “statewide public defender agency or supervisory body that provides oversight regarding almost all aspects of indigent defense services.” JUSTICE DENIED, *supra* note 3, at 148. The U.S. Department of Justice states that there are twenty-two statewide public defender programs that provide funding for all of the public defender

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authority to refuse cases if no other solution is available.<sup>99</sup> It presents a cooperative model for solving the endemic problem of excessive caseloads for public defenders, while still providing the ability for the supervising and managing attorneys to limit case intake if cooperative solutions are not reached or are inadequate in addressing the problem. The Supreme Court of Missouri's opinion expressed a great deal of hope that a cooperative approach will be successful, but it also acknowledged that some other remedy may be necessary to ensure that the rights of the accused are protected through the ethical and effective assistance of counsel. In this regard, the court discussed its authority to require the state to increase funding for the public defender system or courts appointing private lawyers without pay as other possible, but highly problematic, remedies.<sup>100</sup>

The Missouri case is important for at least two reasons. First, it proposes an approach to address the excessive caseload crisis for public defenders in a cooperative fashion that, if judges, prosecutors, and the private bar approach in good faith with the aim toward assisting public defenders, promises some degree of relief. Second, the decision recognizes that the public defender system must be able to limit case intake for line public defenders if there is no other solution.

### C. Seeking Relief in the Courts

As the *Peart* case from Louisiana<sup>101</sup> and the *Pratte* case from Missouri<sup>102</sup> illustrate, supervising and managing attorneys in public defender programs have an ethical obligation to support line public defenders in limiting their caseloads to levels that enable the ethical representation of clients. This view is consistent with the ABA ethics opinion addressing supervising and managing attorneys' ethical obligations, other ethics and court opinions,

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offices in their states. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007 – STATISTICAL TABLES Table 7A (Nov. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf> [hereinafter PUBLIC DEFENDER OFFICES].

99. The U.S. Department of Justice lists eight states (Arkansas, Iowa, Massachusetts, Montana, New Hampshire, North Dakota, Virginia, and Wyoming) where the public defender offices have the authority to refuse appointments due to excessive caseloads. PUBLIC DEFENDER OFFICES, *supra* note 98, at Table 7A. Professor Norman Lefstein, an expert on indigent defense systems, believes that the Department of Justice report is incorrect, in large part because it was based on survey questionnaires to gather its data. E-mail from Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law-Indianapolis, to Peter A. Joy, Vice Dean and Professor of Law, Washington University in St. Louis School of Law (Mar. 8, 2010, 06:55:00 CST) (on file with author).

100. *Pratte*, 298 S.W.3d at 888-89.

101. See *supra* notes 58-60 and accompanying text.

102. See *supra* notes 92-97 and accompanying text.

and studies investigating the excessive caseload crisis.<sup>103</sup> These court and ethics decisions also illustrate that public defender systems and individual public defenders with excessive caseloads are not completely powerless. By exercising their ethical duty to resist providing less than competent representation to their clients, they can find the courts receptive to the needs of the accused for ethically competent representation by public defenders.

If the public defender system is not proactive in managing the caseloads for line defenders, line defenders have the initial ethical obligation to raise their inability to represent more clients with their supervising attorney and, if necessary, continue to raise the issue up the chain of command until adequate relief is provided.<sup>104</sup> If supervising and managing attorneys are not able to regulate the caseloads to manageable levels for the line defenders by reallocating existing resources, then the supervising and managing attorneys must seek relief. In states that provide some mechanism for public defender offices to refuse to take new appointments due to excessive caseloads,<sup>105</sup> they must exercise that right. In other states, they must consider litigation, which in many cases will be framed as a motion to withdraw or to limit new case assignments based upon documenting the excessive caseload.

Lessons learned from successful litigation indicate that the better the excessive caseload issue is documented, the more likely the court will be receptive. In *Peart*, Richard Teissier, the public defender representing Leonard Peart, framed the action as a “Motion for Relief to Provide Constitutionally Mandated Protection and Resources.”<sup>106</sup> In response to Teissier’s motion, the trial court held a series of hearings concerning the defense services provided to Peart and other defendants.<sup>107</sup> At the hearings, the court found that, in a seven-month period, Teissier had represented 418 clients, including 130 guilty pleas at arraignment.<sup>108</sup> The court also found that Teissier “had at least one serious case [an offense for which imprisonment may not be suspended] set for trial every available trial date during that period.”<sup>109</sup> In addition, Teissier received no investigative support and had no funds for expert witnesses.<sup>110</sup> Upon this record, the trial court “found that Teissier was not able to provide his clients with reasonably effective assistance of counsel because of the conditions affecting his work, primarily the large number of cases assigned to him.”<sup>111</sup>

As *Peart* illustrates, requesting a hearing on a motion to withdraw or to limit new assignments is essential to making the record. In addition to docu-

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103. See *supra* Part II.

104. See *supra* notes 76-79 and accompanying text.

105. See *supra* note 99.

106. *State v. Peart*, 621 So. 2d 780, 784 (La. 1993).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

menting the factual basis of the excessive caseloads in terms of what it means for the client's Sixth Amendment rights, a motion to withdraw or limit new cases should rely upon the ethics opinions, state ethics rules, ABA standards, and other relevant authority including the affidavits of experts.<sup>112</sup> Pretrial rather than post-conviction litigation is also more strategic because of the difficult two-part *Strickland* test.<sup>113</sup>

## V. CONCLUSION

In writing the *Gideon* decision for a unanimous U.S. Supreme Court, Justice Hugo Black stated, “[L]awyers in criminal courts are necessities, not luxuries.”<sup>114</sup> Nearly fifty years after *Gideon*, many indigent defendants are finding that they have lawyers but that it is still a luxury to have a lawyer with adequate time to represent the poor in an ethically competent manner. While there are many problems contributing to the crisis in indigent defense systems, excessive caseloads is the primary problem public defenders face in attempting to provide ethically competent, zealous representation to their clients.

Guaranteeing each individual's Sixth Amendment right to counsel is a fundamental principle that should unite prosecutors and public defenders. While the adversary system may divide prosecutors and defenders in the courtroom, each prosecutor has an overarching duty to seek justice.<sup>115</sup> The prosecutor's duty includes an obligation to see that every defendant, rich as well as poor, is accorded procedural justice.<sup>116</sup> Procedural justice is not possible when excessive caseloads for public defenders deny competent, ethical representation to the poor.

If public defenders are to fulfill *Gideon's* promise, it will take a combination of increased funding and the cooperation of prosecutors and judges to identify legally acceptable ways of reducing public defender caseloads while still protecting the rights of the accused and public safety. If these approaches are not taken, ultimately courts must permit public defender programs to limit case intake to acceptable, ethical limits. Until indigent defense systems consistently provide the accused with lawyers who have the time and support

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112. See Lefstein & Vagenas, *supra* note 41, at 17.

113. See JUSTICE DENIED, *supra* note 3, at 142.

114. *Gideon v. Wainwright*, 372 U.S. 332, 344 (1963).

115. The prosecutor has a special obligation to seek justice because the prosecutor represents the government's interest, whose goal is “not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

116. The prevailing ethics rule explains: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[,] . . . that guilt is decided upon the basis of sufficient evidence,” and that special precautions are taken to prevent and to rectify the conviction of innocent persons. MODEL RULES, *supra* note 48, at R. 3.8 cmt.

to comply with both the legal standard for adequate representation of counsel and the ethical standard of competent client representation, the promise of *Gideon* will remain unfulfilled.