

University of Chicago Legal Forum

Volume 2018

Article 10

2019

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Recommended Citation

Siegler, Alison and Zunkel, Erica (2019) "“I Got the Shotgun, You Got the Briefcase” : Criminal Defense Ethics in *The Wire*," *University of Chicago Legal Forum*: Vol. 2018 , Article 10.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2018/iss1/10>

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“I Got the Shotgun, You Got the Briefcase”: Criminal Defense Ethics in *The Wire*

Alison Siegler & Erica Zunkel[†]

INTRODUCTION

The Wire portrays criminal defense attorney Maury Levy as unethical and unscrupulous, the paradigmatic hired gun. In a key scene, the honorable anti-hero Omar Little draws a stark parallel between Levy and those who deal and steal drugs:

Levy: “You are amoral, are you not? You’re feeding off the violence and the despair of the drug trade. You’re stealing from those who themselves are stealing the lifeblood from our city. You are a parasite who leaches off . . .”

Omar: “Just like you”

Levy: “. . . the culture of drugs. Excuse me? What?”

Omar: “I got the shotgun, you got the briefcase. It’s all in the Game though, right?”¹

Levy is ethically complicated. At one level, he engages in extremely effective and zealous lawyering; at another level he abdicates his ethical duties. Over the course of the series, Levy represents two major street gangs, the Barksdale drug organization and the Stanfield drug organization. When Levy represents people at the top of a drug organization, he adheres to the criminal defense lawyer’s central ethical duty: he provides his clients with zealous representation and argues passionately

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¹ *The Wire: All Prologue* (HBO television broadcast July 6, 2003) (Season Two, Episode Six).

on their behalf. However, Levy deviates from the duty of zealous representation when he represents rank-and-file members of the gang whose interests diverge from those of the organization's leaders.

When representing rank-and-file members, Levy not only violates his duty of zealousness but also violates a related ethical duty: the duty of loyalty. When a lawyer represents all of the members of a criminal organization, an inherent conflict of interest arises under the ethical rules because different clients often have divergent objectives.² Levy's behavior highlights this problem. Rather than zealously representing those lower down on the organization's ladder, Levy treats them as expendable pawns. He protects the larger organization that lines his pockets by sacrificing the liberty and even the lives of certain members in the name of the larger drug organization.

The ethical problem created by multiple representations is particularly acute in Levy's case because he affirmatively chooses to elevate the interests of the larger drug organization and its leaders above the interests of his other clients. The reason Levy provides legal representation to everyone in the organization is precisely because it enables him to protect the people at the top, to sacrifice the little fish for the big fish, and to prevent rank-and-file members from cooperating against the larger organization.

At times, Levy crosses over the ethical line into downright criminal behavior, aiding and abetting the illegal activities and violence of the gang members he represents. One example of Levy crossing the line occurs after police seize drugs and money from Levy's clients in the Barksdale drug organization. Levy suggests that the organization's leaders, Avon Barksdale and Stringer Bell, "take stock and . . . ask yourself what's out there that could still hurt you; where are you weak, where you need to clean up."³ In the process, Levy specifically mentions Nakesha Lyles, a security guard who previously testified against a member of the Barksdale organization in a murder trial.⁴ Levy warns: "The point is, anybody who can hurt you can be put into play. The less I hear, the better."⁵ His implication is clear: Levy wants the organization to dispose of any potential witnesses. Heeding their lawyer's advice, the organization's leaders arrange for the guard's murder.⁶

As the series progresses, Levy's behavior remains unethical and his conflicts of interest worsen. During his representation of the Marlo

² See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013).

³ *The Wire: Cleaning Up* (HBO television broadcast Sept. 1, 2002) (Season One, Episode Twelve).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Stanfield organization in Season Five, Levy continues to veer from unethical representation to outright criminality.⁷ One example of that is when Levy is confronted by Assistant State's Attorney Rhonda Pearlman with evidence that he paid court employees for confidential grand jury information.⁸ Levy responds by making a deal with Pearlman that saves him from prosecution and ensures that several members of the Stanfield organization go to prison.⁹ Perhaps this devolution from unethical to criminal results from the fact that there are no external constraints on Levy over the course of the series. Although law enforcement reins in the criminal organizations for a time, there is often no check on the institutional players—the police, the prosecutors, and Levy.

Levy's highly inconsistent adherence to his ethical duties highlights a fundamental dichotomy in the criminal defense world: the distinction between privately retained lawyers who represent criminal organizations, and public defenders who represent individual indigent clients. Public defenders are trained to take a client-centered approach to achieve the best outcome for each individual client. Unlike a retained lawyer who represents the head of a drug organization and the rank-and-file members alike, the public defender's loyalties are not divided.

Unfortunately, *The Wire* gives us only a brief glimpse into this dichotomy and thus misses an opportunity to paint a complex portrait of the public defender, a major player in the urban criminal justice system the series depicts so realistically. Instead, by focusing on Levy, the series provides a caricatured portrait of the criminal defense lawyer as cold, self-interested, and unprincipled.

This Article progresses in four parts. Part I explores the ethical rules that guide criminal defense lawyers, discussing the requirement that attorneys engage in zealous advocacy for their clients, the duty of loyalty, and the conditions under which these ethical rules operate. Parts II and III apply these ethical rules to Levy's representation of members of the Barksdale and Stanfield organizations respectively, finding that, while Levy fulfills his duty to zealously defend members whose interests align with those of the organization, he operates under clear conflicts of interest that lead him to sacrifice lower-ranking or disloyal members. Part IV analyzes the missed opportunity for *The Wire* to explore the role of the public defender in the criminal justice system and to further highlight the stark contrast between Levy's representation and that of other attorneys. Finally, Part V examines potential approaches that would prevent conflicts of interest like Levy's without unnecessarily limiting client autonomy. This Article concludes that courts

⁷ *The Wire: -30-* (HBO television broadcast Mar. 9, 2008) (Season Five, Episode Ten).

⁸ *Id.*

⁹ *Id.*

can protect defendants from potential conflicts of interest by appointing an independent attorney to advise the defendant when joint representation presents a high likelihood of a potential conflict. With that attorney's guidance, the defendant can decide whether waiving the conflict is in his or her best interests.

I. CRIMINAL DEFENSE ETHICS AND CONFLICTS OF INTEREST

The central ethical duty that binds Maury Levy and all lawyers is zealous advocacy for one's client. Specifically, "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."¹⁰ This requirement of zealous advocacy imposes on lawyers a broad obligation to pursue their clients' interests "despite opposition, obstruction or personal inconvenience to the lawyer."¹¹ In the attorney-client relationship, the client's interests are paramount. Of course, this requirement is not without its limits. A lawyer may not, for example, help a client engage in criminal conduct.¹²

In the criminal context, the ethical rule requiring zealous advocacy includes a constitutional dimension. Under the Sixth Amendment, criminal defendants are guaranteed the assistance of counsel, and the Supreme Court has interpreted this provision to require the government to provide such counsel free of charge if the defendant cannot afford retained counsel.¹³ Without a lawyer's assistance, "[e]ven the intelligent and educated layman" "lacks both the skill and knowledge adequately to prepare his [or her] defense . . ."¹⁴ The Sixth Amendment ensures that this lack of legal training will not prevent a defendant from vindicating his or her rights.

It is not enough, though, for a defendant to merely have a lawyer. Instead, "the right to counsel is the right to the effective assistance of counsel."¹⁵ Admittedly, the Supreme Court's standard for effective assistance of counsel, established in *Strickland v. Washington*,¹⁶ leaves much unanswered in terms of the specific actions a lawyer must or must

¹⁰ MODEL RULES OF PROF'L CONDUCT r. 1.3, cmt. 1 (AM. BAR ASS'N 2013).

