August 24, 2007

American Council of Chief Defenders Statement on Caseloads and Workloads

Resolution

The ACCD recommends that public defender and assigned counsel caseloads not exceed the NAC recommended levels of 150 felonies, 400 non-traffic misdemeanors,[1] 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year. These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified. If a defender or assigned counsel is carrying a mixed caseload which includes cases from more than one category of cases, these standards should be applied proportionally.
(For example, under the NAC standards a lawyer who has 75 felony cases should not be assigned more than 100 juvenile cases and ought to receive no additional assignments.)
In public defense systems in which attorneys are assigned to represent groups of clients at court calendars in addition to individual case assignments, consideration should be given to adjusting the NAC standards appropriately, recognizing that preparing for and appearing at such calendars requires additional attorney time. In assigned counsel systems in which the lawyers also maintain private, retained practices, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

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1 Traffic misdemeanors punishable by incarceration should be included in the misdemeanor case limit number; traffic misdemeanors not punishable by incarceration would not be counted.

The ACCD recommends that defenders, contract and assigned counsel, and bar association leaders in each state review local practice conditions and consider developing standards that adjust attorney caseloads when the types and nature of the cases handled warrant it. The increased complexity of practice in many areas will require lower caseload ceilings. The ACCD recommends that each jurisdiction develop caseload standards for practice areas that have expanded or emerged since 1973 and for ones that develop because of new legislation. Case weighting studies must be implemented in a manner which is consistent with accepted performance standards and not simply institutionalize existing substandard practices.

For sexually violent offender commitment cases that often require extensive depositions and pretrial hearings with expert witnesses, review of thousands of pages of discovery, and lengthy trials, a lawyer may reasonably handle only a small number of such cases per year. Similarly, lawyers' workloads should be limited when they are assigned persistent offender cases which, by their nature, require particularly intensive pretrial preparation and time-consuming investigation.

Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards. This should specifically include the ability of counsel to devote full time effort to the case as circumstances will require. Counsel must not be assigned new case assignments that will interfere with this ability after accepting a capital case. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised 2004), Guideline 6.1 and 10.3. Presumptively, there should be at least two counsel on the capital defense team.[2]

One system that can be utilized to arrive at an appropriate reduced maximum limit for complex cases is a case credit system that allocates multiple credits for specific types of cases and that recognizes that lawyers can handle fewer of those cases per year. 3

Introduction

Excessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This can mean that innocent people are wrongfully convicted, or that persons who are not dangerous and

2 Jurisdictions that already have established capital caseload limits include Washington (one open), and Indiana (one capital case plus no more than 20 open felony cases).

3 King County, Washington, has developed such a system for its non-profit defender organizations. The budget is based on caseload standards per attorney, with, for example, 150 felony case credits per attorney per year. Multiple credits are provided, for example, for homicide and persistent offender ("three strikes") cases.

who need treatment, languish in prison at great cost to society. It can also lead to the public's loss of confidence in the ability of our courts to provide equal justice.4

The American Council of Chief Defenders (ACCD) believes that the challenges posed by excessive workload are significant. It has reviewed a variety of caseload standards adopted by defenders and bar associations across the country. While there is considerable variety in prosecution and court practices from state to state, and even within states, defenders have found the National Advisory Commission on Criminal Justice Standards ("NAC standards") to be resilient and to provide a foundation from which local defenders and bar association leaders can develop local caseload standards.

The National Advisory Commission on Criminal Justice Standards and Goals issued a report in 1973 that included a number of suggestions to improve public defense services, and recommended caseloads limits for public defenders. Standard 13.12 Workload of Public Defenders provides in pertinent part as follows:

> The caseload of a public defender office should not exceed the following:
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> felonies per attorney per year: not more than 150;
> misdemeanors (excluding traffic) per attorney per year: not more than 400;
> juvenile court [delinquency] cases per attorney per year: not more than 200;
> Mental Health Act cases per attorney per year: not more than 200; and
> appeals per attorney per year: not more than 25.
>
> For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.

A number of state standards, as well as recent ethics opinions from both the ACCD and the American Bar Association, accept the NAC standards and go on to require that when a defender organization's ability to provide effective representation is threatened by excessive caseloads, the leadership of the office must act to obtain funding to increase staffing or to decline new cases.

Numerous Factors Affect Quality of Representation and Maximum Caseloads

The number and types of cases for which an attorney is responsible may affect the quality of representation individual clients receive.[5] While there are many variables to consider

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4 Courts have been increasingly receptive to challenges to excessive caseloads as a cause of ineffective assistance of counsel, and have relied on caseload standards. In the settlement order in *Best v. Grant County*, a Washington case that led to a change in the felony public defense system and the implementation of standards, the County agreed to caseload limits and workload adjustments for complex cases. http://www.defender.org/files/GrantCountyLitigationSettlementAgreement.pdf

in evaluating attorney workloads, including the seriousness and complexity of assigned cases and the skill and experience of individual attorneys, due process and the right to counsel require that an attorney not be assigned more cases than he or she can effectively handle.

Numerical caseload limits can be affected by many variables including the specific policies and procedures within a local jurisdiction. For example, a prosecutor's office which consistently overcharges, or one which refuses to plea bargain, can add substantially to attorney workload by increasing the necessity and frequency of motions litigation and, ultimately, the number of cases that go to trial.

Allocation of resources in law enforcement and prosecutors' offices, including for example, increased staff funded by grants, and establishment of "cold case" prosecutor units, can result in increased workload for defenders.

Local court calendar management practices, such as a court congestion relief project, can also play havoc with attorney workloads as can legislative changes and new judicial decisions. What may appear to be a relatively small number of cases can actually represent an unreasonable workload depending on various state and local policies and procedures.

In General, Caseloads Should Not Exceed the NAC Limits

The ACCD believes that, in general, defender caseloads should not exceed the limits recommended by the NAC. These numerical standards have proved resilient over the past 34 years because they have been found to be consistent with manageable caseloads in a wide variety of public defender offices in which performance was favorably assessed against nationally recognized standards, such as NLADA's *Performance Guidelines for Criminal Defense Representation*. (Also see: "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems" [American Council of Chief Defenders National Juvenile Defender Center 2004]; and the "Ten Principles of a Public Defense Delivery System" [American Bar Association (2002)]).

Local Practice Should Be Considered in Determining Caseload Limits

Notwithstanding their general suitability, the NAC standards should be carefully evaluated by individual public defense organizations, and consideration should be given to adjusting the caseload limits to account for the many variables which can affect local practice. The NAC standards, for example, weight all felonies the same, regardless of seriousness, and similarly all misdemeanors the same, regardless of the widely varying amounts of work required for different types of cases and dispositions. Similarly, the NAC standards do not account for differences in urban and rural jurisdictions, and instances where attorneys must travel significant distances to and between courts,

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5 Some jurisdictions count charges as equivalent to cases, so, for example, a three-count case with one client charged with three offenses on the same day would be counted as three cases. In such situations, maximum caseload limits should be adjusted accordingly, consistent with the principles of effective representation.

confinement facilities and clients. Such factors significantly affect the number of cases in which effective representation may be given. Because a numerical caseload does not equate to a universal workload from jurisdiction to jurisdiction, the ACCD and the NLADA recognize that there is value in utilizing case-weighting studies for individual jurisdictions so long as such studies are implemented in a manner which is consistent with accepted performance standards. [See *Case Weighting Systems: A Handbook for Budget Preparation* NLADA, 1985); *Keeping Defender Workloads Manageable,* Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001); and The State Bar of California *Guidelines on Indigent Defense Services Delivery Systems (2006),* Workload, p. 24].

Because there are exceptional cases, and categories of cases that require unusual investment of resources, a useful approach to determining maximum workload and to providing adequate resources for defenders is a case credit system. Under such a system, defenders receive additional case credit, or resources, for cases that require significantly more attorney time than the average. A homicide case, or a sex offender case that could result in a life sentence, or a case involving new uses of scientific evidence, would receive additional resources based on the amount of attorney time required. It is incontestable that an attorney who handles only homicide cases cannot represent effectively as many clients in a year as one who handles only "lower level" felonies, such as burglary or car theft or minor assaults, that normally have a limited number of witnesses, less complex fact patterns, and limited or no scientific evidence. Case credit systems can be developed to take into account the need for additional resources for more complex cases.

While the NAC caseload limits remain the standard, there are limited circumstances in which exceptions upward may be acceptable because particular changes in criminal policy and practice, adopted since the NAC Standards were established, have resulted in the ability of defenders to handle an increased number of certain classes of cases.

The courts in some jurisdictions have developed and adopted policies and programs that favor diversion for a significant number of non-violent offenders, and some of these are able to place such clients with the appropriate community-based service provider.

Many jurisdictions have implemented treatment-oriented courts and other programs that provide alternatives to traditional prosecution and punishment. These programs can reduce recidivism and save criminal justice system costs. They also require significant investment of defender time and resources that should be considered in determining appropriate workloads. For example, mental health treatment courts and domestic violence courts require numerous court hearings and monitoring of clients' compliance with court orders.

Contracts for indigent defense services should include a provision to assure the right of the defender organization to seek modification or cancellation of the contract when unforeseen changes in local practices occur. Quality representation must be protected, and jurisdictions must avoid creating financial disincentives to proper representation.

Despite Improvements in Technology, Core Elements of Representation Have Not Changed

The core elements of effective representation have not changed. The National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation (1997), http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines, require that defenders communicate with their clients, investigate their cases, conduct appropriate motions practice, negotiate with the prosecutor, prepare and conduct trials and sentencings, and preserve the client's right to appeal.

The addition of electronic legal research and modern computer equipment and communications has increased efficiency and reduced the time it takes to prepare complex legal motions and memoranda. It should be noted however, that efficiencies associated with computer technology have sometimes been offset by the tendency of courts to provide attorneys with less time to produce legal pleadings; and, in some locations, the availability of computers has resulted in a decrease in the funding available to hire support staff.

In Many Jurisdictions, Caseload Limits Should Be Lower Than the NAC Standards

In many jurisdictions, maximum caseload levels should be lower than those suggested by the NAC. Public defense practice has become far more complex since the NAC standards were established in 1973. For example, developments in forensic evidence over the last 30 years now require significant expenditure of time by attorneys to understand, defend against, and present scientific evidence and the testimony of expert witnesses. New and severe sentencing schemes have developed, resulting in many mandatory minimum sentences, more life-in-prison sentences, and complex sentencing practices that require significant legal and factual research and time to prepare and present sentencing recommendations. Defenders must research and explain to their clients the possible consequences of pleas or convictions at trial of different charges. When alternative sentences are possible, including "exceptional" sentences below the standard range established in a statute, defense counsel must prepare thoroughly to advocate for such sentences, normally including preparation of pre-sentence memoranda for the court to consider, and occasionally using forensic experts or other witnesses. Often, defense counsel will need to research and to challenge the applicability of prior convictions in determining what a standard range sentence would be.

The increase in sanctions is reflected in the fact that the number of people in prison and jails increased more than 600% between 1977 and 2005. The prosecution of people charged with sex offenses has become more comprehensive, and the sentences for this category of crime have increased dramatically. In addition, the diversion of many non-violent felony cases to drug courts and mental health courts has resulted in caseloads where the remaining cases are, on average, more serious (and more likely to involve crimes of violence). In the end, these more serious caseloads require more attorney time, not less.

New, Complex Practice Areas Require More Attorney Time Per Case

The last 34 years have also seen the emergence of entire new practice areas, including sexually violent offender commitment proceedings, and persistent offender ("three strikes") cases which carry the possibility of life imprisonment. These practice areas require a significant degree of specialized knowledge and require substantial investment of attorney and support staff time. For example, a public defender attorney assigned to an office which handles sexually violent offender commitment proceedings will have to devote hundreds of hours just to become familiar with the literature regarding sexual deviance and the prediction of recidivism. These cases typically involve thousands of pages of discovery covering the client's entire life, and the jury is asked to consider psychological diagnoses and actuarial predictions of behavior. Similarly, because expert witnesses are a staple of sexually violent offender proceedings, the defender attorney working in this field must devote significant time to working with and preparing to examine expert witnesses on both sides of the case. The vast body of research and specialized knowledge in this area did not exist in 1973 when the NAC standards were formulated.

The advent of these new practice areas has made even more clear that a "felony" does not always simply require the work of one felony case. Case weighting, to assess the impact of these complex and time-consuming cases, is important to determine the number of cases an attorney actually can handle.

Representing Juveniles Has Become More Complex and Requires More Attorney Time

The work of defenders who represent children has become increasingly complex. A public defender in the 21st century, whether representing children in dependency (abuse and neglect) proceedings, or in delinquency and youthful offender or status offender cases, must possess a sophisticated understanding of family dynamics, mental illness, and cultural difference.

The NAC standards did not address representation in dependency cases. These cases involve significant family history issues and frequent court hearings that can last for years.

Research developments in the last decade have increased scientific understanding of adolescent brain development. The notion that children are simply smaller adults is no longer accepted. Today, a lawyer representing children must devote many hours to learning about clients, distilling and applying the pertinent scientific evidence, and marshaling that evidence for presentation in court.

Some states are now prosecuting and incarcerating juvenile "status offenders," including truants, in proceedings that were unheard of in 1973. The nature of these cases is such that the attorney for the child must spend significant time gathering and synthesizing educational, health, and psychiatric records which will bear on the appropriate resolution of the case. Moreover, the attorney's role often continues beyond the initial court judgment in the case. For example, in some jurisdictions, the defender is obliged to

monitor the progress of juvenile clients in court-ordered placements and determine whether the clients receive the services that were judicially ordered. In cases in which court-ordered services are not being provided, defense counsel must pursue additional in-court proceedings. [See, for example, California's *Guidelines on Indigent Defense Services Delivery Systems (2006) supra,* Juvenile Practice, p.21.]

An equally significant post-1973 development in the representation of juveniles has been the advent of "youthful offender" prosecutions. In many jurisdictions, children who before 1973 would have been the object of a Juvenile Court's *parens patriae* orientation, now face the possibility of being treated as adults and, ultimately, incarcerated in adult prison. This significant change to a more punitive approach toward children has greatly raised the stakes for the defender's child client, and has led to a concomitant increase in the work required of the public defender attorney assigned to defend such cases. Consistent with the more punitive approach to juvenile delinquency, juvenile convictions are also now used to enhance adult sentences in many states.

Increases in Collateral Consequences of Convictions Have Led to the Need for More Attorney Time

There has also been a significant increase in the collateral consequences attendant to criminal convictions and juvenile adjudications, which in turn has led to a substantial increase in the work which defense attorneys are required to perform on their cases. As one professor has noted:

> Society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to reconnect to the social and economic structures that would lead to full participation in society. These structural disabilities often include bars to obtaining government benefits, voting disenfranchisement, disqualification from educational grants, exclusion from certain business and professional licenses, and exclusion from public housing.

Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 B.C. L. Rev. 255, 258 (2004) (footnotes omitted).

When the collateral consequences of conviction are more severe, they can be more important to the clients than possible incarceration, and clients are more likely to go to trial and sentencing preparation can become more difficult and time-consuming. Defenders need to spend considerable time in developing and presenting mitigation evidence and in researching and challenging the applicability of prior convictions, which not infrequently involve convictions from other states.

Probably the most important development has come in the area of the immigration consequences of criminal convictions. Recent changes in U.S. immigration law have dramatically increased the likelihood of deportation and other negative immigration consequences for non-citizen defendants who are convicted of criminal offenses. Today's criminal defense counsel must master the intricacies of a substantial body of U.S. immigration law which did not exist in 1973.

Often, careful negotiations with the prosecutor can result in a conviction that will not result in adverse immigration consequences. In this regard, courts are requiring defense attorneys to advise their clients of immigration consequences. See, e.g., *State v. Paredez*, 136 N.M. 533, 539 (N.M. 2004) (New Mexico Supreme Court held that "criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain"). See also, *People v. Soriano*, 194 Cal. App.3d 1470, 1481 (Cal. App. 1 Dist.1987) (Philippine resident of United States was denied effective assistance of counsel in entering his guilty plea, and habeas relief was warranted, because counsel failed to advise adequately of immigration consequences of plea. The *Soriano* court noted that the public defender's office reported to the court that it "imposes on its staff attorneys, under its 'Minimum Standards of Representation,' the duty to ascertain 'what the impact of the case may have on [the client's] immigration status in this country.'")

When the NAC standards were first promulgated, there was no sex offender registry. Now a registry exists in every state. In 1973, Federal student loan eligibility was not precluded by a conviction for possession of small amounts of controlled substances. Now, such a conviction results in a loss of eligibility. In 1973, a conviction for operating a motor vehicle under the influence of alcohol did not necessarily result in a loss of license. Now, license revocation is a common result of such convictions. In some states, juveniles can lose their driver's license for being in possession of alcohol or marijuana. Additional collateral consequences which have emerged since the NAC standards were first promulgated include loss of eligibility for public housing and loss of SSI benefits.

Defense counsel needs to understand these consequences, and, if possible, help the client to avoid them by finding an alternative resolution, perhaps through a diversion program or a plea to a different charge.

Death Penalty Law Has Become More Complex

Similarly, the law relating to capital punishment has become much more complicated, and many states enacted new death penalty laws following the United States Supreme Court's decision invalidating death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972). When the NAC standards were published in 1973, it was not yet clear that reinstatement of the death penalty would both take place and survive constitutional challenge. It is clear that the NAC 150 felony case standard did not include capital cases and including capital cases in a 150 caseload would be inappropriate**.**

Capital defense can require thousands of attorney hours. Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards.

The provisions of the Anti-Terrorism and Effective Death Penalty Act require trial counsel to be even more comprehensive and careful in preserving issues for appellate and post-conviction review.

A case should be considered a capital case if the charge filed can lead to the death penalty until the prosecutor has declined to seek the death penalty.

Defender Performance Standards Inform Caseload and Workload Limits

The landscape of public defender practice has also undergone a profound change since 1973 in the manner in which attorneys approach their work. This change in orientation – toward increased professionalism and zealous representation – has been the result of a more sophisticated and comprehensive approach to both legal education and defender management. The promulgation of defender performance standards, as well as case law making clear what is required for effective assistance of counsel, have resulted in a greater recognition of the critical importance of thorough pretrial preparation and client-centered representation. These are changes which benefit both courts and clients, and help to ensure that the right to counsel is real, but they are changes which lead to increased attorney hours on each case.

A "Felony" is Not Always a Felony

In a number of jurisdictions there is an additional issue regarding the applicability of the NAC standards, an issue which has existed since their promulgation in 1973. While most jurisdictions define a "felony" as being any offense which carries a potential punishment of more than one year, see Black's Law Dictionary, 651, 1250 (8th Ed. 2004), some jurisdictions, such as Massachusetts, define felonies to include only those offenses which are punishable by incarceration in the State Prison. In Massachusetts, offenses which carry potential punishment up to as much as two and one-half years in a Jail or House of Correction are classified as "misdemeanors." Thus, what would count as a felony in most other jurisdictions, and would be subject to a caseload limit of 150 cases, is a misdemeanor in Massachusetts and under the NAC standards would be subject to a caseload limit of 400 cases.

The NAC standards also do not address the complexity that can result when a public defender office takes only a portion of the total group of assigned counsel cases, and provides representation only in cases which involve felonies with more serious penalties. In Washington, D.C., for example, the staff attorneys of the Public Defender Service (PDS) are assigned few misdemeanors and instead concentrate primarily on cases which involve the most difficult felonies. (The majority of cases in Washington, D.C. are handled by assigned counsel from the private bar, who are trained by PDS). Thus, in this type of defender office, the NAC distinction between "felonies" and "misdemeanors" may be too broad to ensure that maximum caseload limitation levels are set appropriately. Caseloads for a defender office operating under a PDS-type structure must be lower than for those that have a more varied mix of cases.

Appeals

The fundamental requirements of appellate work, including careful review of the record, meeting with the client, discussing the case with trial counsel, research and preparation of briefs and preparing and conducting oral arguments, as affirmed in existing standards and

case law, continue to support a caseload maximum of 25 non-capital cases per year.[6] Technological developments in electronic research permit greater efficiency, but the

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6 The Illinois Appellate Defender in 1994 adopted a 24-unit standard.
Each assistant appellate defender with one year of service was required to complete, during each year, 24 "brief units"-a term defined as an appellate court brief in a direct appeal from a judgment entered following a criminal trial, in which the record on appeal is not less than 250 pages and not more than 500 pages. See, *U.S. ex rel. Green v. Washington***,** 917 F. Supp. 1238, 1250, N.D. Ill.(1996). The Court in Green found "that the assignment of significantly more than 25 cases of average complexity to one attorney in a single calendar year would create an unacceptably high risk that the attorney would be unable to brief the cases competently within a reasonable period of time."

The NLADA Standards for Appellate Defender Offices (1980) provide as follows:

H. **Case Weighting and Staffing Ratios**

1. An appellate defender office or division shall annually complete twenty-two work-units for each full-time attorney or the equivalent. In jurisdictions which require an abridgement of the testimony by the appellant, the annual workload shall be twenty (20) work-units. The number of work units shall be determined as follows:

a. A brief-in-chief or *Anders* brief filed in a case in which the court transcripts are 500 pages or less shall be one work unit, except as otherwise provided herein.

b. In cases in which the defendant has not been sentenced to death, one additional work-unit shall be added for each additional 500 pages of court transcript.

c. in cases in which the defendant has been sentenced to death, the preparation of the brief shall constitute ten (10) work units and the procedures specified in subparagraphs f., g., h., and i. shall constitute ten times the work-units specified in those subparagraphs.

d. A brief involving only the validity of a guilty plea or only the propriety of a sentence in which there shall constitute one-half work unit.

e. A case which is closed by the appellate unit with the submission of neither a brief nor post-conviction motion shall constitute between one-quarter and one-half work-units, depending on the length of the record reviewed and work done on the case.

f. A case which is closed by the appellate unit after the disposition of a post-conviction motion or writ but without the submission of an appellate court brief shall constitute between one-half and one work-unit depending on the length of the record reviewed, the nature of the post-conviction hearing, and whether a trial court brief was submitted.

g. A case in which an evidentiary post-conviction hearing is conducted by the appellate unit and in which an appellate court brief is submitted shall constitute between one and one-half to two work-units.

h. The preparation of a reply brief or a petition for review or certiorari in a state court shall be to one-quarter work-units. A petition for a writ of certiorari filed in the Supreme Court of the United States shall be one-half work-unit.

increase in complexity of cases at the trial level can result in increased attorney hours per case. In addition, the use of video recordings in some places in lieu of typed transcripts results in dramatically increased burdens on appellate attorneys. Jurisdiction-specific assessment of workload is as important for appellate cases as it is for trial level work.