¹¹ *Id.*

¹² *Id.* at r. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

¹³ See *Argersinger v. Hamlin*, 407 U.S. 25, 37–38 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 465, 467–68 (1938).

¹⁴ *Gideon*, 372 U.S. at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

¹⁶ 466 U.S. 668 (1984).

not take.¹⁷ At the very least, though, “counsel must take all reasonable lawful means to attain the objectives of the client.”¹⁸

A. The Lawyer’s Duty of Loyalty and Conflicts of Interest

In order to provide the zealous and effective representation required under the Model Rules of Professional Conduct and the Sixth Amendment, attorneys must maintain loyalty to their clients at all times.¹⁹ To that end, the Model Rules state that a lawyer shall not represent a client if “the representation of one client will be directly adverse to another client,” or even if “there is a significant risk that the representation of one or more clients will be materially limited” by the lawyer’s representation of other clients.²⁰ It is not enough for counsel to be a competent and skilled lawyer in general. Instead, it is essential for counsel to be capable of providing “undivided assistance.”²¹ In *Glasser v. United States*,²² the Court emphasized a judge’s “duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client”²³

At least when it comes to criminal defense, the Model Rules are unwilling to rely on the good will of attorneys to fulfill their duty of loyalty in the face of conflict. Indeed, the Rules specifically note that “[t]he potential for conflict of interest in representing multiple defendants in a criminal case [with divergent interests] is ‘so grave’ that ordinarily a lawyer should decline to represent more than one codefendant.”²⁴ For example, codefendants may face pressure to testify against one another in exchange for a more generous plea bargain from prosecutors, placing their interests in direct conflict. Even if a civil lawyer may be able to carry out similar representation without problems, criminal defense lawyers must stay especially vigilant of the potential for conflicts of interest when representing multiple defendants in order to avoid depriving their clients of the zealous advocacy required by the Sixth Amendment.²⁵

¹⁷ *Id.* at 688 (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”).

¹⁸ *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

¹⁹ See MODEL RULES OF PROF’L CONDUCT r. 1.7, cmt. 1 (AM. BAR ASS’N 2013) (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

²⁰ *Id.* at r. 1.7(a)(1) and (2).

²¹ *Glasser v. United States*, 315 U.S. 60, 76 (1942) (emphasis added).

²² 315 U.S. 60 (1942).

²³ *Id.* at 76.

²⁴ See MODEL RULES OF PROF’L CONDUCT r. 1.7, cmt. 23 (AM. BAR ASS’N 2013).

²⁵ See *id.* (noting that, while a lawyer should refuse to represent more than one codefendant in a criminal case, “common representation of persons having similar interests in civil litigation is

The particular dangers of conflicts in the criminal context are also reflected in Supreme Court precedent. As the Supreme Court recognized in *Wood v. Georgia*,²⁶ it is especially difficult to maintain the duty of loyalty when the operator of an alleged criminal enterprise hires and pays a lawyer to represent his employees.²⁷ A lawyer in that situation must choose between the interests of the people whom he represents and the people who pay his bills. Faced with that choice, “[o]ne risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer’s interest.”²⁸ At the very least, it is “inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee’s testimony.”²⁹

These problems are so serious that the Court has even been willing to relax its constitutional standard for ineffective assistance of counsel in the conflicts context. In *Strickland*, the Supreme Court held that “any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”³⁰ However, defendants are *not* required to show prejudice “when counsel is burdened by an actual conflict of interest”³¹—that is, “a conflict of interest that adversely affects counsel’s performance.”³² The Court does not require a separate investigation into whether the adverse effect of counsel’s performance was severe enough to substantially affect the defendant’s legal rights. This is because it is so difficult to identify the exact way in which such a conflict may have hindered a lawyer’s representation in a particular case; instead, prejudice is presumed.³³ The *Strickland* standard, while never easy for defendants to meet, is at least less onerous when a defendant can show an actual conflict.

The Supreme Court treats conflicts of interest with particular caution and skepticism. In *Wood*, the Court was willing to vacate the trial court’s decision to deny the defendants’ motion to modify the conditions of their probation because the defendants’ lawyer was hired and paid

proper” in many circumstances).

²⁶ 450 U.S. 261 (1981).

²⁷ *Id.* at 268–69.

²⁸ *Id.* at 269.

²⁹ *Id.* at 269 n.15 (quoting *In re Abrams*, 266 A.2d 275, 278 (N.J. 1970)).

³⁰ *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

³¹ *Id.*

³² *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002).

³³ *See Strickland*, 466 U.S. at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (1980)).

by their employer.³⁴ Although the defendants could not point to a specific decision by counsel that harmed their defense, the Court demanded that the trial court revisit the issue of counsel and take greater care to ensure that the defendants receive truly dedicated representation.³⁵ This stands in marked contrast to courts' usual approach under *Strickland*, which some commentators criticize as requiring little more than a "warm body" in the courtroom.³⁶

As a result of the presumption of prejudice, appellate courts have reversed convictions in cases where a defendant has shown that his or her trial lawyer was subject to an actual conflict of interest. The Sixth Circuit, for example, affirmed the district court's grant of a writ of habeas corpus when counsel simultaneously represented mother and daughter codefendants in a drug case.³⁷ In that case, police found drugs in the home where the mother and daughter both lived.³⁸ An unconflicted lawyer representing the mother could have made the obvious argument that the drugs belonged to the daughter. While such a trial strategy would place the daughter's interests in jeopardy, counsel's failure to pursue that strategy was not in the mother's best interests.³⁹ The court saw no need to decide whether the alternative strategy actually would have changed the outcome of the trial; this "evidence of disloyalty" alone sufficed to show that the mother had received ineffective assistance of counsel.⁴⁰

In another case, the Eleventh Circuit found an actual conflict and granted habeas corpus relief when an attorney represented the defendant in a murder trial while also representing the murder victim's sister in a civil case seeking the victim's life insurance benefits.⁴¹ The court reversed the defendant's conviction even though the two clients were not involved in the same criminal case because the defendant demonstrated an actual conflict of interest that in turn adversely affected counsel's representation.⁴² Even when conflicting representations are

³⁴ *Wood*, 450 U.S. at 264–65.

³⁵ *Id.* at 273–74.

³⁶ See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1740 (1993) (noting that public defenders sometimes refer to the *Strickland* test as the "warm body" test); see also Abbe Smith, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship: The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 92 (2003) ("Actually, a warm body might be benign compared to some of the dangerous, dim-witted defenders that roam the criminal courts.").

³⁷ See *McFarland v. Yukins*, 356 F.3d 688, 691–92 (6th Cir. 2004).

³⁸ *Id.* at 702–03.

³⁹ *Id.* at 707.

⁴⁰ *Id.*

⁴¹ See *McConico v. Alabama*, 919 F.2d 1543, 1545 (11th Cir. 1990).

⁴² *Id.* at 1549–50.

not simultaneous, courts endeavor to protect defendants' Sixth Amendment rights. For example, the Eighth Circuit granted habeas corpus relief for a defendant whose attorney had previously represented a codefendant who implicated the defendant at trial.⁴³

B. Waiving Conflicts of Interest

While courts are clearly concerned with how conflicts of interest undermine the right to effective assistance of counsel, regulation of the attorney-client relationship also grants significant deference to clients' decisions about their representation.⁴⁴ As such, the Model Rules allow a lawyer to represent multiple clients notwithstanding a potential conflict of interest as long as, among other things, "each affected client gives informed consent, confirmed in writing."⁴⁵

A defendant's ability to waive potential conflicts is not unlimited, though. Rather, a court "confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel."⁴⁶ In *Wheat v. United States*,⁴⁷ mere days before trial, defendant Wheat asked to be represented by the attorney for two of his coconspirators in the same drug distribution scheme—Bravo and Gomez-Barajas—both of whom had already pled guilty.⁴⁸ The conflict was that the government intended to call Bravo to testify against Wheat at trial.⁴⁹ The Supreme Court affirmed the trial court's refusal to allow one attorney to represent all three coconspirators under these circumstances, even though the codefendants specifically requested the joint representation and offered to waive the potential conflict.⁵⁰ The Court held that, although the Sixth Amendment establishes a presumption in favor of counsel of choice, "[f]ederal courts

⁴³ See *Dawan v. Lockhart*, 31 F.3d 718, 722 (8th Cir. 1994). For a more in-depth explanation of the test the Eighth Circuit uses to determine whether prejudice is presumed, see *id.* at 721 ("If a court requires an attorney to represent two co-defendants whose interests are in conflict, the court has violated the defendants' right to the effective assistance of counsel. Moreover, if the trial court either fails to make an investigation into the source of the conflict in light of a timely objection, or fails to do so when the court knows or reasonably should know that a conflict exists, reversal is automatic. If a defendant has not made a timely objection to his counsel on the grounds of conflict of interest, then he must demonstrate actual conflict and an adverse effect on the representation.") (citations omitted).

⁴⁴ See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM BAR ASS'N 2013) (granting clients the ability to make decisions regarding the nature and objectives of representation).

⁴⁵ *Id.* at r. 1.7(b)(4).

⁴⁶ *Wheat v. United States*, 486 U.S. 153, 160 (1988).

⁴⁷ 486 U.S. 153 (1988).

⁴⁸ *Id.* at 155.

⁴⁹ *Id.* at 156.

⁵⁰ *Id.* at 163–64.

have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.”⁵¹ This interest requires courts to actively investigate potential conflicts and act with substantial latitude in refusing waiver.⁵²

II. MONEY BEFORE CLIENTS: MAURY LEVY AND THE BARKSDALE ORGANIZATION

Maury Levy’s conduct as an attorney for the Barksdale organization starkly illustrates the ethical dangers of multiple representations. Levy’s role as the organization’s lawyer does not just create a “significant risk” that the representation of one client will be “materially limited” by his representation of another client.⁵³ Rather, even when the leaders’ interests are “directly adverse” to the interests of the rank-and-file members, Levy still prioritizes the leaders’ interests because they pay his bills.⁵⁴

A. Levy and Avon: Defending the Ringleader

When Levy represents the organization’s leaders, he zealously advocates on their behalf. Throughout his representation of Avon Barksdale—the head of the Barksdale organization—Levy scrupulously adheres to the duty of zealous representation. Levy’s advocacy on behalf of Avon occurs behind the scenes in the form of negotiation with other players in the system. In this respect, *The Wire*’s portrayal of Levy departs from caricature and reflects a reality of criminal defense practice rarely portrayed in the media: many battles are won through negotiation rather than courtroom showmanship.

In the last episode of Season One, Levy negotiates with the prosecutors to secure a favorable plea agreement for Avon.⁵⁵ The prosecutors demand that Avon’s guilty plea result in a lengthy prison sentence, but Levy pushes back forcefully.⁵⁶ He initially asks the prosecutors to agree to a plea to attempted possession of drugs and a very low sentence of three to four years.⁵⁷ Faced with a difficult case and steep odds, Levy is unable to convince the state to accept such a lenient sentence for Avon.⁵⁸

⁵¹ *Id.* at 160.

⁵² *Id.* at 163.

⁵³ See MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (AM BAR ASS’N 2013).

⁵⁴ See, e.g., *id.* at r. 1.7(a)(1).

⁵⁵ *The Wire: Sentencing* (HBO television broadcast Sept. 8, 2002) (Season One, Episode Thirteen).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

However, through his dedicated representation, Levy ultimately secures an extremely short agreed sentence of seven years for a single count of possession with intent to distribute one kilo of heroin.⁵⁹ During this deft negotiation, Levy notes that the government only has circumstantial evidence against Avon and warns that a Baltimore jury is unlikely to convict Avon based on “half-heard, half-said telephone conversations.”⁶⁰

By negotiating the seven-year agreed plea deal, Levy avoids the far more extensive drug, gun, conspiracy, and even murder charges that could have been brought based on Avon’s role in the Barksdale organization. As the prosecutors say, “We’ve got seized money and a lot of dope on the table,” “and a lot of violence.”⁶¹ The plea Levy negotiates also avoids a contested sentencing hearing where a judge assessing all of the evidence might decide to send Avon to prison for far longer. Admittedly, Levy secures this remarkably lenient sentence in part by selling out lower-ranking members of the Barksdale organization,⁶² but he also engages in a fair share of zealous and legitimate advocacy in the process.

Like any good criminal defense lawyer, Levy does not simply accept Avon’s seven-year sentence. Instead, as Season Two begins, Levy continues to fight zealously for an early release.⁶³ Avon has begun serving his prison sentence, so the matter is out of the hands of the prosecutors.⁶⁴ Levy therefore proceeds to negotiate with officials from the Department of Corrections, who are the relevant decision makers at this stage of the process.⁶⁵ Although Avon is not due to be considered for parole until he is two years into his sentence, Levy drives a hard bargain and negotiates an early parole hearing for him, pledging that in exchange, Avon will provide information about drug smuggling within the prison.⁶⁶ The deal pays off: in Season Three, Avon receives his early parole hearing.⁶⁷ Thanks to Levy’s shrewd representation, Avon is released after serving just one year of his seven-year sentence.⁶⁸

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *infra* Part II.C.

⁶³ *The Wire: Hard Cases* (HBO television broadcast June 22, 2003) (Season Two, Episode Four).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *The Wire: Hamsterdam* (HBO television broadcast Oct. 10, 2004) (Season Three, Episode Four).

⁶⁸ *Id.*

None of this is meant to imply that Levy's representation of Avon is free of ethical problems. Indeed, it is no accident that Avon could provide information about the corrections officer responsible for smuggling a batch of tainted drugs into the prison because Avon was responsible for supplying the officer with the drugs in the first place.⁶⁹ When Levy suggests that officials should search the officer's vehicle to find the drugs,⁷⁰ it is hard to avoid the conclusion that Levy knew of Avon's involvement and still helped his client dupe the Department of Corrections into granting an early release. Levy does everything he can to keep one of his most lucrative clients happy, pursuing every possible path to secure Avon's freedom, without regard to ethical boundaries.

B. Levy and Bodie: Protecting Loyal Members

Levy also litigates to the hilt on behalf of individual members of the Barksdale organization whose interests align with those of the organization. This is evident from his representation of Bodie, a young street-level drug dealer. When Bodie is arrested after assaulting a police officer and escaping from a juvenile detention facility,⁷¹ Levy advocates for his release at a bond hearing.⁷²

As a technical matter, Levy's bond argument for Bodie exemplifies top-notch advocacy: he provides mitigating evidence regarding Bodie's offense (escape) and discusses the particular personal circumstances that render Bodie a good prospect for pretrial release.⁷³ Levy portrays Bodie as the victim of a vicious police beating who left detention while heavily medicated and unsure of his surroundings.⁷⁴ Levy acknowledges his client's checkered past, but specifically notes that his young client was "manipulated by older traffickers in his neighborhood."⁷⁵ Levy and his associate back up their request for release with documentation aimed at demonstrating that Bodie is a good candidate for bond, including "signed statements from [Bodie's] sponsors at the Police Athletic League" and evidence "which indicates that he is enrolled in the GED program at the Baltimore City Community College."⁷⁶ When the judge relents and announces that he will place Bodie on electronic home monitoring at his grandmother's house, Levy objects on the ground that

⁶⁹ *The Wire: Hot Shots* (HBO television broadcast June 15, 2003) (Season Two, Episode Three).