Conclusion

The ACCD reaffirms the NAC recommended maximum caseload limits, but urges thorough assessment in each jurisdiction to determine the impact of local practices and laws on those levels, as outlined in the accompanying resolution.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
CRIMINAL JUSTICE SECTION
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
COUNCIL ON RACIAL AND ETHNIC JUSTICE
STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
GENERAL PRACTICE, SOLO, AND SMALL FIRM DIVISION
SECTION OF LITIGATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
AMERICAN JUDICATURE SOCIETY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the black letter (and introduction and commentary) Eight Guidelines of Public Defense Related to Excessive Workloads, dated August 2009.

EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS

August 2009

Introduction

The American Bar Association (ABA) has declared the achievement of quality representation as the objective for those who furnish defense services for persons charged in criminal and juvenile delinquency cases who cannot afford a lawyer. This goal is not achievable, however, when the lawyers providing the defense representation have too many cases, which frequently occurs throughout the United States. This was emphasized in the report of the ABA Standing Committee on Legal Aid and Indigent Defendants published in 2004, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, available at www.indigentdefense.org. Additionally, in 2009, two national studies concerned with indigent defense documented the enormous caseloads of many of the lawyers who provide representation of the indigent and the crucial importance of addressing the problem.[1]

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued its first ever ethics opinion concerning the obligations of lawyers, burdened with excessive caseloads, who provide indigent defense representation.[2] The opinion made clear that there are "no exceptions" for lawyers who represent indigent clients, i.e., *all* lawyers have a duty to furnish "competent" and "diligent" service, as required by rules of professional conduct.[3]

Although Formal Opinion 06-441 set forth *some* of the steps that those providing defense services should take when faced with excessive caseloads, neither the ethics opinion nor ABA

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[1] *See* Report of the National Right to Counsel Committee, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (The Constitution Project 2009)[hereinafter JUSTICE DENIED), *available at* www.tcpjusticedenied.org; MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (National Association of Criminal Defense Lawyers (2009) [hereinafter MINOR CRIMES], *available at* www.nacdl.org/misdemeanor.

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

[3] ABA MODEL RULES OF PROF'L CONDUCT R. 1.1, R. 1.3 (2008) [hereinafter ABA MODEL RULES].

Standards for Criminal Justice contain the kind of detailed action plan, set forth in these Guidelines, to which those providing public defense should adhere as they seek to comply with their professional responsibilities. Thus, Guideline 1 urges the management of public defense programs to assess whether excessive workloads are preventing their lawyers from fulfilling performance obligations; and Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for management to determine if excessive workloads exist. Guidelines 5 through 8 address the range of options that public defense providers and their lawyers should consider when excessive workloads are present. As set forth in Guideline 6, depending upon the circumstances, it may be necessary for those providing public defense to seek redress in the courts, but other choices may be available, as suggested in Guideline 5, before this step is required.

These Guidelines are intended for the use of public defense programs and for lawyers who provide the representation, when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules. In addition, because these Guidelines contain important considerations for those responsible for indigent defense services, they should be valuable to a number of other audiences, including members of boards and commissions that oversee public defense representation, policymakers responsible for funding indigent defense, and judges who are called upon to address the caseload concerns of those who provide public defense services. Since these Guidelines relate directly to the fair, impartial, and effective administration of justice in our courts, they also should be of special interest to bar leaders, as well as to the legal profession and to the public.

Guidelines with Comments

1. The Public Defense Provider avoids excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients. In determining whether these objectives are being achieved, the Provider considers whether the performance obligations of lawyers who represent indigent clients are being fulfilled, such as:

- **whether sufficient time is devoted to interviewing and counseling clients;**
- **whether prompt interviews are conducted of detained clients and of those who are released from custody;**
- **whether pretrial release of incarcerated clients is sought;**
- **whether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal;**
- **whether necessary investigations are conducted;**
- **whether formal and informal discovery from the prosecution is pursued;**
- **whether sufficient legal research is undertaken;**
- **whether sufficient preparations are made for pretrial hearings and trials; and**
- **whether sufficient preparations are made for hearings at which clients are sentenced.**

Comment

These Guidelines use "Public Defense Provider" or "Provider" to refer to public defender agencies and to programs that furnish assigned lawyers and contract lawyers. The words "lawyer" and "lawyers" refer to members of the bar employed by a defender agency, and those in private practice who accept appointments to cases for a fee or provide defense representation pursuant to contracts. The ABA long ago recognized the importance of indigent defense systems including "the active and substantial participation of the private bar…" provided "through a coordinated assigned-counsel system" and also perhaps including "contracts for services."[4] In addition to covering all providers of defense services, these Guidelines are intended to apply both to adult and juvenile public defense systems. The objective of furnishing "quality legal representation" is American Bar Association policy

[4] ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-1.2(b) (3rd ed. 1992)[hereinafter ABA PROVIDING DEFENSE SERVICES].

related to indigent defense services.[5] This goal is consistent with the ABA's Model Rules of Professional Conduct, which require that "competent representation" be provided consisting of "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] However, if workloads are excessive, neither competent nor quality representation is possible. As stated in the ABA's Model Rules, "[a] lawyer's workload must be controlled so that each matter can be handled competently."[7] In addition, it has been successfully argued that an excessive number of cases create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.[8] The responsibilities of defense lawyers are contained in performance standards[9] and in professional responsibility rules governing the conduct of lawyers in all cases.[10]

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[5] "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.1 See also ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002)[hereinafter ABA TEN PRINCIPLES ("Defense counsel's workload is controlled to permit the rendering of quality representation.").

[6] ABA MODEL RULES, *supra* note 3, R. 1.1.

[7] *Id*. at R. 1.3, cmt. 2.

[8] "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." In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 1130, 1135 (Fla. 1990). *See also* American Council of Chief Defenders, National Legal Aid and Defender Association, Ethics Opinion 03-01, at 4 (2003): "The duty to decline excess cases is based both on the prohibition against accepting cases which cannot be handled 'competently, promptly to completion' … and the conflict-of-interest based requirement that a lawyer is prohibited from representing a client 'if the representation of that client may be materially limited by the lawyer's responsibility to another client.'" (citations omitted). A portion of the language last quoted is from ABA MODEL RULE R. 1.7 (a)(2).

[9] The most comprehensive and authoritative standards respecting the obligations of defense lawyers in criminal cases have been developed by the National Legal Aid and Defender Association. *See* PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (4th Printing)(National Legal Aid and Defender Ass'n 2006). Important defense obligations also are contained in ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION STANDARDS)(3rd ed. 1993)[hereinafter ABA DEFENSE FUNCTION].

[10] *See, e.g*., ABA MODEL RULES, *supra* note 3, R 1.4, dealing with the obligation of lawyers to promptly and reasonably communicate with the client.

When defense lawyers fail to discharge the kinds of fundamental obligations contained in this Guideline, it is frequently because they have excessive workloads. For example, the failure of lawyers to interview clients thoroughly soon after representation begins and in advance of court proceedings, as necessary, is often due to excessive workloads.[11] When Public Defense Providers rely upon "horizontal" systems of representation, in which multiple lawyers represent the client at different stages of a case, and lawyers often stand in for one another at court proceedings, it is usually because there are too many cases for which the Provider is responsible.[12] If written motions are not filed, legal research not conducted, and legal memoranda not filed with the court, the lawyers most likely have an excessive workload. Similarly, excessive workloads may be the reason that crime scenes are not visited in cases where it might be useful to do so. Besides the performance obligations listed in Guideline 1, there are other indicia of excessive workloads, such as a lack of time for lawyers to participate in defense training programs, the need for which is addressed in Guideline 3 and the accompanying commentary.

2. 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, such as those specified in Guideline 1, are performed.

Comment

This Guideline is derived from the ABA Ten Principles of a Public Defense Delivery System and emphasizes the critical relationship between supervision and workloads. The ABA Ten Principles require that "workload[s]…[be] controlled" and that lawyers be "supervised and systematically reviewed for quality and efficiency according to nationally and locally

[11] "As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused." ABA DEFENSE FUNCTION, *supra* note 9, Std. 4-3.2 (a). *See also* ABA TEN PRINCIPLES, *supra* note 5, Principle 4: "Defense Counsel is provided sufficient time and confidential space within which to meet with the client."

[12] "Counsel initially provided should continue to represent the defendant throughout the trial court proceedings…." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-6.2. *See also* ABA TEN PRINCIPLES, *supra* note 5, Principle 7: "The same attorney continuously represents the client until completion of the case." These ABA policy statements do not preclude one or more lawyers with special expertise providing assistance to the lawyer originally assigned to provide representation, and such practices do not necessarily reflect excessive defense workloads.

adopted standards."[13] "Workload," as explained in the ABA Ten Principles, refers to "caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties."[14] The need for such oversight is just as important in programs that use assigned lawyers and contract lawyers as it is in public defender offices. When lawyers have a private practice in addition to their indigent defense representation, the extent of their private practice also must be considered in determining whether their workload is reasonable.[15] This applies to part-time public defenders, assigned lawyers, and contract lawyers.

The ABA endorses complete independence of the defense function, in which the judiciary is neither involved in the selection of counsel nor in their supervision.[16] This call for independence applies to public defender programs, as well as to indigent defense programs that furnish private assigned counsel[17] and legal representation through contracts.[18] Accordingly, the supervision called for under this Guideline is to be provided by seasoned lawyers who are experienced indigent defense practitioners and who act within a management structure that is independent of the judicial, executive and legislative branches of government.

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[13] ABA TEN PRINCIPLES, *supra* note 5, at Principles 5 and 10.

[14] *Id*. at Commentary to Principle 5.

[15] The Massachusetts Committee on Public Counsel Services makes extensive use of private lawyers and seeks to monitor the quality of representation they provide. *See* JUSTICE DENIED, *supra* note 1, at 194, n. 52. However, there are few public defense programs that monitor the *private* caseloads of assigned lawyers or contract lawyers to determine whether these caseloads might interfere with the provision of quality legal representation. *But see* Wash Rev. Code § 10.1-01.050 (2008): "Each individual or organization that contracts to perform public defense services for a county or city shall report…hours billed for nonpublic defense legal services in the previous calendar year, including number and types of private cases."

[16] *See infra* note 54, which contains language from ABA PROVIDING DEFENSE SERVICES, *supra* note 4, dealing with the independence of the defense function.

[17] *See also* ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-2.1.

[18] *See id*. at Std. 5-3.2 (b).

Unless there is supervision of lawyer performance at regular intervals, reasonable workloads and quality representation are not likely to be achieved. Although variations in approach may be called for depending on the kinds of cases represented by the lawyer (e.g., misdemeanor, felony, juvenile, capital, appellate, post-conviction cases) and the lawyer's level of experience, supervision normally requires (1) that meetings be held between an experienced lawyer supervisor and the lawyer being supervised; (2) that the work on cases represented by the supervisee be thoroughly reviewed through case reviews, mock presentations or other thorough reviews; (3) that the lawyer supervisor reviews selected files of the supervisee; (4) that selected court documents prepared by the supervisee be reviewed; (5) that periodic court observations of the supervisee's representation of clients be conducted; and (6) that the number of cases represented by the supervisee, as well as their complexity and likely time commitments, be carefully assessed. In overseeing the work of those providing public defense services, it is important that supervisors have access to data through a management information system, which shows the lawyer's current caseload, the status of cases represented by the lawyer, and other important relevant data.[19]

3. The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable.

Comment

The requirement of training for lawyers who provide public defense representation is well established ABA policy.[20] This Guideline emphasizes a particular subject area in which Public Defense Providers have an obligation to provide training. Lawyers who provide

[19] The National Right to Counsel Committee recommends that systems of indigent defense establish "[u]niform definitions of a case and a continuous uniform case reporting system…for all criminal and juvenile cases. This system should provide continuous data that accurately contains the number of new appointments by case type, the number of new dispositions by case type, and the number of pending cases." JUSTICE DENIED, *supra* note 1, Recommendation 11, at 199. *See also* La. Rev. Stat. Ann. § 15-148 (B)(1) Supp. 2009), which requires the state's public defender agency to establish a uniform case reporting system, including data pertaining to workload.

[20] See ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.5; ABA TEN PRINCIPLES, *supra* note 5, Principles 6 and 9.

defense services need to be aware of their ethical responsibilities to provide "competent" and "diligent" representation, as required by rules of professional conduct,[21] as well as performance standards that will enable them to fulfill those duties. In addition, lawyers should be instructed that they have a responsibility to inform appropriate supervisors and/or managers within the Provider program when they believe their workload is preventing or soon will prevent them from complying with professional conduct rules.[22] This is especially important because there is an understandable reluctance of public defense lawyers to report to those in charge that they either are not, or may not, be providing services consistent with their ethical duties and performance standards. Despite such reluctance, defense lawyers need to make regular personal assessments of their workload to determine whether it is reasonable, whether they are performing the tasks necessary in order to be competent and diligent on behalf of their clients, and whether they need to communicate concerns about their workload to their supervisor. In discussing the ABA Model Rules and their application to excessive public defense caseloads, the ABA Standing Committee on Ethics and Professional Responsibility has explained that lawyers have a duty to inform their supervisors, the heads of defense programs, and, if applicable, the governing board of the Provider when lawyers believe that they have an excessive number of cases.[23] Conversely, it is important that Providers not take retaliatory action against lawyers who, in good faith, express concerns about their workloads.

[21] *See* ABA MODEL RULES, *supra* note 3, R 1.1., 1.3.

[22] The ABA Model Rules contemplate that issues respecting the discharge of professional duties will be brought to the attention of supervisors: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility." ABA MODEL RULES, *supra* note 3, R. 5.2 (b). See also ABA Formal Op. 06-441, *supra* note 2, at 5-6.

[23] "If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office…. Such further action might include: if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office…." ABA Formal Op 06-441, *supra* note 2, at 6.

4. Persons in Public Defense Provider programs who have management responsibilities determine, either on their own initiative or in response to workload concerns expressed by their lawyers, whether excessive lawyer workloads are present.

Comment

Public Defense Providers should learn of excessive workloads when lawyers who provide defense services communicate their concerns to management or from the system for monitoring workloads used by the Provider.[24] Clearly, management should take seriously concerns about case overload expressed by lawyers since those providing client representation are best able to appreciate the daily pressures of their workload yet may be reluctant to complain. Regardless of the source of concerns, it is incumbent upon management to determine whether the volume of cases, perhaps in combination with other responsibilities, is preventing lawyers from providing "competent" and "diligent" representation and a failure to discharge their responsibilities under applicable performance standards.[25] Depending upon the circumstances, supervisors of lawyers and heads of Provider programs are accountable under professional conduct rules when violations of ethical duties are committed by subordinate lawyers for whom they are responsible.[26]

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[24] Client complaints may also be an indication that representation is inadequate due to excessive workloads. *See, e.g.*, NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 405 (1976).

[25] "As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her; and any non-representational responsibilities assigned to the subordinate lawyers." ABA Formal Op 06-441, *supra* note 2, at 7. A supervisor's assessment of the workloads of subordinate lawyers will be significantly aided if an adequate management information system is established, as noted in the Comment to Guideline 2 *supra*. As recognized in the ABA's ethics opinion, the extent of support staff (e.g., investigators, social workers, and paralegals) to assist lawyers impacts the number of persons that a lawyer can represent. When adequate support personnel are lacking or if they have excessive caseloads, it is important for the Provider to seek additional personnel.

[26] "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." ABA MODEL RULES, *supra* note 3, R. 5.1 (c). "Firm" or "law firm" denotes…lawyers employed in a legal services organization or the legal department of a corporation or other organization." *Id*. at R. 1.0 Terminology.

However, when a lawyer and supervisor disagree about whether the lawyer's workload is excessive, the decision of the supervisor is controlling if it is a "reasonable resolution of an arguable question of professional duty."[27] Where the resolution of the supervisor is not reasonable, the lawyer must take further action.[28]

Consistent with prior ABA policy, these Guidelines do not endorse specific numerical caseload standards, except to reiterate a statement contained in the commentary to existing principles approved by the ABA: "National caseload standards should in no event be exceeded."[29] This statement refers to numerical annual caseload limits published in a 1973 national report.[30] As noted by the ABA Standing Committee on Ethics and Professional Responsibility, while these standards "may be considered, they are not the sole factor in determining whether a workload is excessive. Such a determination depends not only the number of cases, but also on such factors as case complexity, the availability of support

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Responsibility for lawyer conduct may also extend to lawyer members of governing boards of Public Defense Providers.

[27] *See* ABA MODEL RULES, *supra* note 3, R. 5.2 (b), quoted in note 22 *supra*.

[28] This includes the possibility of filing motions to withdraw from a sufficient number of cases to permit representation to be provided consistent with professional conduct rules. *See* ABA Formal Op 06-441, *supra* note 2, at 6, and language quoted *supra* in note 20.

[29] ABA TEN PRINCIPLES, *supra* note 5, Commentary to Principle 5, at 2.

[30] "In its report on the Courts, the Commission [National Advisory Commission on Criminal Justice Standards and Goals] recommended the following maximum annual caseloads for a public defender office, i.e., on average, the lawyers in the office should not exceed, per year, more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200 mental health cases; or 25 appeals." JUSTICE DENIED, *supra* note 1, at 66. As noted in JUSTICE DENIED, these caseload numbers are 35 years old, the numbers were never "empirically based," and were intended "for a public defender's office, not necessarily for each individual attorney in that office." *Id*. In fact, the Commission warned of the "dangers of proposing any national guidelines." *Id*. The American Council of Chief Defenders, a unit of the National Legal Aid and Defender Association comprised of the heads of defender programs in the United States, also has urged that the caseload numbers contained in the 1973 Commission report not be exceeded. *See American Council of Chief Defenders Statement on Caseloads and Workloads*, August 24, 2007. Some state and local governments have set limits on the number of cases that defense lawyers can handle on an annual basis. *See infra* note 37.

services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties."[31] Thus, while the ABA has not endorsed specific caseload numbers, except to the limited extent discussed above, the routine failure to fulfill performance obligations like those listed in Guideline 1, usually indicates that lawyers have excessive workloads.

5. Public Defense Providers consider taking prompt actions such as the following to avoid workloads that either are or are about to become excessive:

- **Providing additional resources to assist the affected lawyers;**
- **Curtailing new case assignments to the affected lawyers;**
- **Reassigning cases to different lawyers within the defense program, with court approval, if necessary;**
- **Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;**
- **Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;**
- **Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;**
- **Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and**
- **Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.**

Comment

Some of the most important ways in which a Provider may be able to reduce excessive lawyer workloads are listed in this Guideline. When workloads have been determined to be excessive, the steps suggested will be appropriate to pursue if they can be quickly achieved. However, if the steps will take a good deal of time to achieve, they will likely be appropriate to pursue *only in advance* of the time that workloads actually have become excessive. In other words, once workloads are determined to be excessive, a Provider must be able to achieve immediate relief; when this is not possible, the Provider must seek relief as set forth in Guideline 6.

[31] ABA Formal Op 06-441, *supra* note 2, at 4.

This Guideline is based on the assumption that judges are appointing either the Public Defense Provider or its lawyers to the cases of indigent clients. In jurisdictions in which the Provider is not appointed by judges or court representatives, but instead clients are simply referred to the defense program, the Provider is required to decline representation if acceptance would result in a violation of the rules of professional conduct.[32] Providers who continue to accept cases when an excessive workload is present will fail to provide competent and diligent services as required under rules of professional conduct, have an arguable conflict of interest because of the multiple clients competing for their time and attention,[33] and may be unable to fulfill their duties under the Sixth Amendment.[34]

In the more usual situation in which courts assign cases to the Public Defense Provider, the cooperation of courts may be necessary in order to implement some of the alternatives suggested in this Guideline. One of the most straightforward ways to address excessive lawyer workloads is for the Provider and judges or other officials to negotiate informal arrangements to suspend or reduce new court assignments, with the understanding that additional cases will be represented by assigned counsel, contract lawyers, or other Provider program. This may not be a feasible alternative, however, if funds are not available to compensate the lawyers.[35] It may also be possible to persuade a court to order, or for the funding authority to authorize, that additional resources be provided due either to the complexity of certain types of cases or to one or two particularly time-

[32] "Except as stated in paragraph (c) [where a court orders counsel to proceed with representation], a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law." ABA MODEL RULES, *supra* note 3, R. 1.16 (a)(1).

[33] *See supra* note 8 and accompanying text.

[34] *See* discussion of litigation in JUSTICE DENIED, *supra* note 1, at 110-128.

[35] "[A]ttorneys in several states have successfully argued that a state's refusal to provide adequate compensation amounts to a taking of property under federal or state constitutions, and just compensation must therefore be paid. There appear to be no recent decisions of state appellate courts requiring that lawyers provide pro bono service in indigent criminal and juvenile cases." JUSTICE DENIED, *supra* note 1, at 104-05. The ABA has recognized that "[g]overnment has the responsibility to fund the full cost of quality legal representation for all eligible persons…." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.6.

consuming cases.[36] Further, it may be possible to arrange through either contract or legislation a limit on the number and types of cases annually assigned to lawyers.[37]

In some jurisdictions where courts appoint counsel, it may nevertheless be possible for the Provider simply to notify judges or other officials that lawyers from the defense program are unavailable to accept appointments in all or certain categories of cases for a specified period of time or until further notice. A declaration of "unavailability" has sometimes been used successfully, such as in some counties in California. This approach is seemingly based on the implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules. On the other hand, some Providers may conclude that this approach is either not contemplated by the jurisdiction's statutes[38] or is otherwise deemed inappropriate.

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[36] For example, pursuant to a motion of The Defender Association in Seattle, Washington, a trial court ordered increased "attorney fees and paralegal fees and investigation fees to the levels requested…[as] necessary to provide effective assistance of counsel." *See* In the Detention of Kevin Ambers, et al., Superior Court of Washington for King County, Order Granting Respondent's Motion for Increased Payment for Respondent's Counsel on above Consolidated Cases, January 20, 2006, *available at* http://www.defender.org/files/archive/judgelauorderjan202006.pdf.

[37] The New Hampshire Public Defender, a nonprofit organization that provides defense services, enters into a contract with the state's Judicial Council that contains caseload limitations and requires the defender program to notify the courts if caseloads are too high so that private lawyers can be appointed. See JUSTICE DENIED, *supra* note 1, at 168. In Seattle, the City Council has enacted an ordinance that imposes a ceiling on the number of cases to which lawyers may be assigned annually. The ordinance can be accessed on the website of The Defender Association serving Seattle and King County, Washington. *See* http://www.defender.org/node/18. In Massachusetts, legislation authorizes the Committee on Public Counsel Services to establish "standards" that contain "caseload limitation levels" both for private assigned lawyers and public defenders. *See* Mass. G. L., Chapter 211D, §9 (c) (2009).

[38] Consider, for example, the law in Colorado pertaining to the Colorado State Public Defender: "The state public defender shall represent as counsel…each indigent person who is under arrest for or charged with committing a felony." Colo. Rev. Stat. § 21-1-103 (2004); "Case overload, lack of resources, and other similar circumstances shall not constitute a conflict of interest." Id. at § 21-2-103. This statute is contrary to rules of professional conduct governing lawyers and with these Guidelines.

In addition to the options listed in this Guideline for dealing with excessive caseloads, there may be other ways in which Public Defense Providers can seek to achieve caseload reductions. For example, two national studies issued in 2009 recommended that legislatures consider reclassifying certain offenses as civil infractions so that the need to provide lawyers is removed, assuming there are not adverse public safety consequences.[39] However, if this course is followed, it is important that the possible adverse collateral consequences resulting from a conviction be carefully considered along with any new legislation since a defense lawyer will not be available to counsel the person.[40] Another alternative that can serve to reduce public defense caseloads is for cases to be diverted from the criminal justice system during the pretrial stage. Depending on the jurisdiction, implementation will require legislation, a change in court rules, or approval of prosecutors.[41]

When a Provider cannot reduce excessive lawyer workloads, a motion filed with the court, aimed at stopping case assignments and/or permitting lawyers to withdraw from cases (see Guideline 6 *infra*), or conceivably the filing of a separate civil action, will be necessary. Regardless of the type of litigation pursued, it is almost certain to be time-consuming, labor intensive, and the results not easily predicted. In addition, speedy resolution of the matter may prove elusive. If a trial court decision is adverse to the Provider, an appeal may be required. If the Provider is successful in the trial court, the state may appeal. Moreover, the trial court may simply fail to render a prompt decision

[39] The National Association of Criminal Defense Lawyers has urged that "[o]ffenses that do not involve a significant risk to public safety…be decriminalized" and cites successful examples where this has occurred. *See* MINOR CRIMES, *supra* note 1, at 27-8. Similarly, the National Right to Counsel Committee has suggested that "certain non-serious misdemeanors…be reclassified, thereby reducing financial and other pressures on a state's indigent defense system," and also notes examples where this has taken place. *See* JUSTICE DENIED, *supra* note 1, at 198.

[40] "Under these circumstances, to impose harsh collateral consequences of a conviction, like housing limitations, deportation, and employment limitations would be fundamentally unfair." MINOR CRIMES, *supra* note 1, at 28.

[41] *See* John Clark, PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS I-1-I-2 (Pretrial Justice Institute 2006).

in the matter. Accordingly, every effort should be made to resolve excessive workloads without resort to litigation, which is why the options specified in Guideline 5 are so important.

6. Public Defense Providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.

Comment

When alternative options for dealing with excessive workloads, such as those listed in Guideline 5, are exhausted, insufficient, or unavailable, the Public Defense Provider is obligated to seek relief from the court. Thus, a court should be asked to stop additional assignments in all or certain types of cases and, if necessary, that lawyers be permitted to withdraw from representation in certain cases. Continued representation in the face of excessive workloads imposes a mandatory duty to take corrective action in order to avoid furnishing legal services in violation of professional conduct rules.[42] If representation is furnished pursuant to court appointment, withdrawal from representation usually requires judicial approval.[43] Because lawyers have as their primary obligation the responsibility to represent the interests of current clients, withdrawals from representation is less preferable than seeking to halt the assignment of new appointments.[44] Normally, Providers, rather than individual lawyers, will take the initiative and move to suspend new case assignments and, if necessary, move to withdraw from cases since the Provider has the responsibility to monitor lawyer workloads (Guideline 1), determine whether workloads are excessive (Guideline 4), and explore options other than litigation (Guideline 5). If the Public Defense

[42] *See* ABA MODEL RULES, supra note 3, R. 1.16 (a)(1), quoted in note 29 *supra*. *See also* discussion in Comment to Guideline 1 *supra*. It may also be appropriate to include in a motion to withdraw a request that charges against one or more clients be dismissed due to the failure of the government to provide effective assistance of counsel as required by federal and state law.

[43] "When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority." ABA MODEL RULES, *supra* note 3, R. 1.16, cmt. 2.

[44] "A lawyer's primary ethical duty is owed to existing clients." ABA Formal Op 06-441, *supra* note 2, at 4.

Provider has complied with Guidelines 1 through 4, it should be in an especially strong position to show that its workload is excessive, and its representations regarding workloads should be accepted by the court.[45] Nevertheless, in making its motion to the court, the Provider may deem it advisable to present statistical data, anecdotal information, as well as other kinds of evidence.[46] The Provider also may want to enlist the help of a private law firm with expertise in civil litigation that is willing to provide representation on a pro bono basis. There are notable examples in which private firms have volunteered their time and been extremely helpful to Providers in litigating issues related to excessive workloads.[47] As discussed earlier, an individual lawyer is obliged to take action when there is disagreement with those in charge of the Provider about whether the lawyer has an excessive workload and the lawyer concludes that Provider officials have made an unreasonable decision respecting the matter.[48]

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[45] *See also infra* notes 49-52 and accompanying text.

[46] *See* discussion of litigation respecting such motions in JUSTICE DENIED, *supra* note 1, at 144-45.

[47] The following observation, offered in discussing the role of volunteer lawyers in litigating systemic challenges to indigent defense systems, is also applicable to litigating motions to withdraw and/or to halt additional appointments: "[E]xternal counsel affiliated with law firms, bar associations, or public interest organizations who are willing to provide pro bono representation can make significant contributions. Besides possessing the necessary experience, they are likely to have more time, personnel, and resources than do public defenders to devote to a major systemic challenge. They also are used to conducting extensive discovery, preparing exhibits, and may have funds to retain necessary experts." *Id* at 143.

[48] *See supra* notes 27-28 and accompanying text. *See also* ABA Model Rules, *supra* note 3, R. 5.2 (b), quoted in note 22 *supra*. See also Norman Lefstein and Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, 30 THE CHAMPION 12-13 (Nat'l Assoc. Crim. Defense Lawyers, December 2006); and ABA Formal Op 06-441, *supra* note 2, at 1, 4-6. In 2009, a California appellate court endorsed the approach of the ABA's ethics opinion: "Under the ABA opinion, a deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisorial approval, attempt to reduce the caseload, as by transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, the ABA opinion provides that he or she must 'file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.'… The conduct prescribed by the ABA Opinion, which is fully consistent with the California Rules of Professional Conduct, may also be statutorily mandated." In re Edward S.,173 Cal. App. 4th 387, 413, 92 Cal. Rptr. 3d 725, 746 (Cal. App. 1st Dist. 2009). This decision cites with approval an earlier California decision, Ligda v. Superior Court, 85 Cal. Rptr. 744, 754 (Cal. Ct. App. 1970)("[w]hen a public defender reels under a staggering workload, he

7. When motions to stop the assignment of new cases and to withdraw from cases are filed, Public Defense Providers and lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients.

Comment

The concern that underlies this Guideline relates to the risk that judges confronted with motions to halt the assignment of new cases or to permit lawyers to withdraw from cases will delve inappropriately into the internal operations of Public Defense Providers. While it is appropriate for judges to review motions asking that assignments be stopped and withdrawals from cases are permitted, courts should not undertake to micro-manage the operations of defense programs.[49]

When Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers. As the ABA has noted, "[o]nly the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take."[50] In discussing a defense lawyer's claim of conflict of interest in representing co-defendants, the Supreme Court has noted that "attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'"[51] In an accompanying footnote, the Court further declared: "When a considered representation

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… should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense.")

[49] "We acknowledge the public defender's argument that the courts should not involve themselves in the management of public defender offices." *In re Certification of Conflict in Motions to Withdraw*, 636 So.2d 18, 21-22 (Fla. 1994).

[50] ABA PROVIDING DEFENSE SERVICES, *supra* note 4, at 71. See also State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984)("Attorneys are in a position to know when a contract [for defense services] will result in inadequate representation of counsel.")

[51] Holloway v. Arkansas, 435 U.S. 475, 486 (1978).

regarding a conflict of interest comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation."[52]

The ABA has recognized that the judiciary needs to ensure that Providers and their lawyers are not forced to accept unreasonable numbers of cases: "Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations."[53] This Guideline is a corollary to the well accepted proposition that defense services should be independent of the judicial and executive branches of government.[54] Thus, an ABA standard recommends that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials…."[55] This same standard also urges that the plan for

[52] *Id*., at n. 9. Judges should be especially understanding of the representations of Providers given that the "judiciary plays a central in preserving the principles of justice and the rule of law." ABA CODE OF JUDICIAL CONDUCT, Preamble (2007). Similarly, prosecutors have a duty "to seek justice … [and] to reform and improve the administration of criminal justice." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, Std.3-1.2 (c), (d) (3rd ed., 1993). However, when a Provider seeks relief in court from an excessive workload, the prosecutor seemingly has a conflict of interest in opposing the Provider's motion. Not only do the decisions of prosecutors in filing charges against persons directly impact the caseloads of Providers, but the likelihood of successful prosecutions are enhanced if Providers are burdened with excessive caseloads. The adversary system is premised on the assumption that justice is best served when both sides in litigation are adequately funded and have sufficient time to prepare their respective cases.

[53] ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-5.3 (b). Sometimes the problem is not the number of cases, but the pressure placed on defense lawyers to proceed when they have not had sufficient time to prepare. In an Ohio case, a public defender was prepared to represent his client, but asked for a continuance before proceeding to trial because he had just been appointed earlier the same day and lacked sufficient time to interview witnesses. The trial court denied the public defender's request for a continuance and held the lawyer in contempt because of his refusal to proceed to trial. In reversing the contempt finding, the court concluded that the trial judge had "improperly placed an administrative objective of controlling the court's docket above its supervisory imperative of facilitating effective, prepared representation at trial." State v. Jones, 2008 WL 5428009, at *5 (Ohio App. 2008).

[54] "The legal representation plan for the jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be…subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary…." ABA PROVIDING DEFENSE SERVICES, *supra* note 4, at Std. 5-1.3 (a).

[55] *Id.*

legal representation "guarantee the integrity of the relationship between lawyer and client."[56]

8. Public Defense Providers or lawyers appeal a court's refusal to stop the assignment of new cases or a court's rejection of a motion to withdraw from cases of current clients.

Comment

The ABA Standing Committee on Ethics and Professional Responsibility has indicated that a trial court's denial of motions to halt appointments or to withdraw from pending cases should be appealed, if possible.[57] An appeal or an application for a writ of mandamus or prohibition should properly be regarded as a requirement of "diligence" under professional conduct rules.[58] However, if a defense motion is rejected and an appeal is not permitted, the Public Defense Provider usually has no choice except to continue to provide representation.[59] Similarly, if the motion for relief is granted but implementation of the order is stayed pending appeal, the Provider will likely have to continue to provide representation.[60] This places the Provider in an extremely awkward situation since on the one hand those in charge of the defense program have made it clear that, in their professional judgment, caseloads are excessive and the lawyers providing direct client services are being forced to violate their ethical responsibilities, yet relief is unavailable. Accordingly, the Provider should continue to explore non-litigation alternatives (*see* Guideline 5) while requiring the Provider's lawyers to make a record in their cases, if

[56] *Id.*

[57] "If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant." ABA Formal Op 06-441, *supra* note 2, at 1.

[58] "A lawyer should pursue a matter on behalf of a client…and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with zeal in advocacy upon the client's behalf." ABA MODEL RULES, *supra* note 3, R. 1.3, cmt. 1.

[59] "When ordered to do so, by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id., R*. 1.16 (c). *See also supra* note 32.

[60] However, the Provider or lawyer also will likely want to proceed expeditiously in the appellate court to strike the stay or modify the order pending appeal.

appropriate, about the lawyers' inability, due to excessive caseloads, to furnish "competent" and "diligent" representation as required by professional conduct rules. The Public Defense Provider should also continue to seek public support from bar associations, community groups, and the media.[61]

[61] "Theoretically, when judges resolve court cases concerning indigent defense reform, it should be irrelevant whether the litigation is covered by print and other news media. Nor should it matter whether prominent persons in the state or community speak publicly in favor of necessary changes in the delivery of indigent defense services. However, the reality is that news reports about problems in indigent defense and strong public support for improvements may make a difference not only when legislatures consider new laws, but also when courts decide difficult cases." JUSTICE DENIED, *supra* note 1, at 146.

Report

Introduction

Throughout the United States, there is a lack of adequate funding to provide legal representation for persons in criminal and juvenile delinquency cases who have a Constitutional right to a lawyer but are unable to afford representation. As a result, public defender agencies and their lawyers are routinely faced with enormous caseloads. Defenders, therefore, are unable to represent their indigent clients effectively as required by the Sixth Amendment to the U.S. Constitution and from providing competent and diligent representation as required by rules of professional conduct.

The **Eight Guidelines of Public Defense Related to Excessive Workloads** [hereinafter "Guidelines"] contain a well thought out course of action not only for public defender agencies forced to deal with too many cases, but also for other providers of indigent defense services with excessive workloads. These include lawyers who accept appointments to cases as part of an assignment program and lawyers who enter into contracts to provide indigent defense services.

Excessive Caseloads Are a National Problem

The problem of excessive caseloads among public defense providers has been documented in numerous national, state, and local reports over a period of many years. Recently, two national reports on indigent defense services in the United States were published. The first of these was released in April 2009 by the Constitution Project, on behalf of the National Right to Counsel Committee, an independent and diverse group representing all major constituencies of the justice system, i.e., the judiciary, prosecution, police, and the defense. The Committee was organized by the Constitution Project and the National Legal Aid & Defender Association. In its report, the Committee offered the following assessment of public defense caseloads:

> Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads. Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing

> caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.[62]

The second recent national study, published in May 2009 by the National Association of Criminal Defense Lawyers, focuses on the problems of indigent defense representation in misdemeanor cases. The report summed up the caseload problems in lower courts this way:

> Almost 40 years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision.[63] Legal representation for indigent defendants is absent in many cases. Even when an attorney is provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties. Frequently, judges and prosecutors are complicit in these breaches, pushing defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client.[64]

In 2004, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) issued the Association's most recent national report on indigent defense services. This report, based upon hearings held at four locations across the country during 2003,[65] commemorated the fortieth anniversary of the Supreme Court's decision in *Gideon v. Wainwright*.[66] In referring to the number of cases that public defenders are asked to handle, the report summarized the testimony of numerous witnesses: "[T]he hearings revealed that oftentimes caseloads…[make] it impossible for even the most industrious of lawyers to deliver effective representation in all cases."[67] Twenty-two years earlier, SCLAID offered a similar assessment of caseloads of those providing public defense services.[68]

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[62] JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 17 (The Constitution Project 2009)[hereinafter JUSTICE DENIED].

[63] This is a reference to the Supreme Court's decision in Argersinger v. Hamlin, 407 U.S. 25 (1972). This decision essentially established the right to a lawyer at government expense in misdemeanor cases.

[64] MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (National Association of Criminal Defense Lawyers 14 (2009).

[65] GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (American Bar Association 2004).

[66] 372 U.S. 375 (1963).

[67] *Id*. at 18

[68] *See* GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (American Bar Association, John Thomas Moran ed., 1982).

ABA Ethics Opinion Dealing with Excessive Caseloads

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441 concerning the ethical obligations of indigent defense lawyers burdened with excessive caseloads. The opinion made clear that there are "no exceptions" for lawyers who represent indigent clients – *all* lawyers have a duty to furnish "competent" and "diligent" service, as required by rules of professional conduct. Accordingly, as directed by the ABA Model Rules of Professional Conduct, the opinion admonishes defense programs and lawyers to move to withdraw from cases if they are unable to furnish representation in compliance with their ethical duties. The opinion also advises lawyers that if clients are being assigned through a court appointment system, which is often what occurs in indigent defense, the lawyers should advise the court not to make any new appointments.

Formal Opinion 06-441, therefore, sets forth several basic steps that those providing defense services should take when faced with excessive caseloads. However, the opinion does not contain *a detailed action plan* to which public defense providers should adhere as they seek to comply with their professional responsibilities. The purpose of the proposed Guidelines is to do just that, as more fully explained below.

ABA Standards and Principles Related to Excessive Caseloads

Much like the ABA's new ethics opinion concerning indigent defense representation, a detailed plan for dealing with excessive caseloads is lacking in the ABA's Standards for Criminal Justice and in the ABA Ten Principles of a Public Defense Delivery System. This is understandable since neither these standards nor principles deal with subjects in as much detail as contained in the proposed Guidelines. Thus, a standard in the ABA's Defense Function Standards simply advises "[d]efense counsel…[not to] carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations."[69] Similarly, the ABA's Providing Defense Services Standards urges indigent defense lawyers with excessive caseloads to "take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments."[70] The ABA's Ten Principles of a Public Defense Delivery System, which is largely based on Providing Defense Services, reads as follows: "Defense counsel's workload is controlled to permit the rendering of quality representation."[71]

The Eight Guidelines: Why They Are Needed and What They Do

The problem of excessive indigent defense caseloads has become especially acute during the past year due to America's slumping economy, which has led to more

[69] ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION 4-1.3 (e)(3d ed., 1992).

[70] ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 5-5.3(b)(3d ed., 1992).

[71] ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002).

restricted funding for public defense providers. As the recent report of the National Right to Counsel Committee warned, "[i]n the country's current economic crisis, indigent defense may be further curtailed…. Although troubles in indigent defense have long existed, the need for reform has never been more urgent."[72] The proposed Eight Guidelines build upon the ABA's Formal Opinion 06-411, the ABA's Criminal Justice Standards, and the ABA's Ten Principles of a Public Defense Delivery System. Because the Guidelines contain a complete and coherent approach to dealing with excessive defender caseloads, their implementation by indigent defense providers will contribute to important reform at an especially critical time.

Specifically, Guideline 1 advises the management of public defense providers to assess whether excessive workloads are preventing lawyers from fulfilling their performance obligations under nationally accepted standards, as well as complying with professional conduct rules. This first Guideline also offers an important list of factors for public defense providers to consider in deciding whether their caseloads are too high. Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical responsibilities when confronted with excessive workloads and the need for management to determine if excessive workloads exist. Guideline 5 sets forth a number of non-litigation alternatives for public defense providers to pursue in an effort to address excessive workloads. Guideline 6 recognizes that if non-litigation alternatives are "unavailable, or been proven to be unsuccessful or inadequate," those responsible for public defense are obligated to seek formal redress in the courts. Guidelines 7 and 8 deal with important practices to which public defense providers should adhere in challenging their caseloads through litigation.

Conclusion

The proposed Guidelines will enhance the fairness of our nation's criminal and juvenile courts while enabling lawyers to discharge their duty under the Constitution and also comply with their ethical obligations in accordance with rules of the legal profession. The Guidelines are intended for use by both public defense organizations and their lawyers when they have excessive workloads. In addition, the Guidelines should be valuable to a number of other audiences, including members of boards and commissions that oversee public defense representation, policymakers responsible for funding indigent defense, and judges who are called upon to address the caseload concerns of those who provide public defense services. Moreover, since these Guidelines relate directly to the quality of justice in our courts, they should be of special interest to bar leaders, as well as to the legal profession and to the public.

Respectfully submitted,

Deborah G. Hankinson, Chair
Standing Committee on Legal Aid and Indigent Defendants

August, 2009

[72] JUSTICE DENIED, *supra* note 1, at 2.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-441 **May 13, 2006**

Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

In this opinion,[1] we consider the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers' workloads prevent them from providing competent and diligent representa-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

tion to all their clients. Excessive workloads present issues for both those who represent indigent defendants and the lawyers who supervise them.[2]

Ethical responsibilities of a public defender[3] in regard to individual workload

Persons charged with crimes have a constitutional right to the effective assistance of counsel.[4] Generally, if a person charged with a crime is unable to afford a lawyer, he is constitutionally entitled to have a lawyer appointed to represent him.[5] The states have attempted to satisfy this constitutional mandate through various methods, such as establishment of public defender, court appointment, and contract systems.[6] Because these systems have been created to provide representation for a virtually unlimited number of indigent criminal defendants, the lawyers employed to provide representation generally are limited in their ability to control the number of clients they are assigned. Measures have been adopted in some jurisdictions in attempts to control workloads,[7] including the establishment of procedures for assigning cases to lawyers outside public defenders' offices when the cases could not properly be directed to a public defender, either because of a conflict of interest or for other reasons.

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2. For additional discussion of the problems presented by excessive caseloads for public defenders, *see* "Gideon's Broken Promise: American's Continuing Quest For Equal Justice," prepared by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants 29 (ABA 2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (last visited June 21, 2006).

3. The term "public defender" as used here means both a lawyer employed in a public defender's office and any other lawyer who represents, pursuant to court appointment or government contract, indigent persons charged with criminal offenses.