⁷⁰ *The Wire: Hard Cases*, *supra* note 63 (Season Two, Episode Four).

⁷¹ *The Wire: Old Cases* (HBO television broadcast June 23, 2002) (Season One, Episode Four).

⁷² *The Wire: The Wire* (HBO television broadcast July 7, 2002) (Season One, Episode Six).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

the grandmother does not have a phone because she's "on a fixed income, Your Honor."⁷⁷ In response, the judge reduces the conditions of release still further, suggesting that Bodie simply call his probation officer twice a week.⁷⁸ In the end, Levy's advocacy keeps Bodie out of juvenile detention and off electronic surveillance.⁷⁹

Levy's adherence to his duty of zealous representation, however, is marred by his violation of his duty of candor to the tribunal.⁸⁰ The facts that Levy spins so persuasively are actually a web of lies and half-truths. Levy even lies about the nature of his representation and his own financial interest in the case. Levy pretends that he is providing pro bono representation for at-risk youth when, in fact, he has been retained by the Barksdale organization and is ensuring that Bodie can return to working for them.⁸¹

C. Levy, D'Angelo, and Orlando: Taking Care of Enemies

There is a stark contrast between the vigorous advocacy Levy provides to Avon and Bodie, and the way Levy treats rank-and-file members whose interests diverge from those of the organization. This distinction is highlighted by Levy's representation of Avon's nephew—D'Angelo—over the course of Season One. At the beginning of the season, D'Angelo's interests are aligned with those of the organization and Levy represents him zealously. As the season progresses, however, D'Angelo's interests diverge from the organization's, and he recognizes that Levy's allegiance is to the leaders, not to him. At that point, a public defender steps in to represent D'Angelo and offers him uncompromised and unconflicted representation, creating a stark contrast with Levy's self-interested approach to lawyering.⁸²

As the series opens, Levy is zealously defending D'Angelo on a murder charge. Levy cross-examines a state's witness, casting doubt on the veracity of that witness's identification.⁸³ D'Angelo is ultimately acquitted because one of the witnesses against him recants at the last minute due to pressure from the Barksdale organization.⁸⁴ Later, when police interrogate D'Angelo about the death of a different witness who testi-

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM BAR ASS'N 2013).

⁸¹ *The Wire: The Wire*, *supra* note 72 (Season One, Episode Six).

⁸² *The Wire: Sentencing*, *supra* note 55 (Season One, Episode Thirteen).

⁸³ *The Wire: The Target* (HBO television broadcast June 2, 2002) (Season One, Episode One).

⁸⁴ *Id.*

fied against him in that murder case, Levy continues to represent D'Angelo in an effective, if not kind or sensitive, manner.⁸⁵ Levy advises D'Angelo not to answer any questions and demands his release in the absence of probable cause.⁸⁶

But in the penultimate episode of the season, D'Angelo angrily fires Levy despite the disapproval of Avon's right hand man, Stringer Bell.⁸⁷ The firing is prompted by D'Angelo's concern for his friend Wallace, who D'Angelo suspects (and he is right) was killed by the organization.⁸⁸ D'Angelo says: "I don't want this Payless-wearing motherfucker representing me. Ima get my own man. Alright. So just get back in your car and get the fuck back down south."⁸⁹

In the very next episode, Levy demonstrates his approach toward those who could undermine the organization. When Stringer mentions that the organization needs to post bond for its rank-and-file members to avoid making "enemies," Levy immediately brings up D'Angelo: "Speaking of which, where are you with your nephew? Is he gonna see the light or what?"⁹⁰ Avon responds by assuring Levy that D'Angelo is not going to cooperate against the organization: "He family. Aight? He not gonna bark."⁹¹ But Levy's implication could not be clearer. Levy sees anyone who can harm the Barksdale organization—even one of his own clients—as an enemy. It is hard to imagine a situation more likely to create conflicts of interest for a criminal defense attorney.

Later in that same episode, we learn that D'Angelo has chosen to be represented by a public defender rather than Levy.⁹² The public defender takes a dramatically different approach to the representation of D'Angelo. She immediately recognizes that, in fact, the best thing D'Angelo can do for himself is to cooperate against the organization, and she zealously advocates for his individual interests even though they are diametrically opposed to those of the organization.⁹³ The public defender offers D'Angelo the same kind of zealous advocacy Levy always offers to loyal members of the organization. The public defender's representation of D'Angelo reminds us that zealous advocacy could be available to everyone in the Barksdale organization.

⁸⁵ *The Wire: The Detail* (HBO television broadcast June 9, 2002) (Season One, Episode Two).

⁸⁶ *Id.*

⁸⁷ *The Wire: Cleaning Up*, *supra* note 3 (Season One, Episode Twelve).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *The Wire: Sentencing*, *supra* note 55 (Season One, Episode Thirteen).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

The public defender's only scene in the series arises when she takes D'Angelo in for a proffer session with the prosecutors.⁹⁴ This sort of meeting involves a defendant providing information about other criminal activity in the hopes of obtaining a more lenient plea bargain. During the course of this session, the public defender insists on getting a favorable deal for D'Angelo and ensures that the prosecutors give D'Angelo the promise of what is known as proffer protection, which prevents prosecutors from relying on statements made during a proffer at a later trial or sentencing.⁹⁵ The public defender says: "But again, I want to make it clear that all of this cooperation is contingent on a commitment that my client finds acceptable. Failing that, everything said in here stays in here."⁹⁶

The public defender is a clear contrast to Levy—she is compassionate, respectful, and appears genuinely concerned about D'Angelo's best interests. It is notable that she stands by D'Angelo's decision to cooperate against the Barksdale organization. Cooperation against the organization is something that Avon, Stringer, and Levy do everything in their power to prevent. For example, in the opening scene of the series, the viewer sees security guard Nakeesha Lyles change her story on the stand and refuse to identify D'Angelo in his murder trial.⁹⁷ Stringer watches Lyles testify in court, and his demeanor makes clear that he is behind the change in her testimony.⁹⁸ By convincing Lyles, originally a cooperating state's witness, to change her story, the organization neutralizes her otherwise damning testimony. As a result, D'Angelo is acquitted.⁹⁹ (As noted earlier, Levy continues to consider Lyles a threat and she is ultimately killed.)

While there are arguments to be made about whether cooperation would be in D'Angelo's best interests given the brutality of the Barksdale organization, Levy never even presents this option to D'Angelo (or any other client). In fact, Levy does the opposite, making clear to D'Angelo at the time of his arrest that cooperation with the State's Attorney will not be tolerated.¹⁰⁰ When Levy and Stringer first visit D'Angelo at the jail, D'Angelo asks who is going to take the fall for the drugs. Levy responds, "Kid, you better think."¹⁰¹ As D'Angelo changes over the course of the season from a loyal soldier into a risky weak link in the

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *The Wire: The Target*, *supra* note 83 (Season One, Episode One).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *The Wire: Cleaning Up*, *supra* note 3 (Season One, Episode Twelve).

¹⁰¹ *Id.*

Barksdale organization, Levy also changes from a zealous advocate into an enforcer who puts the organization's interests ahead of D'Angelo's.

But with the public defender supporting him, D'Angelo sees that cooperation might just be the path to a different life. When Detective Jimmy McNulty tells him at the end of the proffer session that he's done well, D'Angelo responds:

Y'all don't understand, man. Y'all don't get it. You grow up in this shit All my people man, my father, my uncles, my cousins, it's just what we do. You just live this shit until you can't breathe no more. . . . I was freer in jail than I was at home. . . . I want to start over. That's what I want. I don't care where. Anywhere. I don't give a fuck. I just want to go somewhere where I can breathe like regular folk. You give me that and I'll give you them.¹⁰²

Cooperation offers D'Angelo the chance to break free—free of the “shit,” free of the Barksdale “family,” free of “the Game.” He's so trapped by the organization that even jail feels liberating. He's willing to give up the organization—both literally and figuratively—in exchange for that freedom: “You give me that and I'll give you them.”¹⁰³

But the pull of the Barksdale organization and its lawyer is just too strong. Towards the end of the episode, we learn through a riveting, almost entirely visual sequence that Levy is once again representing D'Angelo.¹⁰⁴ Levy takes a phone call in the jail and the camera pans to show us, through bars, a defeated shot of D'Angelo.¹⁰⁵ His head is in his hands, and his mother, Brianna, is looking towards Levy.¹⁰⁶ Brianna is Avon's sister; she is in deep with the Barksdale organization's leaders. She is pressing down on D'Angelo's shoulders in a way that does not look at all supportive, but is instead a physical depiction of the pressure the organization has placed on D'Angelo.¹⁰⁷ This scene strongly suggests that the organization has essentially forced D'Angelo to accept Levy back as his lawyer.

¹⁰² *The Wire: Sentencing*, *supra* note 55 (Season One, Episode Thirteen).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*



In the final minutes of Season One, Levy sacrifices D'Angelo's liberty. In this courtroom scene, D'Angelo pleads guilty.¹⁰⁸ From the prosecutor's allocution during the guilty plea proceeding, it becomes clear that D'Angelo is taking the fall for the very conduct Levy avoided having pinned on Avon, the real leader. The prosecutor speaks of D'Angelo as a "leading conspirator" who supervised drug distribution activity and was "integrally involved in the violence attributed to the organization."¹⁰⁹

In addition, although the plea appears to be structured in a way that would allow Levy to request less time than twenty years without hurting the organization as a whole, Levy never tries to bargain over D'Angelo's sentence as he did with Avon's sentence.¹¹⁰ In fact, Levy does not advocate for D'Angelo at all. The prosecutor asks the judge to sentence D'Angelo to twenty years in prison, Levy remains silent, and the judge sentences D'Angelo to twenty years.¹¹¹ When a client is facing a twenty-year maximum and no mandatory minimum sentence, the lawyer is ethically bound to appeal to the judge's discretion by presenting the equities and mitigating factors that weigh in favor of a sentence below the maximum. While a public defender—or any lawyer whose allegiances are not divided—would endeavor to adhere to this ethical duty, Levy shirks it. He has no incentive to secure D'Angelo a lower sentence and probably believes that the organization as a whole would be safer with D'Angelo behind bars.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

In this scene, it is clear that Levy does not see D'Angelo as worthy of the same zealous representation he provides to loyal members of the Barksdale organization, and perhaps does not see D'Angelo as a client at all. Once D'Angelo reveals his disloyalty and shows that he is willing to risk the organization to save himself, Levy treats him as a bargaining chip to preserve the future of the organization that pays his bills and that, to his mind, is his only true client. If D'Angelo had continued being represented by the public defender and cooperating, there is no doubt that he would have secured a much lower sentence in light of how much he knew about the inner-workings of the Barksdale organization. Instead, he goes to prison and ultimately pays for his brief disloyalty with his life. The organization kills D'Angelo in prison, making it look like a suicide.¹¹²

After D'Angelo's death, we learn the full story of why D'Angelo gave up his public defender and returned to Levy—decisions that led to both his incarceration and his murder. As the earlier scene in the prison had suggested, D'Angelo's mother—Brianna—pressured him to change course.¹¹³ This comes out when Brianna hears a rumor that McNulty believes D'Angelo did not commit suicide, but was instead murdered at the behest of the organization's leaders.¹¹⁴ Brianna seeks out McNulty and is in disbelief at his suspicion that her own brother, Avon, might have ordered her son's murder: "Avon and D was family," she says.¹¹⁵ McNulty scoffs, "Family, right."¹¹⁶ He knows that in this "family," money is thicker than blood. McNulty also tells Brianna that he knows she is responsible for convincing D'Angelo not to follow through with cooperating against the organization: "At the end, D'Angelo was this close to flippin', givin' up everybody, everything. But you know all that, right? You were the one who went down to that detention center and talked your son out of a deal."¹¹⁷ When Brianna asks why McNulty didn't come to her with his suspicions about her son's murder, he responds harshly: "Honestly? I was lookin' for somebody who cared about the kid. I mean, like I said, you were the one that made him take the years, right?"¹¹⁸ Brianna begins to cry as it dawns on her that she may have sacrificed her son to protect the organization.¹¹⁹

¹¹² *The Wire: All Prologue*, *supra* note 1 (Season Two, Episode Six).

¹¹³ *The Wire: Sentencing*, *supra* note 55 (Season One, Episode Thirteen).

¹¹⁴ *The Wire: Moral Midgetry* (HBO television broadcast Nov. 14, 2004) (Season Three, Episode Eight).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

D'Angelo is not the only person Levy sacrifices in the name of the organization—the organization and Levy will sacrifice anyone who puts them at risk. Orlando, the owner of a club that the organization used to hide and launder money, finds himself on the losing end of this kind of sacrifice after he is arrested for trying to buy cocaine from an undercover officer.¹²⁰ When Levy meets with Orlando in jail, Orlando expects Levy will act in his interest and post bail on behalf of the Barksdale crew. Instead, Levy orders Orlando to sign paperwork transferring ownership of the club and the club's liquor license.¹²¹ When Orlando objects, Levy makes it clear that he represents the Barksdale organization, not Orlando.¹²² He says: "A front has to be clean, and right now, you ain't that. Sign."¹²³ Levy's actions are driven by the needs of the organization. When Orlando's arrest jeopardizes those interests, Levy protects the organization and leaves Orlando to fend for himself.

In addition to neglecting the needs of individual clients whose interests diverge from those of the Barksdale organization, Levy actively collaborates with the organization's leaders to maximize the benefits of selling out his other clients. During the final episode of Season One, he tells Avon and Stringer: "I want you to start thinking about who was charged and what kind of time they can do. One of the ways to limit your exposure is what's called a structured plea. That means that you're gonna have to deliver your people, all of 'em, down to a man."¹²⁴ In this scene, Levy abdicates all responsibility for his rank-and-file clients, instead handing over the decision about their fates to the organization's leaders. He gives the leaders the power to save themselves and "limit" their own "exposure" by deciding the length of his other clients' sentences. This is perhaps the most egregious example of Levy repudiating his duty of loyalty to his rank-and-file clients.

III. LEVY'S REPRESENTATION OF THE MARLO STANFIELD ORGANIZATION: MORE CONTRADICTIONS AND CARICATURE

Throughout the early seasons of *The Wire*, Levy's representation revolves around the Barksdale organization and its major players. That changes when the Barksdale organization crumbles at the end of Season Three. Avon is in prison, Stringer is dead, and there's a new drug king in town: Marlo Stanfield.¹²⁵ *The Wire* portrays Marlo as a more

¹²⁰ *The Wire: The Cost* (HBO television broadcast Aug. 11, 2002) (Season One, Episode Ten).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *The Wire: Sentencing*, *supra* note 55 (Season One, Episode Thirteen).

¹²⁵ *The Wire: Mission Accomplished* (HBO television broadcast Dec. 19, 2004) (Season Three, Episode Twelve).

vicious and violent Avon who will stop at nothing to solidify his power. Marlo's number two is Chris Partlow, who is himself a more vicious and violent version of Avon's number two, Stringer.

Viewers are introduced to Marlo for the first time at the beginning of Season Three. Bubbles and Johnny, two down-on-their-luck addicts, are wheeling an old shopping cart full of scrap metal down the street when they lose control of the cart and it runs into a black SUV.¹²⁶ Several young men come out of a nearby home and start yelling at Bubbles and Johnny.¹²⁷ One of the men puts a gun to Johnny's head.¹²⁸ Hearing the commotion, Marlo comes to the door and asks what's happening.¹²⁹ The man replies, "Look what they did to my ride!"¹³⁰ Marlo responds matter-of-factly: "Do it or don't, but I've got someplace to be."¹³¹ This scene is quintessential Marlo: cold, unemotional, and savage. He doesn't care whether his guy kills Johnny or not; he's focused on his own plans.