4. U.S. CONST. amends. VI & XIV.

5. The United States Supreme Court has interpreted the Sixth Amendment to require the appointment of counsel in any state and federal criminal prosecution that, regardless of whether for a misdemeanor or felony, leads or may lead to imprisonment for any period of time. *See generally,* Alabama v. Shelton, 535 U.S. 654, 662 (2002); Strickland v. Washington, 466 U.S. 668, 684-86 (1984); Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); Johnson v. Zerbst, 304 U.S. 458. 462-63 (1938).

6. Most states deliver indigent defense services using a public defender's office (eighteen states) or a combination of public defender, assigned counsel, and contract defender (another twenty-nine states), according to the Spangenberg Group, which developed a report on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants. *See* The Spangenberg Group, "Statewide Indigent Defense Systems: 2005," *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf (last visited June 21, 2006).

7. *See generally,* National Symposium on Indigent Defense 2000, *Redefining Leadership for Equal Justice, A Conference Report* (U.S. Dep't of Justice, Bureau of Justice Assistance, Wash. D.C.) 3 (June 29-30, 2000), *available at* http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf (last visited June 21, 2006) (common problem in indigent defense delivery systems is that "lawyers often have unmanageable caseloads (700 or more in a year")).

Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation.[8] These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.[9]

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8. Rule 1.1(a) provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
Rule 1.2(a) states:

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."
Rule 1.4(a) and (b) states:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. *See* ABA Formal Opinion Op. 347 (Dec. 1, 1981) (Ethical Obligations of Lawyers to Clients of Legal Services Offices When Those Offices Lose Funding), in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 at 139 (ABA 1985) (duties owed to existing clients include duty of adequate preparation and a duty of competent representation); ABA Informal Op. 1359 (June 4, 1976) (Use of Waiting Lists or Priorities by Legal Service Officer), *id*. at 237 (same); ABA Informal Op. 1428 (Sept. 12, 1979) (Lawyer-Client Relationship Between the Individual and Legal Services Office: Duty of Office Toward Client When Attorney Representing Him (Her) Leaves the Office and Withdraws from the Case), *id*. at 326 (all lawyers, including legal services lawyers, are subject to mandatory duties owed by lawyers to existing clients, including duty of adequate preparation

Comment 2 to Rule 1.3 states that a lawyer's workload "must be controlled so that each matter may be handled competently."[10] The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association.[11] Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties.[12] 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.[13]

A lawyer's primary ethical duty is owed to existing clients.[14] Therefore, a

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and competent representation). *See also* South Carolina Bar Ethics Adv. Op. 04-12 (Nov. 12, 2004) (all lawyers, including public defenders, have ethical obligation not to undertake caseload that leads to violation of professional conduct rules).

The applicability of Rules 1.1, 1.3, and 1.4 to public defenders and/or prosecutors has been recognized by ethics advisory committees in at least one other state. *See* Va. Legal Eth. Op. 1798 (Aug. 3, 2004) (duties of competence and diligence contained within rules of professional conduct apply equally to all lawyers, including prosecutors).

10. Principle 5 of *The Ten Principles of a Public Defense Delivery System* specifically addresses the workload of criminal defense lawyers:

> *Defense counsel's workload is controlled to permit the rendering of quality representation.* Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Report to the ABA House of Delegates No. 107 (adopted Feb. 5, 2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf (last visited June 21, 2006) (emphasis in original).

11. *Id.*

12. *Id*. *See also* Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d 1045, 1051-52 (1998) (supervising lawyer violated Rule 5.1 by assigning too many cases to supervised lawyer, assigning cases day before trial, and assigning cases too complex for supervised lawyer's level of experience and ability).

13. Rule 1.16(a) states that "a lawyer shall not represent a client or, where representation has begun, shall withdraw from the representation of a client if the representation will result in violation of the Model Rules of Professional Conduct or other law."

14. *See* ABA Formal Opinion Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 369 (ABA 2000); ABA Formal Opinion Op. 347, *supra* note 9.

lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.[15]

If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases;[16] and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).[17]

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15. Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such notification. *See* Rule 1.4.

16. It should be noted that a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds. Rule 6.2(a) provides, in pertinent part, that "[a] lawyer *shall not seek to avoid* appointment by a tribunal to represent a person *except for good cause*, such as representing the client is likely to result in violation of the Rules of Professional Conduct or other law." (Emphasis added). Therefore, 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.

17. It is important to note that, for purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm. *See* Rule 1.0(c). Unless a court specifically names an individual lawyer within a public defender's office to represent an indigent defendant, the public defender's office should be considered as a firm assigned to represent the client; responsibility for handling the case falls upon the office as a whole. *See* ABA Informal Op. 1428, *supra* note 9 (legal services agency should be considered firm retained by client; responsibility for handling caseload of departing legal services lawyer falls upon office as whole rather than upon lawyer who is departing). Therefore, cases may ethically be reassigned within a public defender's office.

If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to 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.

In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors.[18] When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a "reasonable resolution of an arguable question of professional duty" as discussed in Rule 5.2(b).[19] In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.[20]

Such further action might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office;[21] and
- if the lawyer is still not able to obtain relief,[22] 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.[23]

If the public defender is not allowed to withdraw from representation, she must obey the court's order while taking all steps reasonably feasible to insure that her client receives competent and diligent representation.[24]

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18. *See* note 12, *supra*, and accompanying text.

19. *See* Comment [2].

20. *See, e.g.*, Atty. Grievance Comm'n of Maryland v. Kahn, 431 A.2d 1336, 1352 (1981) ("Obviously, the high ethical standards and professional obligations of an attorney may never be breached because an attorney's employer may direct such a course of action on pain of dismissal. . . .")

21. *See* Michigan Bar Committee on Prof. & Jud. Eth. Op. RI-252 (Mar. 1, 1996) (in context of civil legal services agency, if subordinate lawyer receives no relief from excessive workload from lawyer supervisor, she should, under Rule 1.13(b) and (c), take the matter to legal services board for resolution).

22. Rule 5.2 makes clear that subordinate lawyers are not insulated from violating the Rules of Professional Conduct and suffering the consequences merely because they acted in accordance with a supervisory lawyer's advice or direction unless it was in regard to "an arguable question of professional duty."

23. A public defender filing a motion to withdraw under these circumstances should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client. *See* Rule 1.16 cmt. 3.

24. Notwithstanding the lawyer's duty in this circumstance to continue in the representation and to make every attempt to render the client competent representation, the lawyer nevertheless may pursue any available means of review of the court's order. *See* Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Hughes, 557 N.W.2d 890, 894

Ethical responsibility of a lawyer who supervises a public defender

Rule 5.1 provides that lawyers who have managerial authority, including those with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients. As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.

If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients. These might include the following:

- transferring the lawyer's non-representational responsibilities, including managerial responsibilities, to others in the office;
- transferring case(s) to another lawyer or other lawyers whose workload will allow them to provide competent representation;[25]
- if there are no other lawyers within the office who can take over the cases from which the individual lawyer needs to withdraw, supporting the lawyer's efforts to withdraw from the representation of the client;[26] and finally,
- if the court will not allow the lawyer to withdraw from representation, providing the lawyer with whatever additional resources can be made available to assist her in continuing to represent the client(s) in a manner consistent with the Rules of Professional Conduct.

(Iowa 1996) ("ignoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility"); Utah Bar Eth. Adv. Op. 107 (Feb. 15, 1992) (if grounds exist to decline court appointment, lawyer should not disobey order but should seek review by appeal or other available procedure).

25. *See* note 17, *supra*.

26. *See* In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1138-39 (Fla. 1990) (in context of inadequate funding, court stated that if "the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw"); *see also* In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender, 612 So.2d 597 (Fla. App. 1992) (en banc) (public defender's office entitled to withdraw due to excessive caseload from representing defendants in one hundred forty-three cases).

When a supervised lawyer's workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer, and, if the lawyer's cases come by assignment from the court, to support the lawyer's efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients.

In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. As Comment [2] to Rule 5.2 observes, if the question of whether a lawyer's workload is too great is "reasonably arguable," the supervisor of the lawyer has the authority to decide the question. In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c),[27] the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.[28]

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27. Rule 5.1(c) states:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

See also Rules 1.16 (a) and 8.4 (a).

28. *See, e.g.*, Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d at 1052, *supra* note 12); Va. Legal Ethics Op. 1798 *supra* note 9 (lawyer supervisor who assigns caseload that is so large as to prevent lawyer from ethically representing clients would violate Rule 5.1); American Council of Chief Defenders, Nat'l Legal Aid and Defender Ass'n Eth. Op. 03-01 (April 2003), *available at* http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf (last visited June 21, 2006) ("chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case…. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."); Wisconsin State Bar Prof. Ethics Comm. Op. E-91-3 (1991) (assigning caseload that exceeds recognized maximum caseload standards, and that would not allow subordinate public defender to conform to rules of professional conduct, "could result in a violation of disciplinary standards"); Ariz. Op. No. 90-10 (Sept. 17, 1990) ("when a Public Defender has knowledge that subordinate lawyers, because of their caseloads, cannot comply with their duties of diligence and competence, the Public Defender must take action."); Wisconsin State Bar Prof. Ethics Comm. Op. E-84-11 (1984) (supervisors in public defender's office may not ethically increase workloads of subordinate lawyers to point where subordinate lawyer cannot, even at personal sacrifice, handle each of her clients' matters competently and in non-neglectful manner).

Conclusion

The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients. If the problem of an excessive workload cannot be resolved through the non-acceptance of new clients or by other available measures, the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn. If permission of a court is required to withdraw from representation and permission is refused, the lawyer's obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.

Supervisors, including the head of a public defender's office and those within such an office having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.

American Council of Chief Defenders
National Legal Aid and Defender Association

Ethics Opinion 03-01
April 2003

Situation presented:

Due to budgetary pressures within a jurisdiction, a public defense agency is under pressure to accept a substantial budget cut, even though the agency's caseload is not projected to decrease. Alternatively, the agency faces a flat budget but substantially increasing caseloads. In either event, the agency's chief executive officer has determined that some portion of the caseload will be beyond the capacity of the staff to competently handle. What are the ethical obligations of the agency's chief executive officer in such a situation?

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards.

When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

Principle sources: American Bar Association Model Code of Professional Responsibility ("Model Code"); American Bar Association Model Rules of Professional Conduct ("Model Rules"); *Ten Principles of a Public Defense Delivery System* (American Bar Association, 2002) ("ABA Ten Principles"); American Bar Association *Standards for Criminal Justice, Defense Function* (3rd ed. 1993) ("ABA Defense Function"); National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representation* (1995) ("Performance Guidelines"); Monahan and Clark, "Coping with Excessive Workload," Ch. 23 of *Ethical Problems Facing the Criminal Defense Lawyer*, American Bar Association, 1995 ("Ethical Problems").

1. General duty of lawyer to act competently, diligently and promptly

The ABA Model Code requires that a lawyer "should represent a client competently." The ABA Model Rules further require that a lawyer "act with reasonable diligence and promptness" (Rule 1.3), including "zeal in advocacy upon the client's behalf" (*id.,* comment), and communicate promptly and effectively with clients. (Rule 1.4). "Competence" is discussed in terms of the training and experience of the lawyer to handle any particular type of case (comment to ABA Model Rule 1.1).

Inexperience is not a defense to incompetence (*Ethical Problems*, citing *In re Deardorff*, 426 P.2d 689, 692 (Col. 1981)). Being too busy with cases is not an acceptable excuse to avoid discipline for lack of knowledge of the law. (*Id., citing Nebraska State Bar Association v. Holscher*, 230 N.W. 2d 75, 80 (Neb. 1975)).

The question of what constitutes competent representation is addressed in the two national sets of performance standards for criminal defense representation: ABA *Defense Function* Standard 4-1.2 (obligation to provide "effective, quality representation"), and NLADA *Performance Guideline* 1 (duty to provide "zealous, quality representation"). These and various state and locally adopted standards derived therefrom are published as Volume 2 of the U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems* (Office of Justice Programs, 2000 www.ojp.usdoj.gov/indigentdefense/compendium/).

Among the basic components of competent representation under the ABA and NLADA standards, and as discussed in *Ethical Problems, supra,* are:

- Timeliness of representation, encompassing prompt action to protect the rights of the accused;
- Thoroughness and preparation, including research to discover readily ascertainable law, at risk of discipline and disbarment;
- Independent investigation of the facts of the case (use of a professional investigator is more cost-effective than a higher-compensated attorney performing this function)
- Client relationship and interviewing, including not just timely fact gathering, but building a relationship of trust and honesty that is necessary to an effective working relationship;
- Regular client communications, to support informed decision-making; prompt and thorough investigation;
- Discovery (failure to request exculpatory evidence from prosecution is violation of constitutional right to counsel, *Kimmelman v. Morrison,* 477 U.S. 365, 368-69, 385 (1986));
- Retention of experts (including mitigation specialists in capital cases) and forensic services, where appropriate in any case;
- Exploring and advocating alternative dispositions;
- Competent discharge of duties at all the various stages of trial court representation, including from voir dire and opening statement to closing argument;
- Sentencing advocacy, including familiarity with all sentencing alternatives and consequences, and presence at all presentence investigation interviews;
- Appellate representation, including explaining the right, the consequences, the grounds, and taking all steps to preserve issues for appeal (there are additional duties of appellate counsel, under ABA Defense Function Standard 4-8.3, including reviewing the entire appellate record, considering all potential guilt or penalty issues, doing research, and presenting all pleadings in the interest of the client); and
- Maintaining competence through continuing legal education: mandatory CLE was mandated for the first time by the ABA – but only for public defense providers – in

> Principle 9 of its *Ten Principles*[1] ("**Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors"). Training, it should be noted, takes away from the time an attorney has available to provide direct representation (ABA Principle 5, infra: numerical caseload limitations should be adjusted to reflect an attorney's nonrepresentational duties).

Failure to perform such basic duties as researching the law, investigation, advising the client on available defenses, or other preparation, may constitute a constitutional violation, *State* v. *Felton,* 329 N.W.2d 161 (Wis. 1983), or warrant disciplinary sanctions, *Office of Disciplinary Counsel v. Henry,* 664 S. W. 2d 62 (Tenn. 1983); *Florida Bar v. Morales,* 366 So. 2d 431 (Fla. 1978); *Matter of Lewis,* 445 N.E.2d 987 (Ind. 1983). Under national standards, indigent defense counsel's incurring of expenses such as for experts or investigators may not be subject to judicial disapproval or diminution. The first of the ABA Ten Principles (recapitulating other ABA standards) provides that indigent defense counsel should be "subject to judicial supervision only in the same manner and to the same extent as retained counsel," and the courts have no role with regard to matters such as utilization of experts or investigators by retained counsel. By extension, prosecutors have no role in moving for any such judicial action.

Effective assistance of counsel means "that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients." *State v. Peart,* 621 So. 2d 780, 789 (La. 1993). It is no excuse that an attorney is so overloaded as to become disabled or diminished by personal strain or depression; when too much work results in lawyer burnout, discipline for neglect of a client is still the consequence. *In re Conduct of Loew,* 642 P.2d 1174 (Or. 1982).

2. Indigent defender's duty to limit workload so as to ensure quality, and to decline excess cases

The ABA has very recently placed these ethical commands in the context of workload limits on providers of public defense services. Principle 5 of the ABA's *Ten Principles* states:

> **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.

This principle is not expressed as new policy, but as a restatement and summary of long-standing ethical standards and legal requirements relating to indigent defense systems, which are in turn derived from the basic commands of the ABA Model Code and Model Rules. The standards cited are:

[1] The ABA Ten Principles are substantially identical to a document published by the U.S. Department of Justice in December 2000 to guide local jurisdictions in the development and adoption of indigent defense standards: the "Ten Commandments of Public Defense Delivery Systems," written by James Neuhard, State Appellate Defender of Michigan and former NLADA President, and Scott Wallace, NLADA Director of Defender Legal Services, published as an introduction to the five-volume *Compendium of Standards for Indigent Defense Systems*. See www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm#Ten.

- National Study Commission on Defense Services*, Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "National Study Commission"], Guideline 5.1, 5.3;
- American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA Defense Services"], Standard 5-5.3;
- ABA Defense Function, Standard 4-1.3(e);
- National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standard 13.12;
- *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (National Legal Aid and Defender Association, 1984) [hereinafter "Contracting"], Guidelines III-6, III-12;
- *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989) [hereinafter "Assigned Counsel," Standards 4.1,4.1.2;
- Institute for Judicial Administration/American Bar Association*, Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties," Standard 2.2 (B) (iv).

The duty to decline excess cases is based both on the prohibition against accepting cases which cannot be handled "competently, promptly and to completion" (Model Rule 1.16(a)(1) and accompanying commentary), and the conflict-of-interest based requirement that a lawyer is prohibited from representing a client "if the representation of that client may be materially limited by the lawyer's responsibility to another client." (See *Keeping Defender Workloads Manageable*, U.S. Department of Justice, Bureau of Justice Assistance monograph, NCJ 185632, January 2001, at 4-6).

"As licensed professionals, attorneys are expected to develop procedures which are adequate to assume 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 ensure 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 (1986). The fact that the unethical conduct was a prevalent or customary practice among other lawyers is not sufficient to excuse unprofessional conduct. *KBA v. Hammond,* 619 S.W.2d 696, 699 (Ky. 1981). In *People v. Johnson,* 606 P. 2d 738, 744 (Cal. 1980), the court found that a public defender's waiver of one client's speedy trial rights because of the demands of other cases "is not a matter of defense strategy at all; it is an attempt to resolve a conflict of interest by preferring one client over another." Counsel's abdication, if made "solely to resolve a calendar conflict and not to promote the best interests of his client," the court held, "cannot stand unless supported by the express or implied consent of the client himself." In any event, the client's consent must be both fully informed and voluntary.

The duty to decline excess cases has been recognized and enforced through both constitutional caselaw and attorney disciplinary proceedings, as reviewed in *Ethical Problems*. "[T]he duty of loyalty [is] perhaps the most basic of counsel's duties." *Strickland v. Washington,* 466 U.S. 668, 692 (1984). "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 extent that the duty of competent, nonneglectful representation can be ful-

filled." Wisconsin Formal Opinion E-84-.11, reaffirmed in Wisconsin Formal Opinion E-91-3. "There can be no question that taking on more work than an attorney can handle adequately is a violation of a lawyer's ethical obligations.... No one seriously questions that a lawyer's staggering caseloads can result in a breach of the lawyer's duty of competence." Arizona Opinion 90-10. *See State v. Alvey,* 524 P.2d 747 (1974); *State v. Gasen,* 356 N.E.2d 505 (1976).

A chief public defender may not countenance excessive caseloads even if it saves the county money (*Young v. County of Marin*, 195 Cal.All.3d §63, 241 Cal.Rptr. 3d 863). Nor is a chief public defender permitted to allow his or her financial interests, personal or professional, to oppose the interests of any client represented by any attorney in the office (*People v. Barboza*, 29 Cal.3d, 173 Cal.Rptr. 458). Nor can the lawyer's ethical or constitutional obligations be contracted away by a public defender agency's contract with the municipality or other government body.[2]

Though the duty to decline excess cases is the same for both the individual attorney and the chief executive of a public defense agency, the individual attorney may not always have the *ability* to withdraw from a case once appointed. If a court denies the attorney's motion to withdraw from a case due to issues such as excessive workload, the attorney may, under ABA Model Rule 1.16(a) (Declining or Terminating Representation), have no choice but to continue representing the client, while retaining a duty to object and seek appropriate judicial review, as noted in *Ethical Problems.* A chief defender, on the other hand, has the ability not only to decline cases prospectively (as does the individual lawyer), but to redress an individual staff attorney's case-overload crisis by reallocating cases among staff attorneys or declaring the whole office unavailable for further appointments.

3. Determining whether workload is excessive

The question of how to determine whether the workload of an attorney has become excessive and unmanageable is addressed in the remainder of ABA Principle 5. It provides that:

> National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

The national caseload standards referenced as unconditional numerical maxima per attorney per year, are those promulgated in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, a body established by Administrator of the U.S. Law Enforcement Assistance Administration to write standards for all components of the criminal justice system, pursuant to the recommendation of the President's Commission on Law Enforcement and Administration of Justice in its 1967 report, *The Challenge of Crime in a Free Society*.[3] Courts

[2] Model Rule 1.8(f)(2) allows a lawyer to accept compensation for representing a person from a third party, but only if, first, there is no interference with the lawyer's independence of professional judgment, and, second, no interference with the client-lawyer relationship. This would include all of the lawyer's ethical & fiduciary obligations (including conflict of interest, zealous advocacy, competence), and legal obligations (including constitutional) to the client.

[3] As noted in a footnote to ABA Principle 5, these annual caseload limits per attorney are:

- 150 felonies
- 400 misdemeanors

have relied on numerical national caseload standards in determining the competence of the lawyer's performance for all of his or her clients. *See, e.g., State v. Smith,* 681 P.2d "1374 (Ariz. 1984). "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads." *Id.* at 1381 (cited in *Ethical Problems*).

The concept of workload referenced in ABA Principle 5 is explained in a manual prepared for the National Institute of Justice by NLADA, *Case Weighting Systems: A Handbook for Budget Preparation.* Essentially, the National Advisory Commission's numerical caseload limits are subject to local adjustment based on the "weights," or units of work, associated with different types of cases and different types of dispositions, the attorney's level of support services, and nonrepresentational duties.

The concept of workload allows appropriate adjustment to reflect jurisdiction-specific policies and practices. The determination of workload limits might start with the NAC caseload limits, and then be adjusted by factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, extent and quality of supervision, and availability of investigative, social worker and support staff.[4] It is the responsibility of each chief public defender to set appropriate workload limits for attorney staff, reflecting national standards adjusted by local factors. Some jurisdictions may end up significantly below the numerical caseload standards (e.g., if the prosecution follows a no-plea policy, or pursues statutory mandatory minimums for any class of cases), and others significantly above (e.g., if court policies favor diversion of nonviolent offenders, and judicial personnel are responsible for matching the client with appropriate community-based service providers). Workload must always subsume completion of the ethical requirements of competent representation (see section 1, *supra*) for every indigent client.