Marlo and his organization become Levy's most important clients in Season Five. Through the lens of Levy's representation of the Stanfield organization, we see additional examples of the contradictions he presents: his unethical, illegal conduct on the one hand, and his zealous lawyering on the other. Like before, Levy is willing to sell out anyone below Marlo to further his own goals, and he does it in a way that is not only unethical, but criminal. At the same time, Levy continues to show deep loyalty and zealousness to the head of the organization who pays his bills—Marlo—as well as to the people whose interests are aligned with Marlo's interests.

The first example of Levy's unethical and criminal behavior in his representation of the Stanfield organization comes when Levy meets with Marlo, Chris, and Snoop, who is a high-ranking member of the Stanfield organization, to discuss the organization's business.¹³² The three are concerned about Chris and Snoop's arrest, where officers found guns in a secret compartment of the car they were driving.¹³³ Chris and Snoop make clear to Levy that they can't do prison time and neither can the car's owner.¹³⁴ Levy responds that they should "get

¹²⁶ *The Wire: Time After Time* (HBO television broadcast Sept. 19, 2004) (Season Three, Episode One).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *The Wire: React Quotes* (HBO television broadcast Feb. 3, 2008) (Season Five, Episode Five).

¹³³ *Id.*

¹³⁴ *Id.*

someone who can [do time], preferably someone without priors, someone you trust to stand the charge.”¹³⁵ Levy’s response is nonchalant. This is standard operating procedure for him and he knows that this approach—finding a scapegoat to protect those at the top of the drug trafficking organization—will win him Marlo’s future business.

Levy works to keep Marlo happy by directing O-Dog—the organization’s fall guy for Chris and Snoop—to commit perjury and say that the gun was his. Snoop brings O-Dog to Levy’s office and Levy tells him what he needs to do. O-Dog responds, “[W]hatever guns them cops took out the truck last year, they mine, even though I ain’t touch that iron.”¹³⁶ O-Dog thus assures Levy that he will falsely admit to owning the seized guns, although, in truth, the guns did not belong to him and he never even touched them. Levy nevertheless barrels forward, unfazed by this claim of innocence. It’s all business to him. In preparation for O-Dog’s guilty plea hearing, Levy instructs him to “[f]amiliarize yourself with the make and model of the weapons you left in the truck, Mr. Hill. The details matter.”¹³⁷

Of course, Levy’s conduct is illegal and a clear violation of several ethical rules. He knows that O-Dog is going to commit perjury by falsely claiming the guns are his. Levy knows this not only from O-Dog’s own statements, but from how Chris and Snoop tell him that they can’t do the time and neither can the registered owner of the car. In addition, any competent, ethical attorney would know that Levy’s representation of Marlo, Chris, Snoop, and O-Dog presents an untenable conflict. But Levy wants to satisfy Marlo, who pays his bills. Marlo doesn’t want Chris and Snoop to go to jail. So O-Dog, a low-level crew member, is forced to take the fall, even though all signs point to him being innocent.¹³⁸ At no point does Levy seek a conflict waiver in which any of these individuals accept the concurrent conflicts of interest, as the ethics rules require.¹³⁹ Instead, Levy ensures Marlo’s continued business by representing everyone without advising clients like O-Dog of their right to conflict-free representation, unmoved by the fact that the joint representation tramples O-Dog’s individual interests.

After Levy makes the unethical and criminal suggestion that Marlo and his crew find someone to commit perjury and take the fall for Chris and Snoop, Marlo leaves Levy with a check and something even more

¹³⁵ *Id.*

¹³⁶ *The Wire: Late Editions* (HBO television broadcast Mar. 2, 2008) (Season Five, Episode Nine).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See MODEL RULES OF PROF’L CONDUCT r. 1.7(b)(4) (AM BAR ASS’N 2013).

valuable to Levy—Marlo’s phone number.¹⁴⁰ Levy knows this means business for his firm. Levy tells Herc, a disgraced former Baltimore police officer whom Levy hires as a private investigator, “I have a feeling this firm is going to have quite a payday from Mr. Stanfield and his people. He just gave me his phone number. If Marlo Stanfield is using a cell phone, it’s just a matter of time before we are up to our asses in pretrial motions, litigating a wiretap case.”¹⁴¹

The second example of Levy’s unethical and criminal behavior on behalf of the Stanfield organization occurs when Marlo and his crew are arrested for various drug-related offenses at the end of the series. Levy’s loyalty to Marlo and those at the top of Marlo’s organization pays off when Levy is called on to represent them.¹⁴² With the bust, Levy has numerous clients to represent simultaneously: Cheese and Monk (two higher-level players in the Stanfield organization), Chris, and, of course, Marlo.¹⁴³ The four are arrested and taken to jail.¹⁴⁴ Levy represents all of them at their first appearance and is only able to negotiate for Cheese to be released on bond, in spite of Marlo’s pleas for Levy to find a way to bond him out as well.¹⁴⁵

Levy demonstrates his diligence and zeal by piecing together something the viewer already knows—that the bust of the Stanfield organization is a result of an illegal wiretap by the Baltimore Police Department. Levy first realizes that something is wrong when he talks to Marlo about how he is unlikely to be released on bond because “the charging papers portray [Marlo] at the top of the conspiracy.”¹⁴⁶ Levy tells Marlo, “the full affidavit says they developed a source of information, a source of information who told them that you communicated with each other using photographic transmissions on cell phones, coded transmission.”¹⁴⁷ Marlo tells Levy that is impossible because “ain’t nobody know about the code except me, Chris, Monk, and Cheese, and we all locked up behind this.”¹⁴⁸ Unprompted by Levy, Herc goes to Detective Carver and asks about the Stanfield bust. Herc suspects that it is a wiretap because he previously gave Carver Marlo’s number from Levy’s rolodex.¹⁴⁹ Herc says to Carver knowingly, “It was a wiretap,

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *The Wire: Late Editions*, *supra* note 136 (Season Five, Episode Nine).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *The Wire: React Quotes*, *supra* note 132 (Season Five, Episode Five).

right?"; Carver demurs.¹⁵⁰ Later, in the office, Herc shares with Levy what he learned about a possible wiretap.¹⁵¹ He explains that he's hearing on the record that "the only [overtime] is people who are detailed on the homeless killings,"¹⁵² but off the record, he's "hearing that maybe it's a wire."¹⁵³ With this new information, Levy is increasingly convinced that it must have been a wiretap.¹⁵⁴ He says to Herc, "So no one is making any money, but there's no wiretap?"¹⁵⁵

In the final episode of the series, Levy probes his suspicions that the wiretap was illegal and concludes it was. He visits Marlo at the jail and asks him again about who knew the code on his phone.¹⁵⁶ Marlo insists, as he had before, that no one else knew about it other than the people from his organization who were also in jail with him.¹⁵⁷ Marlo then tells Levy that no one else had his cell phone number except Levy.¹⁵⁸ Levy thinks about this and looks genuinely perplexed.¹⁵⁹ He tells Marlo that only a wiretap would explain the speed at which the police broke the code.¹⁶⁰

Levy knows that he has just uncovered very important leverage for his clients. He conveys that information to prosecutor Rhonda Pearlman in the courthouse: "They grabbed the phones and minutes later they've cracked an elaborate code that implicates everyone. No one's that brilliant, not in the BPD anyway."¹⁶¹ He goes on to tell her: "[I]f you wait until this goes past indictments, I'm gonna run wild with it."¹⁶² This is quintessential zealous Levy, using his leverage to try to secure a favorable result for his clients. From past experience, Pearlman knows Levy is a skilled enough attorney to effectively litigate against the illegal wiretap in court.¹⁶³ As Levy puts together the pieces about the wiretap, Pearlman does the same thing and discovers a new side to Levy's illegal conduct: he's been buying confidential court documents

¹⁵⁰ *The Wire: Late Editions*, *supra* note 136 (Season Five, Episode Nine).

¹⁵¹ *Id.*

¹⁵² The "homeless killings" refer to McNulty's creation of a fake serial killer in Season Five who targets homeless men. McNulty diverts resources from the "homeless killings" investigation to the investigation of the Stanfield organization. *See The Wire: The Dickensian Aspect* (HBO television broadcast Feb. 10, 2008).

¹⁵³ *The Wire: Late Editions*, *supra* note 136 (Season Five, Episode Nine).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *The Wire: -30-*, *supra* note 7 (Season Five, Episode Ten).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

from a grand jury prosecutor.¹⁶⁴ Lester Freamon, a Baltimore Police Department detective who works closely with McNulty, tells Pearlman that he will get Levy on tape admitting to the illegal conduct as a way to atone for his own involvement with the illegal wiretap.¹⁶⁵

In addition to learning about Levy illegally obtaining confidential documents, the final episode provides more examples of Levy as the caricatured, unethical criminal defense lawyer. After Pearlman learns about the grand jury documents, she confronts Levy and blackmails him for a deal.¹⁶⁶ She makes her terms clear: she does not want the illegal wiretap to be made public and she wants Marlo's crew to go to prison.¹⁶⁷ They strike a deal that elevates Pearlman to a judgeship, saves Levy from a criminal indictment, and astonishingly keeps Marlo out of prison entirely.¹⁶⁸ Others are not so fortunate. Chris is forced to be the fall guy, pleading guilty to several murders and agreeing to life without the possibility of parole.¹⁶⁹ Cheese and Monk plead guilty to the drug charges, and face up to 20 years.¹⁷⁰ Chris' sentence in particular shows that even the most important members of the Stanfield organization will be sacrificed by Levy when their interests diverge from those of Marlo and the organization as a whole.

From a legal standpoint, the viewer is left to wonder what would have happened if Levy did not negotiate the case under the prosecutor's threat to expose his own criminal conduct. Chris, Cheese, and Monk would very likely have been better off if Levy (or another attorney without conflicts) had exposed the illegal wiretap in court. Chris, for example, could not have done any worse if Levy had litigated the issues in his case.¹⁷¹ With all three, fighting the wiretap issue alone had the potential of winning dismissal, or at least significantly lower sentences. But here, as with the Barksdale organization, the man who pays the bills is the person who benefits the most from Levy's representation.

Levy's ethical and moral decline is on full display as he gloats over the result to Herc and is jubilant about what it will mean for his business: "[N]ow, if Marlo takes the deal, he's gonna get a walk after being charged in a multimillion-dollar drug seizure. That doesn't happen very often, and when it does happen, the name and number of the defense

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ While the death penalty in Maryland was not officially abolished until 2013, only five people were executed in the previous four decades. See *Maryland*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/maryland-1> [<https://perma.cc/8FA4-8DH4>].

attorney goes in the front pocket of every respectable drug trafficker.”¹⁷² The Stanfield organization is ostensibly in shambles, but Levy knows that his unethical deal not only has saved him from losing his livelihood and going to prison, but has also secured him the business of the next Avon or Marlo.

Although it is beyond the subject of this article, Pearlman’s ethical decline is notable. Throughout most of the series, Pearlman is portrayed as a tough, hardworking, and ethical prosecutor who does the right thing. During her blackmail conversation with Levy, however, he quickly points out that she is also committing a crime: “You’re blackmailing an officer of the court. The moment you came in here and offered that quid pro quo, you were guilty of obstruction of justice.”¹⁷³ Pearlman agrees and says, “You’re right, I could get 6–8 years. And for bribery of a state’s attorney and the violation of grand jury secrecy, you could see 10–12.”¹⁷⁴ Here, we see a very different Pearlman, one who is willing to engage in criminality to protect the Baltimore Police Department from embarrassment and elevate her own professional stature (in the final scenes of the final episode of the series, the viewer sees that Pearlman has become a state court judge).¹⁷⁵ At this point, Pearlman is no better than Levy. Pearlman’s decline embodies a larger takeaway from *The Wire*: urban institutions are complex and there are no “good guys” or “bad guys.” Levy is a complex “bad guy” and Pearlman is a complex “good guy” who, try as she might, is as vulnerable to the pressures of the system as Levy.

The viewer sees all of the contradictory sides of Levy on display as he represents the Stanfield organization on the cases relating to this bust. When he represents low-level dealers like O-Dog (who took the fall for Chris and Snoop’s arrest for gun possession) to suit the organization’s needs, the viewer sees the unethical, nefarious attorney who embraces what should be an obvious conflict of interest. However, in his representation of the Stanfield organization, Levy reveals himself to be a zealous and talented attorney who gets good results for clients at the top of the organization.

¹⁷² *The Wire*: -30-, *supra* note 7 (Season Five, Episode Ten).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

IV. THE LACK OF PUBLIC DEFENDERS IN *THE WIRE*: A MISSED OPPORTUNITY

Levy is *the* representation of criminal defense attorneys in *The Wire*. As discussed above, the only time the viewer so much as sees another criminal defense lawyer is after D'Angelo Barksdale fires Levy as his lawyer and is very briefly represented by a public defender. See Part II.C, *supra*. This singular focus on Levy makes it easy for the viewer to see his unethical behavior and criminal misdeeds as representative of criminal defense attorneys as a whole. Levy is—perhaps intentionally—a caricature.

This caricature of criminal defense attorneys is, however, an unfortunate and surprising shortcoming of the show and a missed opportunity to reflect the reality of criminal defense lawyering more broadly. *The Wire* portrays criminal defense attorneys as villainous and nefarious across the board, when in reality Levy's conduct represents a very small minority of criminal defense lawyers. There is also no counterbalance to Levy. With one exception, the show does not depict public defenders or other hardworking criminal defense lawyers doing their best to provide zealous representation to their clients in an ethical and legal manner. In this respect, *The Wire* is no better than *Law and Order* or similar shows, which often caricature the criminal justice system as heavily slanted in defendants' favor and portray "criminals" being set free on legal technicalities.¹⁷⁶

For example, the scene in which Levy shares his excitement with Herc about getting Marlo's cell phone number reflects an important difference between private lawyers like Levy and public defenders—one that goes unexplored in the series. Unlike private attorneys, public defenders do not have to worry about winning new clients, and money does not cause them ethical trouble. Their only interest is in obtaining the best outcome for their individual client. Generally speaking, public defenders also would prefer fewer prosecutions; they would prefer to be out of a job. On the other hand, retained lawyers like Levy are inherently conflicted. They prefer some level of prosecution because without it, they won't be paid. At the same time, they need to be successful in order to retain new business. Levy's behavior reflects an attempt to tow that line.