4. Special duties of the chief executive officer of a public defense agency

In a structured public defender office environment, a subordinate lawyer is ethically required to refuse to accept additional casework beyond what he or she can ethically handle, even though ordered to by a supervisor (ABA Model Rule 5.2; Attorney Grievance Committee v. Kahn, 431 A.2d 1336 (Md. 1981) (lawyer's conduct not excused by employer's order on pain of dismissal)). And conversely, a supervisor is ethically prohibited from ordering a subordinate lawyer to do

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- 200 juvenile
- 200 mental health, or
- 25 appeals

Capital cases, the note observes, are in a category by themselves: "the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea," citing *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). (Note: these are averages, not minima, and assume that, as required under federal law and national death penalty standards of the ABA and NLADA, at least two attorneys are appointed to each capital case, and that these hour-totals are spread among all attorneys on the case.)

[4] For maximum efficiency and quality, national standards call for particular ratios of staff attorneys to other staff, e.g., one investigator for every three staff attorneys (every public defender office should employ at least one investigator), one full-time supervisor for every ten staff attorneys, as well as professional business management staff, social workers, paralegal and paraprofessional staff, and secretarial/clerical staff for tasks not requiring attorney credentials or experience. National Study Commission, Guideline 4.1.

something that would cause a violation of the ethical rules (ABA Model Rule 5.1). Thus, "supervisors in a state public defender office may not ethically increase the workloads of subordinate lawyers to the point where the lawyer cannot, even at personal sacrifice, handle each of his or her clients' matters competently and in a non-neglectful manner." Wisconsin Formal Opinion E-84-11, *reaffirmed,* Wisconsin Formal Opinion E-91-3. A supervisor who does so, or a chief defender who permits it, acts unethically.

Thus, the chief executive of a public defense agency is required to decline excessive cases. *See, e.g., In re Prosecution of Criminal Appeals by the Tenth judicial Public Defender*, 561 So. 2d 1130, 1138 (Fla. 1990) (where "woefully inadequate funding of the public defender's office despite repeated appeals to the legislature for assistance" causes a "backlog of cases in the public defender's office … so excessive that there is no possible way he can timely handle these cases, it is his responsibility to move the court to withdraw"); *Hattern v State*, 561 So. 2d 562 (Fla. 1990); *State v. Pitner*, 582 A.2d 163 (Vt.1990); *Schwarz v Cianca*, 495 So. 2d 1208 (Fla. App. 1986).

The rule is the same if the excessive caseloads are caused not by an increase in case assignments, but by decrease in funded positions. The Model Code "creates a primary duty to existing clients of the lawyer. Acceptance of new clients, with a concomitant greater overload of work, is ethically improper. Once it is apparent that staffing reductions caused by loss of funding will make it impossible to serve even the existing clientele of a legal services office, no new matters should be accepted, absent extraordinary circumstances." ABA Formal Opinion 347, *Ethical Obligations of Lawyer to Clients of Legal Services Offices When Those Offices Lose Funding* (1981). DR 6-101(A)(2) and (3) are violated by the lawyer who represents more clients than can be handled competently. *Id.*

Chief public defenders also have various duties to effectively manage the agency's staff and resources, to ensure the most cost-effective and least wasteful use of public funding. ABA Principle 10 requires that in every defender office, staff be supervised and periodically evaluated for efficiency and quality according to national standards. Principle 9 requires that systematic and comprehensive continuing legal education be provided to attorneys, to assure their competence and efficiency. Principle 3 requires that defendants be screened for financial eligibility as soon as feasible, which allows weeding out of ineligible cases and triggering of cost-recovery mechanisms (such as application fees and partial reimbursement) for clients found to be partially eligible. And Principle 1 requires that in the performance of all such duties, the chief public defender should be accountable to an independent oversight board, whose job is "to promote efficiency and quality of services."

5. Civil liability of chief public defender and unit of government

In addition to ethical problems, both the chief public defender and the jurisdiction may have civil liability for money damages as a result of the violation of a client's constitutional right to counsel caused directly by underfunding of the public defense agency. In *Miranda v. Clark County, Nevada*, 319 F.3d 465, 2003 WL 291987, (9th Cir., February 3, 2003), the *en banc* Ninth Circuit ruled that a §1983 federal civil action may stand against both the county and the chief public defender (even though the individual assistant public defender who provided the inadequate representation does

not qualify as a state actor for purposes of such a suit, under *Polk Co. v. Dodson*, 454 U.S. 312 (1981)). The chief public defender had taken various administrative steps to cut costs in response to underfunding by the county – steps other than increasing the caseloads of assistant public defenders. He adopted a policy of allocating resources for an adequate defense only to those cases where he felt that the defendant might be innocent, based upon polygraph tests administered to the office's clients. Even clients who "claimed innocence, but appeared to be guilty" through the polygraph testing, as the court put it, "were provided inadequate resources to mount an effective defense" (slip op. at 1507-08). He also adopted a policy of saving money on training, and assigning inexperienced lawyers to handle cases they were not qualified for – in this case, involving capital charges.

The court held that both policies were sufficient to create a claim of a pattern or practice of "deliberate indifference to constitutional rights," redressable under §1983. On the triage-by-polygraph policy specifically, the court wrote:

> The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt. *City of Canton*, 489 U.S. at 389. This is a core guarantee of the Sixth Amendment and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin our civil rights. *Gideon*, 372 U.S. at 340-41, 344; *Powell v. Alabama*, 287 U.S. 45, 67-69 (1932); *see also Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 1767 (2002).

Conclusion

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case, encompassing the elements of such representation prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards.

When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

American Bar Association / National Association of Criminal Defense Lawyers Public Defender Training Programs

CASELOAD STANDARDS AND ETHICAL OPINIONS: STRATEGIES FOR MEETING THE CHALLENGES

Problem Number One: The Staff Attorney Perspective

You are an assistant public defender in a medium size trial office that is part of a statewide public defender system. You have been an attorney for eighteen months and have practiced with the public defender for almost one year. Your office services the two counties in the judicial district, each of which has its own courthouse, and it is located in the larger of the two counties. Judges ride circuit between the two counties, and the public defenders follow the judges to cover all of the dockets in both counties.

You handle all of the office's juvenile delinquency cases that are scheduled in the two courthouses. On Monday-Wednesday-Friday you are in one courthouse, and on Tuesday and Thursday you are in the other courthouse. You live in the M-W-F County, but you have to drive at least one hour to get to the Tu-Th courthouse, which is a two hour total commute. Detained juveniles are held in a regional detention facility located in a third county, which is also at least a one hour drive from your home and office county. Considering your daily court schedule, it is very difficult for you to meet with the detained juveniles prior to seeing them in the courthouse holding area, and, although you do try to visit with them during the weekend, it is not easy for you to get there given the demands of your wife and new baby.

Under your jurisdiction's case law and rules of juvenile court procedure, all juveniles are presumed indigent, so you represent most juveniles whose cases do not present a conflict of interest. Given the oil and natural gas boom in your county and this part of your state, families are relocating to this area, bringing with them many more children under the age of eighteen. In the last eight months your delinquency case load has substantially risen. Right now you carry 527 delinquency cases, and by the end of the calendar year you expect to have handled over 1000 cases. You are especially concerned about representation in the serious sexual offense cases that stay in delinquency court because your state is federal SMART office "compliant" with the federal Adam Walsh Act juvenile lifetime sex offender registration requirements.

You are stressed out, exhausted and overwhelmed by the all the never ending work and by the constant travel back and forth. You've asked your immediate supervisor for another attorney, but, since the state has a hiring freeze, she has asked you to "tough it out".

What should you do? Are there any ethical challenges? Would a Four Frames analysis help you? What steps should you take for your clients?

American Bar Association / National Association of Criminal Defense Lawyers Public Defender Training Programs

CASELOAD STANDARDS AND ETHICAL OPINIONS: STRATEGIES FOR MEETING THE CHALLENGES

Problem Number Two: The Experienced Attorney Perspective

You are an experienced staff attorney in a large, suburban county public defender office where you have practiced for eight years. Your office is primarily funded through the county with some state funding that is allocated to the county and part of your office's funding. The chief public defender is directly appointed by the county commissioners, who have been known to rely upon the judges for their appointment "suggestions". When one political party wins an election and takes control of the county commission from the other political party, it is not unusual for the new commissioners to appoint a new chief county public defender.

You specialize in handling sexual assault cases for adult clients and juveniles directly filed in adult court. In addition to your caseload, you are the second in command for the Sexual Assault Unit. When the chief of the unit is out of the office or not available, you assign cases, respond to complaints and other issues, and you keep things running as smoothly as possible. You are also involved in most new attorney training programs offered by your office, and you consistently mentor two or three new attorneys in the office. There are several specialty courts in your county, and you serve as the office's policy representative on the court/ county's joint specialty courts coordinating council.

Your caseload and that of the Sexual Assault Unit continues to grow, in large part due to a new federally funded police/sheriff sexual assault task force that has moved into the county and that makes numerous arrests. Your caseload is now 120 open cases, mostly sexual assault with some probation violations. In the first eight months of the year you've already closed out 65 cases, but the assignments just keep coming.

Even though you are an experienced attorney, you just cannot keep up with this caseload, and you are completely overwhelmed and not satisfied with how you are representing your clients. You've been stressed out for months, and have been sick off and on throughout the summer with colds and fever. You've discussed all of this with your supervisor, and she is very sympathetic, but she confidentially tells you that the chief public defender will not do anything to help…like lobbying the commission for new funds to hire additional attorneys. The Chief wants a felony judgeship appointment and needs the county commissioners' political support.

What should you do? Are you facing any ethical challenges? Would a Four Frames analysis help you? What steps should you take for your client?

American Bar Association / National Association of Criminal Defense Lawyers Public Defender Training Programs

CASELOAD STANDARDS AND ETHICAL OPINIONS: STRATEGIES FOR MEETING THE CHALLENGES

Problem Number Three: The Supervising Attorney Perspective

You are the chief of the appellate unit and supervising appellate attorney for a statewide public defense system that is statutorily placed under the executive branch of state government. Your unit consists of eight attorneys (nine including you) and two secretaries, one of whom also acts as the appellate unit's administrator. Your unit practices in the intermediate appellate court and the state supreme court. There is an appeal of right to the intermediate appellate court for all felony convictions (including misdemeanor appeals into felony court) and delinquency adjudications, but the Supreme Court only hears these cases upon grant of writ of certiorari. The Supreme Court does hear direct appeals in capital cases and in life without parole sentences and you assign two appellate attorneys to these types of appeals.

Your state has imposed a hiring freeze on all executive branch agencies, and all state employees face four mandatory furlough days in the current fiscal year. Your appellate unit is short two attorneys: one entry position and one intermediate attorney. You have begged the state chief public defender for replacement of these positions, but she has no attorney flexibility to transfer trial office personnel to your unit. In fact, all of the trial offices are suffering under the state hiring freeze with docket delays and continuances piling up. Trial offices cannot assign to attorneys any of your appellate cases because they are equally overwhelmed with trial cases.

In order to accommodate the loss of two attorneys, you have added additional cases to your reduced caseload and you are now carrying a full caseload, which should result in a total of 57 jury trial appellate cases for the calendar year. Your remaining staff attorneys are handling at least as many cases, and the unit has had to request additional continuances to competently prepare briefs. The secretaries are also complaining because their workload has increased since you asked them to handle administrative communications for the appellate staff attorneys. Now the chief judge of the intermediate appellate court has called both you and the chief defender complaining about the number of continuances requested, and he wants to meet with you both.

It just seems to be getting worse and worse. Everyone in your unit is complaining, overwhelmed and working well over forty hours a week; the appellate judges are complaining; and you are ready to freak out.

What should you do? Are you facing any ethical challenges? Would a Four Frames analysis help you? What steps, if any, should you take to protect your clients, your staff, your office and yourself?

American Bar Association / National Association of Criminal Defense Lawyers Public Defender Training Programs

CASELOAD STANDARDS AND ETHICAL OPINIONS: STRATEGIES FOR MEETING THE CHALLENGES

Problem Number Four: The Chief Public Defender Perspective

You are the chief public defender for a large, metropolitan public defender office that employs approximately two hundred and fifty attorneys who practice in state criminal and delinquency trial courts, who represent parents in dependency court proceedings, who represent adults and children at civil mental health commitment hearings, and who handle the appeals for all these cases, as well as probation and parole violation hearings. Following eighteen years as a trial attorney and trial supervisor in the office, you were appointed to the chief's position five years ago by the board of directors that is responsible for the overall policies and management of the office. The office is actually an IRS 501 (c) (3) agency that has for over fifty years contracted with the county to fund these legal services. (Note: your office is not a union office.)

For three years you worked with your board, your office supervising attorneys and senior attorney corps to develop and to adopt caseload performance standards, which also include workload impact. These standards follow the National Advisory Commission on Criminal Justice, the Courts, suggested caseload numbers, and they contain permitted modifications based upon workload realities in the office and based upon prosecution and judicial approaches. Unfortunately, the last year has seen the continued ignoring of these caseload standards. Felony attorneys now handle more than 200 cases a year; misdemeanor cases have skyrocketed to over 500 cases per attorney due in part to district attorney and police policies to arrest and prosecute "quality of life" misdemeanors and drunk drivers; and juvenile caseload increases (up to 500 + for attorneys) have felt the burden of school "zero tolerance" policies that send school based infractions into the delinquency court.

County funding reductions in your budget have made it impossible for you to hire additional staff, and relying upon law school interns for assistance has its own supervision, availability, and other limitations. Your unit supervisors are complaining to you about their staffing and case management problems: they have no flexibility when staff leaves or is sick and their judges are complaining about increased continuance and speedy trial extension requests. Your board of directors is also very concerned about what is happening in the office, and, while they have worked with you to lobby the county for additional funding and resources, they acknowledge that the county just doesn't have the funds in the current recession to meet the funding needs of all its agencies and mandated contractors.

What should you do? Are you facing any ethical challenges? Would a Four Frames analysis help you? What steps, if any, should you take under these circumstances?

ABA/NACDL DEFENDER TRAINING PROGRAM

CASELOAD STANDARDS & ETHICS OPINIONS: STRATEGIES TO MEET THEM

Phyllis H. Subin, Esq.

Director, PA Indigent Defense Representation Reform Project

WHAT IS “CASELOAD”??

WHAT IS CASELOAD??

DEMO BY:

MRS. L.M. RICARDO & MRS. E. MERTZ

MANAGING PD Workload

National Advisory Commission on Criminal Justice Standards and Goals

TASK FORCE ON THE COURTS (1973)

DELPHI METHODOLOGY

NAC WORKLOAD STANDARD

STANDARD 13.12 : PER ATTORNEY PER YEAR

Felonies: 150

Misdemeanors (not traffic) 400

Juveniles: 200

Appeals: 25

NAC WORKLOAD STANDARD

STANDARD 13.12

"CASE": **A single charge or set of charges concerning a defendant in one court in one proceeding.**

"Appeal": **A Separate Case**

NAC WORKLOAD STANDARD

"EXCESSIVE CASELOAD"

- ✓ATTORNEY DUTY
- ✓ATTENTION OF THE COURT

AMERICAN COUNCIL OF CHIEF DEFENDERS (ACCD)

ACCD ETHICS OPINION 03-01

(April 2003)

- **Competence (Rule 1.1)**
- **Diligence and Promptness (Rule 1.3)**
- **Communications (Rule 1.4)**

ACCD ETHICS OPINION

- Responsibilities Managers/Supervising Lawyers (Rule 5.1)

- Responsibilities of a Subordinate Lawyer (Rule 5.2)

AMERICAN BAR ASSOCIATION

ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

FORMAL OPINION 06-441

(May, 2006)

ABA ETHICS OPINION 06-441

WHAT IS AN "EXCESSIVE" INDIVDUAL ATTORNEY WORKLOAD"??

Caseload ***adjusted*** **by** ***factors*** **such as:**

- **Attorney Experience**
- **Case Complexity**
- **Support Services**
- **Non-representational Duties**
- **Unique System Practice Factors**

ABA ETHICS OPINON 06-441

"EXCESSIVE (INDIVIDUAL) WORKLOAD"

OBLIGATIONS OF ASSIGNED COUNSEL APPOINTED BY THE COURT

ABA ETHICS OPINION 06-441

PUBLIC DEFENDERS
(ASSIGNED & CONTRACT DEFENDERS)

- **NO EXEMPTION: RULES OF PROFESSIONAL CONDUCT**
- **PROCESS: ORGANIZED OFFICE**

ABA ETHICS OPINION 06-441

RULE 5.1

ETHICAL RESPONSIBILITIES OF A SUPERVISING ATTORNEY IN A PUBLIC DEFENDER OFFICE

ACCD STATEMENT ON CASELOADS AND WORKLOADS (2007)

- REAFFIRMS NAC STANDARDS

- RECOMMENDS WORKLOAD ADJUSTMENTS TO ANY CASELOAD STANDARD

AMERICAN BAR ASSOCIATION

EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS(2009)

ABA EIGHT GUIDELINES

<u>GUIDELINE ONE</u>:

PUBLIC DEFENSE PROVIDER avoids excessive workloads & adverse impact on quality representation.

(Lists 9 Attorney Performance obligation measurements)

ABA EIGHT GUIDELINES

GUIDELINE TWO

PD PROVIDER'S supervision program continuously monitors lawyers' workloads.

ABA EIGHT GUIDELINES

GUIDELINE THREE

PD PROVIDER *trains* its lawyers in the professional & ethical responsibilities of representing clients, including duty to inform supervisors when workload is "unreasonable."

ABA EIGHT GUIDELINES

GUIDELINE FOUR

PROVIDER MANAGERS determine on their own initiative or in response to attorney workload concerns whether excessive workloads are present.

ABA EIGHT GUIDELINES

GUIDELINE FIVE

PD PROVIDERS consider taking prompt actions to avoid excessive workloads.

(Lists 8 suggested actions)

ABA EIGHT GUIDELINES

GUIDELINE SIX

PD PROVIDERS or lawyers file motions asking a court to stop the [assignment of new cases] and to [withdraw from current cases]…when workloads excessive & adequate alternatives unavailable.

ABA EIGHT GUIDELINES

GUIDELINE SEVEN

WHEN MOTIONS TO STOP *NEW CASE ASSIGNMENTS* & *TO WITHDRAW* ARE FILED:

PD PROVIDERS/LAWYERS RESIST JUDICIAL DIRECTIONS RE: MANAGEMENT OF PD PROGRAMS THAT IMPROPERLY INTERFERE WITH THEIR PROFESSIONAL & ETHICAL DUTIES REPRESENTING THEIR CLIENTS.

ABA EIGHT GUIDELINES

GUIDELINE EIGHT

PD PROVIDERS/LAWYERS appeal court's refusal to stop assignment of new cases or court's rejection of motion to withdraw from current cases.

CASELOAD/WORKLOAD ISSUES

PUBLIC DEFENDER LITIGATION/ CHALLENGES:

UNREASONABLE CASELOADS

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE REVIEW OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL AND JUVENILE DELINQUENCY CASES.

ADKT No. 411

FILED

OCT 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER

WHEREAS, the paramount obligation of criminal defense counsel is to provide zealous and competent representation at all stages of criminal proceedings, adhere to ethical norms, and abide by the rules of the court; and

WHEREAS, the performance standards attached as Exhibit A provide guidelines that will promote effective representation by both appointed and retained counsel;

IT IS HEREBY ORDERED that the performance standards contained in Exhibit A to this order are to be implemented effective April 1, 2009.

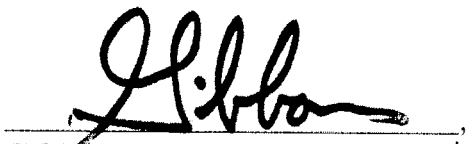
IT IS FURTHER ORDERED that an extension for Washoe County and Clark County to complete the weighted caseload studies is granted to May 15, 2009; and

IT IS FURTHER ORDERED that this court shall hold a public hearing at 2:00 p.m. on Tuesday, January 6, 2009, at which time the court will consider the final report from the Rural Issues Subcommittee; and

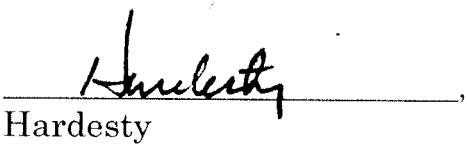
IT IS FURTHER ORDERED that representatives from Clark

County and Washoe County shall appear at the hearing scheduled for 2:00 p.m. on Tuesday, January 6, 2009, for a status report on the weighted caseload studies.

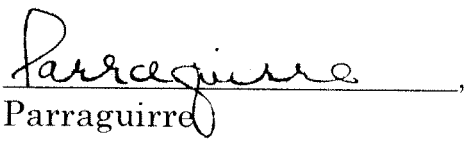
Dated this 15th day of October, 2008.



_____, C.J.
Gibbons



_____, J.
Hardesty



_____, J.
Parraguirre

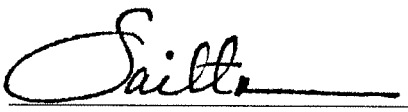
_____, J.
Douglas

cc: Members of the Indigent Defense Commission
Hon. Connie Steinheimer, Chief Judge, Second Judicial District
Howard W. Conyers, Washoe District Court Clerk
Hon. Kathy Hardcastle, Chief Judge, Eighth Judicial District
Ed Friedland, Court Executive Officer
All District Court Judges
All Justices of the Peace
All Justices' Court Administrators
All Municipal Court Judges
All District Attorneys
All Public Defenders
Washoe County Alternative Public Defender
Clark County Special Public Defender
All City Attorneys
Franny Forsman, Federal Public Defender
All County Managers
Administrative Office of the Courts

SAITTA, J., with whom, CHERRY, J., agrees, concurring in part and dissenting in part:

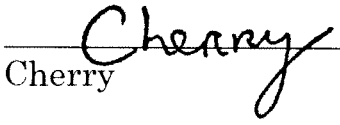
I concur with the majority's decision to adopt the performance standards but dissent, in part, with respect to the adoption of standards 2-11(b)(2), 4-9(e)(2) and 5-9(e)(2). It is well settled that deportation, as a consequence of conviction, does not affect the voluntariness of a guilty plea.[1] However, in my opinion, an attorney properly exercising his duty to the client is still obligated to advise of any and all consequences of a plea. Specifically, I believe that counsel should not only be required to advise the defendant of potential penalties in any criminal prosecution, but also circumstances involving forfeiture of assets, deportation and civil liabilities which may be affected by the acceptance of a plea offer. The majority standard fails to recognize the significance of this.