The only depiction of a public defender in the entire series is in the brief but pivotal scene in which we learn that D'Angelo has fired Levy and is attempting to cooperate against the Barksdale organization. In that scene, the public defender not only provides zealous representation

¹⁷⁶ See Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 34–35 (2008).

but also serves as a moral compass. The public defender's detachment from the overall criminal enterprise also allows her to acknowledge the Barksdale organization's brutality in a way that emphasizes her humanity without undermining D'Angelo's interests. Throughout the meeting, D'Angelo's public defender looks troubled with the Barksdale organization's activities.¹⁷⁷ When a detective pulls out a gruesome photograph of one of the people the organization has killed, the public defender flinches and says, "God!"¹⁷⁸ After spending so long immersed in the Barksdale organization's pattern of violence, the public defender's honest reaction to this image prevents the viewer from becoming desensitized. As one critic writes, the moment is "an outside reminder of just how brutal the Barksdale crew is."¹⁷⁹

The near absence of public defenders stands in stark contrast to *The Wire's* complex portraits of actors in nearly every other facet of the criminal justice system. Considering that public defenders represent as many as 68% of felony defendants in the United States' 75 most populous counties, the show leaves out one of the system's most ubiquitous and important actors.¹⁸⁰ Recent data from the Baltimore Metro area shows that public defenders are working under arduous conditions. In 2016, they were assigned to 473 circuit court cases each, on average, which is more than twice the state's recommended caseload limit.¹⁸¹ These kinds of crushing caseloads raise serious constitutional concerns and contribute to mass incarceration. As Jonathan Rapping, a leader in the field of indigent defense, notes, "[i]f we want lasting criminal justice reform and a real end to mass incarceration, we must reverse this practice of ignoring the need for a strongly supported system of public defenders."¹⁸² He continues, "[i]f we truly care about justice and liberty for every American accused of a crime . . . then we need to stop treating [the] conversation as though it were an episode of *Law & Order*. Public

¹⁷⁷ *The Wire: Sentencing*, *supra* note 55 (Season One, Episode Thirteen).

¹⁷⁸ *Id.*

¹⁷⁹ Alan Sepinwall, *The Wire, Season 1, Episode 13: "Sentencing" (Veterans edition)*, WHAT'S ALAN WATCHING? (Aug. 29, 2008), http://sepinwall.blogspot.com/2008/08/wire-season-1-episode-13-sentencing_29.html [<https://perma.cc/2WXA-L77H>].

¹⁸⁰ CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES 5 (Bureau of Justice Statistics ed., 2000).

¹⁸¹ Jesse Coburn, *Maryland Public Defenders Juggle Heavy Caseloads; Critics Say Indigent Clients Suffer*, THE BALTIMORE SUN (Aug. 20, 2016), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-public-defender-caseloads-20160819-story.html> [<https://Perma.cc/4LE8-6NXA>].

¹⁸² Jonathan Rapping, *Public Defenders Key to Reducing Mass Incarceration*, TALK POVERTY (Oct. 28, 2015), <https://talkpoverty.org/2015/10/28/public-defenders-key-reducing-mass-incarceration/> [<https://perma.cc/FB2X-9QXJ>].

defenders—and how we as a nation support and invest in them—must be at the center of the reform debate.”¹⁸³

V. PROPOSED SOLUTION

Despite the serious and legitimate concerns surrounding conflicts of interest in criminal cases, the solution remains unclear. As the Supreme Court demonstrated in *Wheat*,¹⁸⁴ courts remain comfortable with vigorously policing conflicts of interest in extreme cases, even overruling a defendant's waiver of a conflict. Many commentators, though, have claimed that courts' skepticism of conflicts and the denial of waivers do not go far enough.

In response, these commentators primarily recommend two approaches. The first of these approaches, supported by Professor Kevin H. Michels, involves a strong, hands-on role for courts. Recognizing the importance of representing and prioritizing the client's interests first, Michels argues that courts should reject a supposed informed consent waiver if the limitations placed on a lawyer due to a conflict of interest are “likely to defeat the client's objectives for the representation.”¹⁸⁵ This focus on the client's objectives reflects the need for loyalty in an attorney-client relationship. While a lawyer may make certain strategic decisions in the course of the representation, the client decides on the desired outcome of that representation. Conflicts of interest pose a problem to the legal system for exactly this reason: they can make it impossible for a lawyer to appropriately pursue the interests of multiple clients at once. For this reason, Michels proposes that “[a]n informed conflict waiver must be rejected as incompetent if limitations on the means or procedures by which the attorney pursues the matter caused by the conflict of interest are likely to defeat the client's objectives for the representation.”¹⁸⁶

The second approach, advocated in a student Note by Ross Barr and Brian Friedman, leaves the power and responsibility of ensuring ethical representation to the attorneys themselves rather than in the hands of the courts. According to this school of thought, attorneys should “decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop . . . or that common representation will be advantageous to each of the codefendants represented”¹⁸⁷

¹⁸³ *Id.*

¹⁸⁴ 486 U.S. 153 (1988).

¹⁸⁵ Kevin H. Michels, *What Conflicts Can Be Waived? A Unified Understanding of Competence and Consent*, 65 RUTGERS L. REV. 109, 136 (2012).

¹⁸⁶ *Id.* at 138.

¹⁸⁷ Ross Barr and Brian Friedman, Note, *Joint Representation of Criminal Codefendants: A*

This solution involves caution and conscientiousness on the part of attorneys themselves.

When considering these current approaches to conflicts of interest, it is also important to note that lawyers who knowingly engage in conflicted representation are the exception rather than the rule. The problem discussed in *Wood*¹⁸⁸—a lawyer representing both a criminal enterprise and its individual members—is rarer still, despite occasional attempts to present the “mob lawyer” as an existential threat to the criminal defense bar.¹⁸⁹ In general, the corrupt defense lawyer is more pop culture caricature than real-life phenomenon. On the other hand, strict rules limiting the behavior of criminal defense lawyers present a serious risk of abuse by courts and prosecutors.¹⁹⁰ Any solution to conflicts of interest must take these two factors into account, taking care to prevent the scope of any solution from exceeding the scope of the problem to which it is addressed.

The solution that best protects clients’ interests in the rare situation when a criminal defense lawyer seeks to engage in multiple representations is for judges to appoint an attorney to advise the client when there is a high likelihood of a potential conflict. This approach comes down between the two approaches discussed above and accounts for the shortcomings in both the competence test proposed by Michels and the attorney-driven, largely toothless approach advocated by Barr and Friedman. This approach is also a common practice in federal court, where judges appoint independent “conflict counsel” when multiple clients are being represented by the same lawyer.¹⁹¹ The job of conflict counsel is to discuss the potential conflict with the client, ensure that the client understands the potential problems and risks, and determine whether the client nevertheless wishes to waive the conflict. If judges are more proactive about appointing conflict counsel when there is a high likelihood of a potential conflict as a result of multi-client representation by the same lawyer, this will solve some of the problems with

Proposal to Breathe Life into Section 4-3.5(c) of the ABA Standards Relating to the Administration of Criminal Justice, 15 GEO. J. LEGAL ETHICS 635, 637 (2002) (quoting STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-3.5(c) (AM. BAR ASS’N 3d ed. 1992)).

¹⁸⁸ 450 U.S. 261 (1981).

¹⁸⁹ See Morgan Cloud, *Forfeiting Defense Attorneys’ Fees: Applying an Institutional Role Theory to Define Individual Rights*, 1987 WIS. L. REV. 1, 5 n.20 (describing how the President’s Commission on Organized Crime “attempted to use Justice Department data concerning federal prosecutions of attorneys to support its theory of the ‘mob lawyer’ as a widespread problem, but were unable, at that time, to develop a reliable statistical base of information.”).

¹⁹⁰ *Id.* at 6 (noting in the context of asset forfeiture that “one need not accept the jeremiads of forfeiture opponents to recognize that allowing the government to seize defense attorneys’ earned compensation affects the ability of defendants to obtain legal representation, and perhaps the quality of that representation as well”).

¹⁹¹ See Ronald D. Rotunda, *Resolving Client Conflicts by Hiring “Conflicts Counsel”*, 62 Hastings L.J. 677 (2011).

the representation provided by lawyers like Levy. This solution is also preferable to excessively aggressive solutions like that proposed by Michels because it does not risk compromising the client's Sixth Amendment right to counsel.