I also dissent from the majority with respect to the effective date of the adoption of these standards. I would make the standards effective January 1, 2009.



_____, J.
Saitta

I concur:



_____, J.
Cherry

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[1]Barajas v. State, 115 Nev. 440, 991 P.2d 474 (1999).

MAUPIN, J., concurring in part and dissenting in part:

I concur with the adoption of the revised performance standards[1] with three qualifications.

First, the adoption of performance standards 2-11(b)(2), 4-9(e)(2) and 5-9(e)(2) specifically omit any obligation to advise a criminal defendant of the collateral consequences of a plea of guilty to a criminal charge. This is seemingly based upon the notion, with which I disagree, that such an obligation would undermine case authority concerning the enforceability of such pleas. In any case, while collateral consequences do not of necessity affect the legal voluntariness of a guilty plea,[2] a criminal lawyer must still communicate with the client concerning any consequences of a guilty plea that are either known or should be known by the attorney in the reasonable exercise of his or her professional duties.[3] The standards adopted today by this court should acknowledge this fact.

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[1]This order revisits and revises the standards promulgated by our previous order in ADKT 411 entered January 4, 2008.

[2]See, e.g., Barajas v. State, 115 Nev. 440, 442, 991 P.2d 474, 475-76 (1999) (holding that potential deportation of criminal defendant is a collateral consequence that does not affect the voluntariness of a guilty plea).

[3]In Barajas, we also noted that "trial counsel's failure to provide such information does not fall below an objective standard of reasonableness" for the purposes of ineffective assistance of counsel. 115 Nev. at 442, 991 P.2d 475-76. While such failures do not compel the invalidation of guilty pleas for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), such failures still implicate a lawyer's general duty of care toward the client.

Second, with regard to performance standard 2-6, applicable to capital cases, it would seem fundamental that mitigation and psychological consultants should be part of any defense team in a capital case. Certainly, the absence of such support has been the repeated subject of prolonged and costly litigation in this court and in federal courts—much of which could be preempted by a performance standard mandating these consultants. Having said this, standard 2-6 does appear to be consistent with the United States Supreme Court case of Wiggins v Smith.[4]

Third, while the performance standards we adopt today could and probably should be made effective immediately, and while Justices Saitta and Cherry properly note that imposition should come sooner than later, the majority draws a reasonable compromise to allow providers of indigent defense services ample time to adjust to the impact of today's order.

Maupin, J.

Maupin

[4]539 U.S. 510 (2003).

NEVADA INDIGENT DEFENSE
STANDARDS OF PERFORMANCE

Standard 1: Function of Performance Standards

(a) These performance standards are designed to improve the quality of criminal defense representation in Nevada and provide objective guidelines for the allocation of resources for indigent defense.

(b) These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for criminal defendants. The standards also may be used as a training tool.

(c) Every attorney who defends persons accused of crime shall be familiar with these standards. The steps covered in these standards are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The standards recognize that the representation of criminal defendants is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that ethically "fits" the case, the client and the court proceeding.

(d) These standards are intended to facilitate the efficient and effective operation of indigent and other criminal defense programs and are to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. Failure to adhere to the standards does not, in and of itself, constitute ineffective assistance of counsel. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances. These standards are not intended to create substantive or procedural rights which might accrue either to the accused, or convicted persons, or to counsel. Nothing contained herein shall be construed to overrule, expand, or extend, whether directly or by analogy, the decision reached by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), nor its progeny as adopted by the Nevada Supreme Court.

CAPITAL CASE REPRESENTATION

Standard 2-1: The Defense Team and Services of Experts in Capital Cases

(a) The Defense Team

The defense team should:

1. consist of no fewer than two attorneys qualified in accordance with Standard 2-2.

(b) Expert and Ancillary Services

1. Counsel should:

(A) secure the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide competent legal representation at every stage of the proceedings, including but not limited to, an investigator, mitigation specialist and persons qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;

(B) have the right to have such services provided by persons independent of the government; and

(C) have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Standard 2-2: Appointment, Retention, and Removal of Defense Counsel

(a) Qualifications of Defense Counsel

1. Consistent with Supreme Court Rules, the appointing authority should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with competent legal representation.

2. In formulating qualification standards, the appointing authority should ensure that every attorney representing a capital client has:

(A) obtained a license or permission to practice in the jurisdiction;

(B) demonstrated a commitment to providing zealous advocacy and quality legal representation in the defense of capital cases; and

(C) satisfied the training requirements set forth in Standard 2-3.

3. The appointing authority should ensure that the pool of defense attorneys as a whole is such that each capital client within the jurisdiction receives competent legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

(A) substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases and skill in the management and conduct of complex negotiations and litigation;

(B) skill in legal research, analysis, and the drafting of litigation documents;

(C) skill in oral advocacy;

(D) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

(E) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

(F) skill in the investigation, preparation, and presentation of mitigating evidence; and

(G) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

(b) Workload

The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing clients in death penalty cases is maintained at a level that enables counsel to provide each client with competent legal representation in accordance with the Nevada Indigent Defense Standards of Performance.

(c) Monitoring; Removal

1. The appointing authority should monitor the performance of all defense counsel to ensure that the client is receiving competent legal representation. Where there is evidence that an attorney is not providing competent legal representation, the responsible agency should take appropriate action to protect the interests of the attorney's current and potential clients. The appointing authority shall not interfere with counsel's legal representation. Nor shall the appointing authority, if that is other than the judge, remove or attempt to remove an attorney from a specific case.

2. The appointing authority should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide competent legal representation.
3. The appointing authority should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing competent legal representation. Where there is evidence that an attorney has failed to provide competent legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to systemically fail to provide competent legal representation, the office should not receive additional appointments.
4. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the appointing authority should provide written notice that such action is being contemplated and give the attorney or defender office an opportunity to respond in writing.
5. An attorney or defender office sanctioned pursuant to this Standard should be restored to the roster only in exceptional circumstances.
6. The appointing authority should ensure that this standard is implemented consistently with standard 2-2, so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this guideline.

Standard 2-3: Training

(a) Funds should be made available for the effective training, professional development, and continuing education of all members of the defense team who are employed by an institutional defender.
(b) Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases Such a program should include, but not be limited to, presentations and training in the following areas:
1. relevant state, federal, and international law;
2. pleading and motion practice;

3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. ethical considerations particular to capital defense representation;
7. preservation of the record and of issues for post-conviction review;
8. counsel's relationship with the client and his family;
9. post-conviction litigation in state and federal courts; and
10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.

(c) Attorneys seeking to remain on the appointment roster should be required to attend and successfully complete, at least once every 2 years, a specialized training program that focuses on the defense of death penalty cases.

Standard 2-4: Funding and Compensation

(a) The appointing authority must ensure funding for the full cost of competent legal representation by the defense team and outside experts selected by counsel, as defined by these guidelines,.

(b) Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of competent legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
2. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

(c) Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

1. Mitigation specialists and experts retained by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
2. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

(d) Additional compensation should be provided in unusually protracted or extraordinary cases.

(e) Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Standard 2-5: Obligations of Counsel Respecting Workload

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with competent legal representation in compliance with the Nevada Indigent Defense Standards of Performance.

Standard 2-6: Role of the Defense Team

As soon as possible after appointment, counsel should assemble a defense team by selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes, if reasonably necessary and appropriate under the facts of the case and applicable case law:

(a) at least one mitigation specialist and one fact investigator;

(b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;

(c) any other members needed to provide competent legal representation; and

(d) at all stages demanding on behalf of the client all resources necessary to provide competent legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

Standard 2-7: Relationship With the Client

(a) Counsel at all stages of the case should:

1. make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client;
2. conduct an interview of the client within 24 hours of initial counsel's entry into the case, barring exceptional circumstances;
3. promptly advise the prosecution the client is represented by counsel and communicate in an appropriate manner with the client regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards; and
4. at all stages of the case, re-advise the client and communicate with the prosecution regarding these matters as appropriate.

(b) Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

Standard 2-8: Additional Obligations of Counsel Representing a Foreign National

(a) Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

(b) Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

Standard 2-9: Investigation

(a) Counsel at every stage has an obligation to conduct an appropriate and independent investigation relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

(b) Post-conviction counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

(c) Counsel at every stage has an obligation to assure that the official record of the proceedings is complete and to supplement the record as appropriate.

Standard 2-10: Duty to Assert Legal Claims

(a) Counsel at every stage of the case, exercising professional judgment in accordance with these standards, should:

1. consider all legal claims potentially available;

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

(A) the unique characteristics of death penalty law and practice; and

(B) the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;

(C) the importance of protecting the client's rights against later contentions by the government that the claim has been waived defaulted, not exhausted, or otherwise forfeited; and

(D) any other professionally appropriate risks and benefits to the assertion of the claim.

(b) Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

Standard 2-11: Duty to Seek an Agreed-Upon Disposition

(a) Counsel at every stage of the case has an obligation to take all steps that maybe appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.

(b) Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser-included or alternative offenses;

2. the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of the client as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and goodtime credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;

4. the governing legal regime, including, but not limited to, whatever choices the client may have as to the fact-finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere, or other plea that does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, penal/parole authorities, and any others who may be involved;

7. the practices, policies, and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim, and any other persons or entities that may affect the content and likely results of plea negotiations;

8. Concessions that the client might offer, such as:

(A) an agreement to waive trial and to plead guilty to particular charges;

(B) an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

(C) an agreement, if permitted under applicable law, regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

(D) an agreement to forgo in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;

(E) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

(F) an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

(G) an agreement with the victim's family, which may include matters such as a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution; and

(H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.

9. Benefits the client might obtain from a negotiated settlement, including:

(A) a guarantee that the death penalty will not be imposed;

(B) an agreement that the client will receive a specified sentence;

(C) an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
(D) an agreement that one or more of multiple charges will be reduced or dismissed;
(E) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
(F) an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
(G) an agreement that the court or prosecutor will, to the extent provided by law, make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement; and
(H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.
(c) Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.
(d) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement along with the advantages, disadvantages, and potential consequences of the agreement.
(e) If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
(f) Counsel should not accept any agreed-upon disposition without the client's express authorization.
(g) The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

Standard 2-12: Entry of a Plea of Guilty

(a) The informed decision whether to enter a plea of guilty lies with the client.
(b) In the event the client determines to enter a plea of guilty, prior to the entry of the plea, counsel should:

1. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
2. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and direct consequences to which he or she will be exposed by entering the plea; and
3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court, and providing a statement concerning the offense.

(c) During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

Standard 2-13: Trial Preparation Overall

As the investigations addressed in Standard 2-7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

Standard 2-14: Voir Dire and Jury Selection

(a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons, as well as to the selection of the petit jury venire.

(b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques:

1. for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the client is death-eligible, regardless of the individual circumstances of the case;

2. for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and 3. for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.
(c) Counsel should consider seeking expert assistance in the jury selection process.

Standard 2-15: Defense Case Concerning Penalty

(a) As set out in Standard 2-7, counsel at every stage of the case has a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.
(b) Counsel should discuss with the client early in the case the sentencing alternatives available and the relationship between the strategy for thesentencing phase and for the guilt/innocence phase.
(c) Prior to the sentencing phase, trial counsel should discuss with the client thespecific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.
(d) Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.
(e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.
(f) In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
1. witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;
2. expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that

may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;

3. witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

4. witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones; and

5. demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

(g) In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration and should make a full record in order to support any subsequent challenges.

(h) Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any noncompliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

(i) Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible.

(j) If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. consider what legal challenges may appropriately be made to the interview or the conditions surrounding it;

2. consider the legal and strategic issues implicated by the client's cooperation or noncooperation;
3. ensure that the client understands the significance of any statements made during such an interview; and
4. attend the interview.

(k) Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

(l) While taking into consideration all ethical and legal requirements, counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

Standard 2-16: Official Presentence Report

If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

(a) where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;

(b) provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;

(c) review the completed report;

(d) take appropriate steps to ensure that improper, incorrect, or misleading information that may harm the client is deleted from the report; and

(e) take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate, or misleading.

Standard 2-17: Duty to Facilitate the Work of Successor Counsel

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

(a) maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

(b) providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;

(c) sharing potential further areas of legal and factual research with successor counsel; and

(d) cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

Standard 2-18: Duties of Trial Counsel After Conviction

Trial counsel should:

(a) be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence;

(b) While considering all ethical and legal requirements, take whatever action(s), such as filing a notice of appeal and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief;

(c) not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Standard 2-17 applies in its entirety; and

(d) take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

Standard 2-19: Duties of Post-Conviction Counsel

(a) Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

(b) If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available forms.

(c) Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to competent capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

(d) The duties of the counsel representing the client on direct appeal should include, where appropriate, filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the responsible agency.

(e) Post-conviction counsel should fully discharge the ongoing obligations imposed by these standards, including the obligations to:

1. maintain close contact with the client regarding litigation developments;
2. continually monitor the client's mental, physical, and emotional condition for effects on the client's legal position;
3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
4. continue an aggressive investigation of all aspects of the case.

Standard 2-20: Duties of Clemency Counsel

Clemency counsel should:

1. be familiar with the procedures for and permissible substantive content of a request for clemency;
2. conduct a reasonable investigation in accordance with Standard 2-7;
3. ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case, and jurisdiction; and
4. ensure that the process governing consideration of the client's application is substantively and procedurally just, and if not, should seek appropriate redress.

APPELLATE AND POST-CONVICTION REPRESENTATION

Standard 3-1: Role of Appellate Defense Counsel

The paramount obligation of appellate criminal defense counsel is to provide zealous and competent representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court. Trial counsel should advise the client of his or her right to appeal and any limits on that right, pursuant to then-existing case law. If the client instructs the attorney to proceed with an appeal, even if the attorney believes that the appeal is without merit or is not cognizable, trial counsel will assure that a Notice of Appeal is filed. If the client wishes to proceed with the appeal, against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court and complies with the Nevada Rules of Appellate Procedure.

Standard 3-2: Identification of issues on appeal

In selecting issues to be presented on appeal, counsel should:

(a) conduct a thorough review of the trial transcript, the pleadings, and docket entries in the case;

(b) investigate potentially meritorious unpreserved claims of error.;

(c) assert claims of error that are supported by facts of record that will benefit the client if successful, that possess arguable legal merit, and that should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research;

(d) not hesitate to assert claims that may be complex, unique, or controversial in nature, such as issues of first impression or arguments for change in the existing law;

(e) inform the client when counsel has decided not to raise issues that the client desires to be raised and the reasons why the issues were not raised; and

(f) consider whether there are federal constitutional claims that, in the event that relief is denied in the state appellate court, would form the basis for a writ of habeas corpus in federal district court. Such claims should raise and argue the federal

constitutional claims, unless counsel concludes that there is a tactical basis for not including such claims.

Standard 3-3: Diligence and Accuracy

In presenting the appeal, counsel should:

(a) be diligent in perfecting appeals and expediting prompt submission to the appellate court;

(b) be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument; and

(c) not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Standard 3-4: Duty to Meet With Trial Lawyers

In preparing the appeal, counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the client's issues on appeal.

Standard 3-5: Duty to Confer and Communicate With Client

In preparing and processing the appeal, counsel should:

(a) assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel;

(b) discuss the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client, and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the appeal along with a statement of the reasons certain issues will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his or her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations;

(c) inform the client of the status of the case at each step in the appellate process, explain any delays, and provide general information to the client regarding the process and procedures that will be taken in the matter, and the anticipated timeframe for such processing;
(d) provide the client with a copy of each substantive document filed in the case by both the prosecution and defense;
(e) respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval; and
(f) promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal and the scope of any further representation counsel will provide.

Standard 3-6: Duty to Seek Release during Appeal
Appellate counsel should file appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

Standard 3-7: Responsibilities in "Fast Track" Appeals
If the conviction qualifies for "fast track" treatment under NRAP 3C, counsel shall fulfill the responsibilities set forth in the rule. In preparing the "fast track" statement, counsel should:
(a) order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal;
(b) thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e); and
(c) consult, if possible within the "fast track" deadlines, with the client as to which issues should be presented in the statement.

Standard 3-8: Post-Decision Responsibilities
If the decision of the appellate court is adverse to the client, appellate counsel should:

(a) promptly inform the client of the decision and confer with the client with regard to the availability of rehearing or en banc reconsideration and the benefits or disadvantages of filing such a motion;
(b) file a Motion for Rehearing and/or Request for en banc reconsideration if grounds for such a motion and/or request exist;
(c) advise the client whether a petition for writ of certiorari to the United States Supreme Court is warranted and determine whether such a petition will be filed;
(d) promptly advise the client of any remedies that are available in state or federal court for post-conviction review and shall advise the client of the applicable statute of limitations for filing for such relief;
(e) advise the client of any claims such as ineffective assistance of counsel that may be available to the client but that will not be pursued by appellate counsel;
(f) provide the client with any available forms for post-conviction relief and appointment of counsel; and
(g) cooperate with the client and with post-conviction counsel in securing the trial and appellate record and investigation of potential claims for postconviction relief.

Standard 3-9: Post-Conviction Representation
Counsel appointed to represent a client in post-conviction proceedings should:
(a) assure that the client is able to contact post-conviction counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the post-conviction case, counsel shall provide advice to the client, in writing, as to the method(s) that the client can employ to discuss the post-conviction proceeding with counsel;
(b) consult with trial/appellate counsel and secure the entire trial and appeal file;
(c) seek to litigate all issues, whether or not previously presented, that are arguably meritorious;
(d) maintain close contact with the client and consult with the client on all decisions with regard to the content of any pleadings seeking collateral or post-conviction relief prior to the filing of any petition for post-conviction relief. When possible, post-conviction counsel should meet in person with the client and in all instances, counsel

should provide a written summary of the merits and strategy to be employed in the post-conviction proceeding along with a statement of the reasons certain issues will not be raised, if any;

(e) investigate all potentially meritorious claims that require factual support;

(f) secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition;

(g) raise all federal constitutional claims, along with appropriate citations, that are arguably meritorious; and

(h) advise the client of remedies that may be available should post-conviction relief not be granted, including appeal from the denial and federal habeas corpus along with any applicable time limits for seeking such relief. Postconviction counsel shall advise the client in writing if counsel will not be representing the client in any subsequent proceedings and shall provide advice on the steps that must be taken and the time limits that are applicable to appeals or the seeking of relief in the federal courts.

FELONY AND MISDEMEANOR TRIAL CASES

Standard 4-1: Role of Defense Counsel

(a) The paramount obligation of criminal defense counsel is to provide zealous and competent representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

(b) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.

Standard 4-2: Education, Training, and Experience of Defense Counsel

(a) To provide competent representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the courts of Nevada. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practice of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide competent representation and should move to be relieved as counsel should counsel determine at a later point that he or she does not possess sufficient experience or training to handle the case assigned.

Standard 4-3: Adequate Time and Resources

Counsel has an obligation to make available sufficient time, resources, knowledge, and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses, and must maintain a system for receiving collect telephone calls from incarcerated clients.

Standard 4-4: Initial Client Interview

(a) Preparing for Initial Interview: Prior to conducting the initial interview, the attorney should:

1. be familiar with the elements of each offense charged and the potential punishment;
2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by agencies concerning pretrial release, and law enforcement reports;
3. be familiar with legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
4. be familiar with the different types of pretrial release conditions the court may set; and
5. be familiar with any procedures available for reviewing the judge's setting of bail.

(b) Timing of the Initial Interview: Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. When the client is in custody, counsel should attempt to conduct the interview no later than 72 hours after appointment to the case. The initial interview should be conducted, whenever possible, in a confidential setting.

(c) Contents of the Initial Interview: The purpose of the initial interview is both to inform the client of the charges/penalties and to acquire information from the client concerning pretrial release. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy are overcome. Information that counsel should consider acquiring from the client includes, but is not limited to:

1. the client's ties to the community, including the length of time in the community, family relationships, immigration status, and employment record and history;
2. the client's physical and mental health, education, and armed services record;
3. the client's immediate medical needs;
4. the client's criminal history and a determination of whether the client has other pending charges or is on supervision;
5. the ability of the client to meet any financial conditions of release; and
6. sources of verification (counsel should obtain permission from the client before contacting such sources).

(d) The following information should be provided to the client in the initial interview:

1. an explanation of the procedures that will be followed in setting the conditions of pretrial release;
2. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and an explanation that the client should not make any statements regarding the offense;
3. an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
4. the charges and the potential penalties;
5. a general procedural overview of the progression of the case;
6. how and when counsel can be reached;
7. when counsel will see the client next;
8. realistic answers, where possible, to the client's most urgent questions; and
9. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers.

Standard 4-5: Pretrial Release Proceedings

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release. Counsel should:

(a) present about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives, or other persons who may take custody of the client or provide third-party surety;

(b) consider pursuing modification of the conditions of release under available procedures when the client is not able to obtain release under the conditions set by the court; and

(c) explain to the client the available options, procedures, and risks in posting security if the court sets conditions of release.

Standard 4-6: Preliminary Hearings/Grand Jury Representation

(a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.

(b) In preparing for the preliminary hearing, the attorney should consider:

1. the elements of each offense charged;
2. the law for establishing probable cause;
3. the factual information that is available concerning probable cause;
4. the tactics of calling witnesses or calling the client as a witness and the potential for later use of the testimony; and
5. any issues arising from the limited availability of discovery inherent at this stage of the proceeding.

(c) Counsel should meet with the client prior to the preliminary hearing. The client has the sole right to waive a preliminary hearing. Counsel must evaluate and advise the client regarding the consequences of such waiver and the tactics of full or partial cross-examination.

(d) Where counsel becomes aware that his or her client is the subject of a grand jury investigation, appointed counsel should consult with the client to discuss the grand

jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Nevada law to present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

Standard 4-7: Case Preparation and Investigation

(a) Counsel should conduct, or secure the resources to conduct, a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the client's admissions or statements to defense counsel of facts constituting guilt or the client's stated desire to plead guilty, however counsel may consider such admissions, statements or desires in determining the scope of the investigation.

(b) Counsel should:

1. obtain and examine all charging documents, pleadings, and discovery;
2. research and review the relevant statutes and case law to identify elements of the charged offense(s); defects in the prosecution such as statute of limitations or double jeopardy; and available defenses and required notices of those defenses;
3. conduct an in-depth interview of the client to assist in shaping the investigation;
4. attempt to locate all potential witnesses and have them interviewed. (If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
5. request and secure discovery including exculpatory/impeaching information; names and addresses of prosecution witnesses and their prior statements and criminal records; the prior statements of the client and his or her criminal history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, mental health, drug treatment, or other records of the client, victim, or witnesses and records of police officers as appropriate;

6. inspect the scene of the offense as appropriate; and

7. obtain the assistance of such experts as are appropriate to the facts of the case and reasonably necessary under applicable case law.

Standard 4-8: Pretrial Motions and Writs

(a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief, which the court has discretion to grant.

(b) The decision to file pretrial motions should be made after investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:

1. the pretrial custody of the client;
2. the constitutionality of the implicated statute(s);
3. any defects in the charging process or the charging document;
4. severance of charges or defendants;
5. discovery issues;
6. suppression of evidence or statements;
7. speedy trial issues; and
8. evidentiary issues.

(c) Counsel should determine whether a pretrial writ should be filed challenging the determination that probable cause exists. The decision whether to file a pretrial writ should be made based upon an examination of the preliminary hearing or grand jury transcripts. If transcripts are not available at the time of arraignment, appropriate steps should be taken to secure an extension of time to prepare the writ after the transcripts are received pursuant to NRS 34.700. Counsel shall advise the client as to the effect of filing a pretrial writ on his speedy trial rights and provide an evaluation of the likelihood of success to assist in the decision to waive such rights, which rests with the client, after consultation with counsel.

(d) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default.

(e) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:

1. investigation, discovery, and research relevant to the claim advanced;
2. subpoenaing of all helpful evidence and witnesses; and
3. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

(f) Requests or agreements to continue a trial date shall not be made without consultation with the client.

(g) Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

Standard 4-9: Plea Negotiations

(a) Under no circumstances should defense counsel recommend to a client acceptance of a plea offer unless the investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

(b) Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements, including early case resolutions, with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers, including any additional investigation or legal challenges discussed in Standards 4-7(b) and 4-8 that would be abandoned as a result of accepting an offer ;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

(c) In developing a negotiation strategy, counsel shall be familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to: not to proceed to trial on the merits of the charges; to decline from asserting or litigating any particular pretrial motions; an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

2. Benefits the client might obtain from a negotiated settlement, including, but not limited to, an agreement: that the prosecution will not oppose the client's release on bail pending sentencing or appeal; that the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction; to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement; that the client will not be subject to further investigation
or prosecution for uncharged alleged criminal conduct; that the client
will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range; that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the Division of Parole and Probation, a specified position with respect to the sanction to be imposed on the client by the court; and that the client will receive, or the prosecution will recommend, if permitted by case law or statute, specific benefits concerning the client's place and/or manner of confinement and/or release on parole.

(d) In the decision-making process, counsel should:

1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and direct consequences of the agreement; and

2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client. Where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

(e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other direct consequences the client will be exposed to by entering the plea; and
3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(f) After entry of the plea, counsel should:

1. be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release on bail pending sentencing; and
2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Standard 4-10: Trial Preparation

(a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) Where appropriate, counsel should have the following materials available at the time of trial:

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. voir dire questions;
4. outline or draft of opening statement;
5. cross-examination plans for all prospective prosecution witnesses;
6. direct examination plans for all prospective defense witnesses;
7. copies of defense subpoenas;
8. prior statements of all prosecution witnesses (e.g., preliminary hearing/grand jury transcripts, police reports/statements);

9. prior statements of all defense witnesses;

10. reports from all experts;

11. a list and copies or originals of defense and prosecution exhibits;

12. proposed jury instructions with supporting authority;

13. copies of all relevant statutes or cases; and

14. outline or draft of closing argument.

(c) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence, use of prior convictions of client) and, where appropriate, counsel should prepare motions and memoranda in support of the client's position.

(e) Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.

(f) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated or is not able to secure appropriate clothing for trial, counsel shall arrange for the provision of appropriate clothing for the client to wear in the courtroom.

(g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek an order to facilitate conferences with the client.

(h) If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of, the client.

(i) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Standard 4-11: Voir Dire and Jury Selection

In preparing for and conducting jury selection, counsel should:

(a) be familiar with the law governing selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire;

(b) be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures;

(c) seek access to any jury questionnaires that have been completed by jurors and should petition the court to use a special questionnaire when appropriate due to unique issues in the case;

(d) should seek attorney-conducted voir dire and should develop, support, and file written voir dire questions if the court restricts attorney-conducted voir dire;

(e) consider whether additional peremptory challenges should be requested due to the circumstances present in the case;

(f) consider whether sensitive or unusual facts or circumstances of the case support sequestered voir dire of jurors;

(g) consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client; and

(h) object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

Standard 4-12: Defense Strategy

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

Standard 4-13: Trial

(a) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.

(b) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.

(c) In preparing for cross-examination, counsel should:

1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
2. consider the need to integrate cross-examination, theory, and theme of the defense;
3. avoid asking unnecessary questions that may hurt the defense case;
4. anticipate witnesses that the prosecution may call in its case-in-chief and on rebuttal;
5. create a cross-examination plan for all anticipated witnesses;
6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances;
7. review relevant statutes, regulations, and policies applicable to police witnesses; and
8. consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of the expert or reliability of the anticipated opinion.

Standard 4-14: Presenting the Client's Case

(a) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

(b) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

(c) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:

1. develop a plan for direct examination of each potential defense witness;
2. determine the implications that the order of witnesses may have on the defense case;

3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
4. consider the possible use of character witnesses;
5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and,
7. review all tangible evidence that must be presented.

(d) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(e) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

(f) Counsel should conduct redirect examination as appropriate.

(g) At the close of the defense case, counsel should seek an advisory instruction directing the jury to acquit when appropriate.

Standard 4-15: Jury Instructions

(a) Counsel should be familiar with the appropriate rules of the court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of instructions typically given, and preserving objections to the instructions.

(b) Counsel should always submit proposed jury instructions in writing.

(c) Where appropriate, counsel should submit modifications to instructions proposed by the State or the court in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser-included offense. Counsel should provide citations to appropriate law in support of the proposed instructions.

(d) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including ensuring that a written copy of proposed instructions is included in the record along with counsel's objection.

(f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instruction, object to deviations unfavorable to the client, and if necessary, request additional or curative instructions.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

Standard 4-16: Obligations of Counsel in Final Sentencing Hearings

Among counsel's obligations in the sentencing process are:

(a) To correct inaccurate information that is potentially detrimental to the client and to object to information that is not properly before the Court in determining sentence. Counsel should further correct or move to strike any improper and harmful information from the text of the presentence report.

(b) To present to the court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports.

(c) To develop a plan that seeks to achieve the least restrictive and burdensome sentencing alternative that is most favorable to the client and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

Standard 4-17: Preparation for Sentencing

In preparing for sentencing, counsel shall:

(a) inform the client of the applicable sentencing requirements, options, alternatives including any applicable regulations and statutory minimum requirements concerning parole eligibility;

(b) maintain contact with the client prior to the sentencing hearing and inform the client of the steps being taken in preparation for sentencing;

(c) obtain from the client relevant information concerning his or her background and personal history, prior criminal record, employment history, skills, education,

medical history and condition, and financial status and obtain from the client sources that can corroborate the information provided by the client;

(d) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;

(e) ensure the client has an opportunity to examine the presentence report;

(f) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to deliver to the court;

(g) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings, such as forfeiture or restitution proceedings;

(h) inform the client of the sentence or range of sentences counsel will ask the court to consider;

(i) where appropriate, collect affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence;

(j) prepare to address victim participation either through the victim impact statements or by direct testimony at sentencing; and

(k) advise the client of the difference between testimony and allocution. If the client elects to testify, counsel should prepare the client for possible cross-examination by the prosecution where applicable.

Standard 4-18: Official Presentence Report

(a) Counsel should prepare the client for the interview with the official preparing the presentence report.

(b) Counsel has a duty to become familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report. In addition, counsel shall:

1. determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of waiving the report;

2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
3. attend any interview of the client by an agency presentence investigator where appropriate;
4. review the completed report prior to sentencing;
5. take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report;
6. take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading; and
7. make sure that, if there is a significant change in the information contained in the report by the judge at the sentencing hearing, counsel takes reasonable steps to ensure that a corrected copy is sent to corrections officials.

Standard 4-19: Sentencing Hearing

(a) At the sentencing proceeding, counsel shall take steps necessary to advocate fully for the requested sentence and to protect the client's interest.
(b) Counsel shall endeavor to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
(c) Where appropriate under statutory or case law, counsel shall request specific orders or recommendations from the court concerning alternative sentences and forms of incarceration.
(d) Counsel should obtain a copy of the judgment and review it promptly to determine that it is accurate or to take steps to correct any errors.

Standard 4-20: Post-Disposition Responsibilities

Counsel should be familiar with the procedures available to the client after disposition. Counsel should:
(a) be familiar with the procedures to request a new trial, including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised;
(b) inform the client of his or her right to appeal a conviction after trial, after a conditional plea or after a guilty plea, pursuant to then-existing case law or where

counsel has received new information indicating the plea was not entered in a knowing, intelligent, and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision. If the client instructs counsel to appeal after consultation with counsel, even if counsel believes that an appeal will not be successful or is not cognizable, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal;

(c) fulfill the responsibilities set forth in NRAP 3C if the conviction qualifies for "fast track" treatment under the rule. Counsel shall order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal. Counsel shall thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e);

(d) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;

(e) inform the client of any right that may exist to be released pending disposition of the appeal;

(f) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed;

(g) include in the advice to the client an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-conviction proceedings. Counsel should provide a pro se habeas packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise the client of the relevant time frames for filing state and federal habeas corpus petitions and provide information and advice necessary to protect a client's right to post-conviction relief; and

(h) inform the client of procedures available for requesting that the record of conviction be expunged or sealed.

JUVENILE DELINQUENCY CASES

Counsel for juveniles in delinquency proceedings should abide by the Nevada Indigent Defense Standards of Performance applicable to felony and misdemeanor cases where applicable. The performance standards set forth below recognize the need to meet some concerns particular to representation of juveniles in delinquency proceedings.

Standard 5-1: The Role of Defense Counsel

(a) The role of counsel in delinquency cases is to be an advocate for the child. Counsel should:

1. Ensure that the interests and rights of the client are fully protected and advanced irrespective of counsel's opinion of the client's culpability;
2. fully explain to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings;
3. make sure the juvenile fully understands all court proceedings, as well as all his or her rights and defenses;
4. upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent;[1]
5. not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile;
6. fully inform both the juvenile and juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications;
7. present the juvenile with comprehensible choices, help the juvenile reach his or her own decisions, and advocate the juvenile's viewpoint and wishes to the court; and

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[1] The use of the word "parent" in these Standards refers to parent, guardian, custodial adult, agency or other natural person assuming legal responsibility for the child.

8. refrain from waiving substantial rights or substituting counsel's own view, or the parents' wishes, for the position of the juvenile.

(b) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases, both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

Standard 5-2: Education, Training, and Experience of Defense Counsel

(a) Counsel who undertake the representation of a client in a juvenile delinquency proceeding shall have the knowledge and experience necessary to represent a child diligently and effectively.

(b) Counsel should consider working with an experienced juvenile delinquency practitioner as a mentor when beginning to represent clients in delinquency cases.

(c) At a minimum, counsel should attend 4 hours of CLE relevant to juvenile defense annually.

(d) Counsel shall familiarize themselves with Nevada statutes relating to delinquency proceedings, as well as the Nevada Rules of Criminal Procedure, Nevada Rules of Evidence, Nevada Rules of Appellate Procedure, relevant case law, and any relevant local court rules. Counsel should be knowledgeable about and seek ongoing formal and informal training in the following areas:

1. Competency and Developmental Issues:

(A) Child and adolescent development;

(B) Brain development;

(C) Mental health issues, common childhood diagnoses, and other disabilities; and

(D) Competency issues and the filing and processing of motion for competency evaluations.

2. Attorney/Client Interaction:

(A) Interviewing and communication techniques for interviewing and communicating with children, including police interrogations and Miranda considerations;

(B) Ethical issues surrounding the representation of children and awareness of the role of the attorney; and

(C) Awareness of the role of the attorney versus the role of the guardian ad litem, including knowledge of how to work with a guardian ad litem

3. Department of Juvenile Justice Services/Other State and Local Programs:

(A) Diversion services available through the court and probation;

(B) The child welfare system and services offered by the child welfare system;

(C) Nevada Department of Child and Family Services facility operations, release authority, and parole policies;

(D) Community resources and service providers for children and all alternatives to incarceration available in the community for children;

(E) Intake, programming, and education policies of local detention facility;

(F) Probation department policies and practices; and

(G) Gender specific programming available in the community.

4. Specific Areas of Concern:

(A) Police interrogation techniques and Miranda consideration, as well as other Fourth, Fifth, and Sixth Amendment issues as they relate to children and adolescents;

(B) Substance abuse issues in children and adolescents;

(C) Special education laws, rights, and remedies;

(D) Cultural diversity;

(E) Immigration issues regarding children;

(F) Gang involvement and activity;

(G) School-related conduct and zero tolerance policies ("school to prison pipeline" research, search and seizure issues in the school setting);

(H) What factors lead children to delinquent behaviors;

(I) Signs of abuse and/or neglect;

(J) Issues pertaining to status offenders; and

(K) Scientific technologies and evidence collection.

Standard 5-3: Adequate Time and Resources

Counsel should not carry a workload that by reason of its excessive size or representation requirements interfere with the rendering of competent legal service,

endangers the juvenile's interest in the speedy disposition of charges, or risks breach of professional obligations. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that he or she has sufficient time, knowledge, and experience and will pursue adequate resources to offer competent legal services in a particular matter. If, after accepting an appointment, counsel finds he or she is unable to continue effective representation, counsel should consider appropriate case law and ethical standards in deciding whether to move to withdraw or take other appropriate action. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

Standard 5-4: Initial Client Interview

(a) Preparing for the Initial Interview: Prior to conducting the initial interview, the attorney should:

1. be familiar with the elements of the offense and the potential punishment;
2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by the Department of Juvenile Justice and law enforcement;
3. be familiar with detention alternatives and the procedures that will be followed in setting those conditions;
4. consider all possible defenses and affirmative defenses and any lesserincluded offenses that may be available;
5. consider the collateral consequences attaching to any possible sentencing, for example parole or probation revocation, immigration consequences, sex offender registration and reporting provisions, loss of driving privileges, DNA collection, school suspension or expulsion, consequences relating to public housing, etc.; and 6. review the petition for any defects.

(b) Counsel shall make every effort to conduct a face-to-face interview with the client as soon as practicable and sufficiently in advance of any court proceedings. In cases where the client is detained or in custody, counsel should make efforts to visit with the client no later than 72 hours after receiving the appointment. Counsel should:

1. interview the client in a setting that is conducive to maintaining the confidentiality of communications between attorney and client;
2. maintain ongoing communications and/or meetings with the client, which are essential to establishing a relationship of trust between the attorney and client;
3. provide the client with a method to contact the attorney, including information on calling collect from detention facilities;
4. utilize the assistance of an interpreter as necessary and seek funding for such interpreting services from the court;
5. work cooperatively with the parents, guardian, and/or other person with custody of the child to the extent possible without jeopardizing the legal interests of the child;
6. consider the client's age, developmental stage, mental retardation, and mental health diagnoses in all cases, understand the nature and consequences of a competency proceeding, and resolve issues of raising or not raising competency in consultation with the client; and
7. be alert to issues that may impede effective communication between counsel and client and ensure that communication issues such as language, literacy, mental or physical disability, or impairment are effectively addressed to enable the client to fully participate in all interviews and proceedings. Appropriate accommodations should be provided during all interviews, preparation, and proceedings, which might include the use of interpreters, mechanical or technological supports, or expert assistance.

Standard 5-5: Detention Hearing

(a) When appropriate, counsel should attempt to obtain the pretrial release of any client. Counsel should advocate for the use of alternatives to detention for the youth at the detention hearing. Such alternatives might include electronic home monitoring, day or evening reporting centers, utilization of other community-based services such as after school programming, etc. If counsel is appointed after the initial detention hearing or if the youth remains detained after the initial detention hearing, counsel should consider the filing of a motion to review the detention decision.

(b) If the youth's release from secure detention is ordered by the court, counsel should carefully explain to the juvenile the conditions of release from detention and any obligations of reporting or participation in programming. Counsel should take steps to secure appointment of counsel to juveniles prior to the detention hearing.

Standard 5-6: Informal Supervision/Diversion

Counsel should be familiar with all available alternatives offered by the court or available in the community. Such programs may include diversion, mediation, or other informal programming that could result in a juvenile's case being dismissed, handled informally, or referred to other community programming. When appropriate and available, counsel should advocate for the use of informal mechanisms that could steer the juvenile's case away from the formal court process.

Standard 5-7: Case Preparation and Investigation

An investigation by defense counsel is essential for competent representation of youth in delinquency proceedings. The duty to investigate exists regardless of the youth's admissions or statements to defense counsel of facts or the youth's stated desire to plead guilty, however counsel may consider such admissions statements or desires in determining the scope of the investigation.

Counsel should:

(a) obtain and examine all charging documents, pleadings, and discovery;

(b) request and secure discovery, including exculpatory/impeaching information;

(c) request the names and addresses of prosecution witnesses, their prior statements, and criminal records;

(d) obtain the prior statements of the client and his or her delinquency history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, records of the client, including, but not limited to, educational, psychological, psychiatric, substance abuse treatment, children services records, court files, and prior delinquency records and be prepared to execute any needed releases of information or obtain any necessary court orders to obtain these records;

(e) research and review the relevant statutes and case law to identify elements of the charged offense(s), defects in the prosecution, and available defenses;
(f) conduct an in-depth interview of the client to assist in shaping the investigation;
(g) consider seeking the assistance of an investigator when necessary and consider moving the court for funding to pay for the use of an investigator;
(h) attempt to locate all potential witnesses and have them interviewed (if counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
(i) obtain the assistance of such experts as are appropriate to the facts of the case;
(j) consider going to the scene of the alleged offense or offenses in a timely manner;
(k) consider the preservation of evidence and document such by using photographs, measurements, and other means; and

Standard 5-8: Pretrial Motions

Counsel should consider filing an appropriate motion whenever there exists a good faith reason to believe that the applicable law may entitle the client to relief that the court has discretion to grant. Counsel shall review all statements, reports, and other evidence and interview the client to determine whether any motions are appropriate. Counsel should timely file all appropriate pretrial motions and participate in all pretrial proceedings.
(a) The decision to file pretrial motions should be made after investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:
1. the pretrial detention of the client;
2. the constitutionality of the implicated statute(s);
3. defects in the charging process or the charging document;
4. severance of charges or defendants;
5. discovery issues;
6. suppression of evidence or statements;
7. speedy trial issues; and
8. evidentiary issues.

(b) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default.

(c) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:

1. investigation, discovery, and research relevant to the claim advanced;
2. subpoenaing of all helpful evidence and witnesses; and
3. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to that hearing, including the benefits and costs of having the client testify.

(d) Requests or agreements to continue a contested hearing date shall not be made without consultation with the client. Counsel shall diligently work to complete the investigation and preparation in order to be fully prepared for all court proceedings. In the event that counsel finds it necessary to seek additional time to adequately prepare for a proceeding, counsel should consult with the client and discuss seeking a continuance of the upcoming proceeding. Whenever possible, written motions for continuance made in advance of the proceeding are preferable to oral requests for continuance. All requests for a continuance should be supported by well-articulated reasons on the record in the event it becomes an appealable issue.

Standard 5-9: Plea Negotiations

(a) Under no circumstances should defense counsel recommend to a client acceptance of a plea offer unless the investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

(b) Counsel should:

1. with the consent of the client, explore diversion and other informal and formal admission of disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;

4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers, including any additional investigation or legal challenges that would be abandoned as a result of accepting an offer;

5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and

6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

(c) In developing a negotiation strategy, counsel must be completely familiar with:

1. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

(A) not to proceed to trial on the merits of the charges;

(B) to decline from asserting or litigating particular pretrial motions;

(C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal/delinquent activity.

2. benefits the client might obtain from a negotiated settlement, including, but not limited to:

(A) that the prosecution will not oppose the client's release pending disposition or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction;

(C) that one or more of the charged offenses may be dismissed or reduced either immediately or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged delinquent conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction;

(F) that the prosecution will take, or refrain from taking, at the time of disposition and/or in communications with the probation department a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that the client will receive, or the prosecution will recommend, specific benefits concerning the client's place and /or manner of confinement and/or release on probation.

(d) In the decision-making process, counsel should:

1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and direct consequences of the agreement; and

2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client; where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

(e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligently made;

2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other direct consequences the client will be exposed to by entering the plea; and

3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge, and providing a statement concerning the offense.

(f) After entry of the plea, counsel should:

1. be prepared to address the issue of release pending disposition hearing. Where the client has been released, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release pending disposition; and

2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Standard 5-10: Adjudicatory Hearing

(a) Counsel should develop a theory of the case in advance of the adjudicatory hearing. Counsel shall issue subpoenas and obtain court orders for all necessary evidence to ensure the evidence's availability at the adjudicatory hearing. Sufficiently in advance of the hearing, counsel shall subpoena all potential witnesses. Where appropriate, counsel should have the following materials available at the time of the contested hearing:

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. outline or draft of opening statement;
4. cross-examination plans for all prospective prosecution witnesses;
5. direct examination plans for all prospective defense witnesses;
6. copies of defense subpoenas;
7. prior statements of all prosecution witnesses;
8. prior statements of all defense witnesses;
9. reports from all experts;
10. a list and copies of originals of defense and prosecution exhibits;
11. copies of all relevant statutes or cases; and
12. outline or draft of closing argument.

(b) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(c) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence), and where appropriate, counsel should prepare motions and memoranda in support of the client's position.

(d) Throughout the adjudicatory process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.

(e) Counsel should advise the client as to suitable courtroom dress and demeanor.

(f) Counsel should plan with the client the most convenient system for conferring throughout the contested hearing.

(g) During the adjudicatory hearing, counsel shall raise objections on the record to any evidentiary issues; in order to best preserve a client's appellate rights, counsel

shall object on the record and state the grounds for such objection following the courts denial of any defense motion.

(h) Counsel shall ensure that an official court record is made and preserved of any pretrial hearings and the adjudicatory hearing.

(i) Counsel shall utilize expert services when appropriate and petition the court for assistance in obtaining expert services when necessary.

(j) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.

(k) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.

(l) In preparing for cross-examination, counsel should:

1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
2. consider the need to integrate cross-examination, theory, and theme of the defense;
3. avoid asking unnecessary questions that may hurt the defense case;
4. anticipate evidence that the prosecution may call in its case-in-chief and on rebuttal;
5. create a cross-examination plan for all anticipated witnesses;
6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances; and
7. review relevant statutes, regulations, and policies applicable to police witnesses and consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of experts or reliability of the anticipated opinion.

Standard 5-11: Presenting the Client's Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

(c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:

1. develop a plan for direct examination of each potential witness;
2. determine the implications that the order of witnesses may have on the defense case;
3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
4. consider the possible use of character witnesses;
5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and
7. review all tangible evidence that must be presented.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

(g) Counsel should conduct redirect examination as appropriate.

Standard 5-12: Objections to the Hearing Master's Recommendations

Counsel should advise client of the role of the Hearing Master and the procedure and purpose of filing objections to the Hearing Master's findings and recommendations. Counsel should review the Hearing Master's decision for possible meritorious grounds for objection. If the Hearing Master's decision does not contain findings of facts and conclusions of law, counsel request in writing such findings of

facts and conclusions of law in accordance with NRS 62B.030(3) Counsel should ensure that the transcript of the proceeding is timely obtained and objections are timely filed in accordance with NRS 62B.030(4). Counsel should draft and file objections and supplemental points and authorities with specificity and particularity and participate in the oral argument if scheduled.

Standard 5-13: Preparation for the Disposition Hearing

Preparation for disposition should begin upon appointment. Counsel should:

(a) be knowledgeable of available dispositional alternatives both locally and outside of the community;

(b) review, in advance of the dispositional hearing, the recommendations of the probation department or other court department responsible for making dispositional recommendations to the court;

(c) inform their client of these recommendations and other available dispositional alternatives; and

(d) be familiar with potential support systems of the client such as school, family, and community programs and consider whether such supportive services could be part of a dispositional plan.

Standard 5-14: The Disposition Process

During the disposition process, counsel should:

(a) correct inaccurate information that may be detrimental to the client and object to information that is not properly before the court in determining the disposition;

(b) present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports;

(c) develop a plan that seeks to achieve the least restrictive and burdensome disposition alternative and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable disposition and alternatives, and other information pertinent to the disposition decision;

(d) consider filing a memorandum setting forth the defense position with the court prior to the dispositional hearing;

(e) maintain contact with the client prior to the disposition hearing and inform the client of the steps being taken in preparation for sentencing;
(f) obtain from the client and/or the client's family relevant information concerning his or her background and personal history, prior delinquency record, employment history, education, and medical history and condition and obtain from the client sources that can corroborate the information provided;
(g) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
(h) ensure the client has an opportunity to examine the disposition report;
(i) inform the client of his or her right to speak at the disposition hearing and assist the client in preparing the statement, if any, to deliver to the court;
(j) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings;
(k) collect affidavits to support the defense position when appropriate and prepare witnesses to testify at the sentencing hearing and request the opportunity to present tangible and testimonial evidence;
(l) prepare to address victim participation either through the victim impact statement or by direct testimony at the disposition hearing; and
(m) ensure that an official court record is made and preserved of any disposition hearing.

Standard 5-15: The Disposition Report

Counsel should:
(a) become familiar with the procedures concerning the preparation, submission, and verification of the disposition report;
(b) prepare the client for the interview with the official preparing the disposition report;
(c) determine whether a written disposition report will be prepared and submitted to the court prior to the disposition hearing; where preparation ofthe report is optional, counsel should consider the strategic implications ofrequesting report;
(d) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(e) attend any interview of the client by an agency disposition investigator; review the completed report prior to sentencing;
(f) take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report; and
(g) take reasonable steps to ensure that a corrected copy of the report is sent to corrections officials if there are any amendments made to the report by the court.

Standard 5-16: Post-Disposition Responsibilities/Advocacy

Following the disposition hearing, counsel should:
(a) review the disposition order to ensure that the sentence is clearly and accurately recorded and take steps to correct any errors and ensure that it includes language regarding detention credits and plea agreements;
(b) be aware of sex offender registration requirements and other requirements, both state and federal, imposed on sex offenders and communicate those requirements to the client;
(c) be familiar with the procedure for sealing and expunging records, advise the client of those procedures, and utilize those procedures when available;
(d) be familiar with the procedures to request a new contested hearing, including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised and advise the client of his or her rights with regard to those procedures;
(e) inform the client of his or her rights to representation and to appeal an adjudication after a contested hearing, after a conditional plea or after an admission that was not entered in a knowing, intelligent, and voluntary manner and document the client's decision regarding appeal;
(f) ensure that the notice of appeal and request for appointment of counsel is filed, or that the client has obtained or the court has appointed, appellate counsel in a timely manner even if counsel believes that an appeal will not be successful or is not cognizable;
(g) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;

(h) inform the client of any right that may exist to be released pending disposition of the appeal;

(i) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed; and

(j) include in the advice to the client, an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-adjudication proceedings.

Standard 5-17: Transfer Proceedings to Adult Court

(a) Transfer proceedings require special knowledge and skill due to the severity of the consequence of the proceedings. Counsel shall not undertake representation of children in these areas without sufficient experience, knowledge, and training in these unique areas. It is recommended that counsel representing children in transfer proceedings have litigated at least 2 criminal jury trials or be assisted by co-counsel with the requisite experience.

(b) Counsel representing juveniles in transfer proceedings should:

1. be fully knowledgeable of adult criminal procedures and sentencing;
2. be fully knowledgeable of the legal issues regarding probable cause hearings and transfer proceedings;
3. investigate the social, psychological, and educational history of the child;
4. retain or employ experts including psychologists, social workers, and investigators, as necessary and appropriate under the facts of the case and applicable case law, in order to provide the court with a comprehensive analysis of the child's strengths and weaknesses in support of retention of juvenile jurisdiction;
5. be knowledgeable of the statutory findings the court must make before transferring jurisdiction to the criminal court and any case law affecting the decision;
6. be prepared to present evidence and testimony to prevent transfer, including testimony from teachers, counselors, psychologists, community members, probation officers, religious associates, employers, or other persons who can assist the court in determining that juvenile jurisdiction should be retained;
7. ensure that all transfer hearing proceedings are recorded;
8. preserve all issues for appeal; and

9. investigate possible placements for the client if the case remains in juvenile court.

History of Defender Standards in Washington

Robert C. Boruchowitz, Professor from Practice
Director, Defender Initiative

Acknowledgements to Marc Boman, Chair of WSBA Council on Public Defense, and Joanne Moore, Director Washington Office of Public Defense, who prepared some of this material

Washington Defender Association

WASHINGTON DEFENDER ASSOCIATION STANDARDS FOR PUBLIC DEFENSE SERVICES

Objectives and minimum requirements for providing legal representation to poor persons accused of crimes or facing juvenile, dependency, or civil commitment proceedings in Washington State.

- Washington State Bar Association
- **Standards for Indigent Defense Services**
-
- **[Approved by the Board of Governors June 3, 2011]**

STANDARD THREE: Caseload Limits and Types of Cases

- **Standard:**
- The contract or other employment agreement or government budget shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.
- The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the minimum level of attention, care and skill that Washington citizens would expect of their state's criminal justice system.

Caseload Limits: The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

- **150 Felonies** per attorney per year; or
- **300 Misdemeanor** cases per attorney per year; or in certain circumstances described below the caseload may be adjusted to no more than 400 cases, depending upon:
- The caseload distribution between simple misdemeanors and complex misdemeanors; or
- Jurisdictional policies such as post-filing diversion and opportunity to negotiate resolution of large number of cases as non-criminal violations;
- Other court administrative procedures that permit a defense lawyer to handle more cases; or
- **250 Juvenile Offender** cases per attorney per year; or
- **80 open Juvenile Dependency** cases per attorney; or
- **250 Civil Commitment cases** per attorney per year; or
- **1 Active Death Penalty** trial court case~~s~~ at a time plus a limited number of non death penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of Standard 3.2 *supra*; or
- **36 Appeals** to an appellate court hearing a case on the record and briefs per attorney per year. (*The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced*.)
-

A Brief History of Efforts to Provide Effective Public Defense Services in Washington

- **Late 1960's** - First public defender offices in Washington
- **1983** - Washington Defender Association (WDA) created
- **1984** – WDA develops Standards for Public Defense Services
- **1985, 1990, 2007** – WSBA endorses WDA Standards
- **1989** – Washington legislature enacts RCW 10.101.030 requiring counties and cities to adopt standards for the delivery of public defense services and stating, "[t]he standards endorsed by the Washington state bar association for the provision of public defense services may serve as guidelines"
- **1996** – Legislature creates Washington State Office of Public Defense
- **2003** – WSBA Board of Governors appoints Blue Ribbon Panel on Criminal Defense following WDA presentation documenting problems in delivery of public defense services.

A Brief History of Efforts to Provide Effective Public Defense Services in Washington (cont.)

- **March 2004** – ACLU of Washington report, "The Unfulfilled Promise of Gideon: Washington's Flawed System of Defense for the Poor," stating, in part, "The lack of meaningful standards and the failure of the State to monitor indigent defense services has resulted in a checkered system of legal defense with no guarantee that a person who is both poor and accused will get a fair trial."
- **April 2004** – Seattle Times publishes 3-part investigative series, "An Unequal Defense: The failed promise of justice for the poor" describing public defense failures in Washington
- **May 2004** – Blue Ribbon Panel Report finds, among other things, "The mandate of RCW 10.101.030, 'Standards for public defense services,' is being ignored in many jurisdictions and there is no effective state enforcement program." Panel recommends creation of Committee on Public Defense
- **September 2004** – WSBA creates Committee on Public Defense
- **December 2004** – *Best v. Grant County*. Civil rights class action lawsuit under 6th and 14th Amendments against Grant County seeking injunctive and declaratory relieve "to prevent further violations and to protect the constitutional rights of all indigent persons charged with felony crimes in Grant County."
- **July 2005** – Washington legislature amends RCW 10.101.030 to provide, "[t]he standards adopted by the Washington state bar association for the provision of public defense services <u>should</u> serve as guidelines"

A Brief History of Efforts to Provide Effective Public Defense Services in Washington (cont.)

- **2007** – CPD Subcommittee on Caseload Standards conducts thorough review of 1990 WDA/WSBA caseload limits in light of experience and issues report and recommendations.
- **January 2010** – Landmark Washington Supreme Court case, *State v. A.N.J.* ("While we do not adopt the WDA Standards for Public Defense Services, we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel.")
- **July 2010** – Washington Supreme Court adopts amendments to CrR 3.1, CrRLJ 3.1 and JuCR 9.2, requiring that appointed counsel for indigent person certify compliance with "applicable Standards for Indigent Defense Services to be approved by the Supreme Court."
- **September 9, 2010** – Washington Supreme Court requests comments from WSBA Council on Public Defense regarding the adoption of standards
- **September 2010 – February 2011** – Council on Public Defense conducts thorough review of existing WSBA Standards, proposes modest changes and makes recommendation to Board of Governors for CrR 3.1, CrRLJ 3.1 and JuCR 9.2 Standards
- **March 18, 2011** – WSBA Board of Governors meets to consider Council's proposals
- **Summer, 2011**— Supreme Court postpones implementation of rule until January 2012.

WSBA Involvement in Public Defense Issues

1985 and 1990:
WSBA endorses Washington Defender Association (WDA) *Standards for Public Defense Services*

1989: WSBA-Endorsed *Standards* referenced in RCW 10.101.030 which requires counties and cities to adopt standards for the delivery of public defense services

2003: BOG Appoints Blue Ribbon Panel on Criminal Defense

2004 BOG Creates Committee on Public Defense

2007: WSBA adopts updated *Standards for Public Defense Services*

2011: BOG adopts CPD recommendations; set to consider additional recommendation in September

RCW 10.101.030: Standards

Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. ***The standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards.***

WSBA Blue Ribbon Panel Report (May 2004) : Conclusions

- The mandate of RCW 10.101.030, "Standards for public defense services," is being ignored in many jurisdictions and there is no effective enforcement program. This may lead to violations of the constitutional right to effective assistance of counsel.
- The lack of enforceable standards, especially caseload standards, jeopardizes the ability of even the most dedicated defenders to provide adequate representation
- Inadequate funding is a significant cause of failures in the quality of indigent defense services in Washington
- Poor contracting practices, especially fixed-rate defense contracts, invite abuses
- Effective oversight and accountability do not exist in some jurisdictions.

WSBA Blue Ribbon Panel Report (May 2004): Recommendations

- A WSBA Standing Committee on Public Defense Services should be established. Its charter should include:

  Adoption of specific measures to require compliance with RCW 10.101.030, including appropriate liaison activities with the Washington Supreme Court and Washington Legislature. **These efforts should include proposing legislation and a Court Rule (or Rules) implementing the Standards for Public Defense Services** . . .

  . . .

  Updating the Standards for Public Defense Services to (a) specifically address contracting practices that create potential conflicts of interest, such as fee arrangements that contain disincentives for appointed counsel to thoroughly investigate and prepare defenses, file motions or bring appropriate cases to trial and (b) **review the caseload limits in light of experience.**

  . . .

Judicial Recognition That Limited Resources Cause, But Do Not Excuse, Defense Shortcuts

"Yet 45 years since *Gideon*, we continue our efforts to fulfill *Gideon's* promise. While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance. Public funds for appointed counsel are sometimes woefully inadequate, and public contracts have imposed statistically impossible caseloads on public defenders… It is clear, even if not calculated, that the prosecution benefits from a system that discourages vigorous defense and creates an economic incentive for indigent defense lawyers to plea bargain. "

State v. A.N.J., 168 Wn.2d 91, 98-99 (2010)

Washington Appellate Cases Citing Standards

Mt. Vernon v. Weston 68 Wn. App. 411; 844 P.2d 438; 1992

- **The evidence was undisputed, however, that the public defenders here were operating with caseload levels in excess of those endorsed by the American Bar Association, by the Washington State Bar Association, and by the Skagit County Code. *See RCW 10.101.030* (standards endorsed by Washington State Bar Association may serve as guidelines for counties and cities contracting for public defense services).** … There was no contention below that these caseload guidelines were inappropriate or inapplicable. Under these circumstances, the Superior Court's assumption that the public defenders had the time to undertake further representation following a RALJ appeal finds no support in the record.

Mt. Vernon v. Weston

- The decision rested on a mistaken understanding of the procedures for funding indigent appeals, on an irrelevant assumption regarding the resources available to the prosecutor's office, and on a failure to consider the undisputed evidence of the high caseloads of the public defenders. Under these circumstances, the denial of the motion to withdraw and substitute new counsel was an abuse of discretion. Those portions of the orders of indigency denying the motion to withdraw are reversed.

In re Michels, 150 Wn.2d 159 (2003)

- The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided. FN2 The fact that this was side-stepped by Judge Michels and the Toppenish Municipal Court is most troubling. Disregarding our most basic and important principles weakens the legal system as a whole. In light of this, we again find it necessary to reiterate that this court will not tolerate short cuts to due process.

Michels

- FN2. RCW 10.101.030 further outlines the standards a county or city operating a criminal court shall incorporate into a public defender contract or office. The standards include:

  "[c]ompensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination."

Michels

- Judge Michels violated Canons 1, 2(A), 3(A)(1), and 3(D)(1), and denied numerous defendants their constitutional rights.[FN3] His actions warrant suspension. Therefore, we order censure, suspension without pay for 120 days, and *175 attendance of a judicial education approved by the Commission or the State Judicial College.

State v. ANJ 168 WN.2D 91 (2010)

- The Washington Defender Association (WDA) has established standards for adequate representation. *See* WDA, STANDARDS FOR PUBLIC DEFENSE SERVICES std. 6 & cmt at [*110] 52-53 (2006). [12] The State essentially argues that we should not consider these standards because they have not been adopted by the court. We disagree. We accept the State's point that professional standards do not establish minimum *Sixth Amendment* standards. *Cf. Helling v. Carey, 83 Wn.2d 514, 518-19, 519 P.2d 981 (1974)* (quoting *Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905 (1903))*. " 'Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.' " *Id. at 519* (emphasis omitted) (quoting *The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932))*. **However, while not binding, relevant standards are often useful to courts in evaluating things like effective assistance of counsel.** *See*, *e.g.*, *In re Pers. Restraint of Brett, 142 Wn.2d 868, 879-80, 16 P.3d 601 (2001)*. We note that state law now requires each county or city providing public defense to adopt such standards, guided by standards endorsed by the Washington State Bar Association. *RCW 10.101.030*; *see also* WASH. STATE BAR ASS'N, STANDARDS FOR INDIGENT DEFENSE SERVICES (Sept. 20, 2007)

ANJ

- While we do not adopt the WDA *Standards for Public Defense Services*, **we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel.**

Washington Supreme Court Passes Rule Requiring Certification of Compliance With Standards

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE ADOPTION OF THE AMENDMENTS TO CrR 3.1-RIGHT TO AND ASSIGNMENT OF LAWYER; CrRLJ 3.1-RIGHT TO AND ASSIGNMENT OF COUNSEL AND JuCR 9.2-ADDITIONAL RIGHT TO REPRESENTATION BY LAWYER

ORDER

NO. 25700-A-959

Justice Sanders having recommended the adoption of the proposed amendments to CrR 3.1-Right to and Assignment of Lawyer; CrRLJ 3.1-Right to and Assignment of Counsel and JuCR 9.2-Additional Right to Representation by Lawyer, and the Court having considered the amendments and comments submitted thereto, and having determined that the proposed amendments will aid in the prompt and orderly administration of justice;

FILED
SUPREME COURT
STATE OF WASHINGTON
10 JUL -8 PM 4:38
BY RONALD R. CARPENTER
CLERK

Now, therefore, it is hereby

ORDERED:

(a) That the amendments as attached hereto are adopted.

(b) That the amendments will be published in the Washington Reports and will become effective September 1, 2010.

DATED at Olympia, Washington this 8th day of July, 2010.

Madsen, C.J.
Alexander, J.
Sanders, J.
Chambers, J.
Fairhurst, J.

589/211

New Language Added to CrR 3.1, CrRLJ 3.1, and JuCR 9.1

(4) Before appointing a lawyer for an indigent person or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUSPENSION OF THE EFFECTIVE DATE OF THE AMENDMENTS TO CrR 3.1(d), JuCR 9.2(d) and CrRLJ 3.1(d) (25700-A-959)

ORDER

NO. 25700-A- 964

By ORDER NO. 25700-A-959, dated July 8, 2010, the Court adopted proposed amendments to CrR 3.1- Right to and Assignment of Lawyer; CrRLJ 3.1- Right to and Assignment of Lawyer, and JuCR 9.2- Additional Right to Representation by Lawyer. The Board for Judicial Administration (BJA) has requested that the Court delay the effective date of the adopted amendments to CrR 3.1, CrRLJ 3.1, and JuCR 9.2, which all have the effective date of September 1, 2010, until such time as Standards for Indigent Defense Services have been promulgated and adopted by this Court. This Court having considered the request, and having determined that the granting of the request will aid in the orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

That the previously ordered effective date for CrR 3.1, CrRLJ 3.1, and JuCR 9.2 of September 1, 2010, is suspended until September 1, 2011. However, if Standards for Indigent Defense Services have not been adopted by that date, the Court will reconsider the effective date for these rules.

FILED
SUPREME COURT
STATE OF WASHINGTON
10 SEP 10 AM 9:08
BY RONALD R. CARPENTER
CLERK

DATED at Olympia, Washington this 10th day of September, 2010.

For the Court,

Madsen, C. J.

CHIEF JUSTICE

595/10

The July 13, 2011 En Banc suspended the effective date of rules adopted into Law. The following court rules now have an effective date of January 1, 2012:

CrR - Superior Court Criminal Rules

- 3.1 - Right to and Assignment of Lawyer

CrRLJ - Criminal Rules for Courts of Limited Jurisdiction

- 3.1 - Right to and Assignment of Lawyer

JuCR - Juvenile Court Rules

- 9.2 - Additional Right to Representation by Lawyer

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUSPENSION OF THE EFFECTIVE DATE OF THE AMENDMENTS TO CrR 3.1(d), JuCR 9.2(d) and CrRLJ 3.1(d)	**ORDER** NO. 25700-A-989

By ORDER NO. 25700-A-959, dated July 8, 2010, the Court adopted proposed amendments to CrR 3.1-Right to and Assignment of Lawyer; CrRLJ 3.1-Right to Assignment of Lawyer, and JuCR 9.2-Additional Right to Representation by Lawyer. The Board of Judicial Administration (BJA) requested that the Court delay the effective date of September 1, 2010, until such time as Standards for Indigent Defense Services had been promulgated and adopted by this Court. The Court considered the request and by ORDER NO. 25700-A-964, dated September 10, 2010, delayed the effective date until September 1, 2011. The Standards for Indigent Defense Services have not yet been adopted.

Now, therefore, it is hereby

ORDERED:

That the previously ordered effective date for CrR 3.1, CrRLJ 3.1 and JuCR 9.2 of September 1, 2011, is suspended until January 1, 2012, in order for the Standards for Indigent Defense Services to be published for comment.

DATED at Olympia, Washington this 13th day of July, 2011.

For the Court

Madsen, C.J.
CHIEF JUSTICE

FILED
JUL 13 01 2:16
BY RONALD R. CARPENTER
CLERK

617/1