

ABA

EIGHT GUIDELINES

OF PUBLIC DEFENSE
RELATED TO EXCESSIVE WORKLOADS



**ABA Standing Committee
on Legal Aid and Indigent Defendants**

2008 - 2009

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First and foremost, the Standing Committee thanks Professor Norman Lefstein who had the vision to recognize the need to develop the Guidelines and served as Reporter for the project. Professor Lefstein's expertise in the area of indigent defense is well known, as he previously served as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Defense Function and Providing Defense Services*. His prior publications for ABA SCLAID include *Criminal Defense Services for the Poor*, published in 1982, and his co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, published in 2004. Recently, he served as co-Reporter for *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, published in 2009 by the Constitution Project's National Right to Counsel Committee. Earlier in his career, Professor Lefstein's served as director of the Public Defender Service for the District of Columbia, as an Assistant U.S. Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice.

Special thanks also are owed to members of the Standing Committee and especially to its Indigent Defense Advisory Group whose members reviewed numerous drafts of the Guidelines and provided extensive comments. Also, the Committee is indebted to its talented ABA SCLAID staff, Georgia Vagenas, Assistant Counsel, who assisted all of us and made significant contributions to the Guidelines.

The Standing Committee is grateful as well to the many ABA entities that provided support for the Guidelines by co-sponsoring them in the House of Delegates, including the 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; and American Judicature Society. Further, we thank the ABA Standing Committee on Ethics and Professional Responsibility for its review of the Guidelines and comments. The Committee also thanks the many members of the defender community throughout the country whose review of the Guidelines and thoughtful comments improved our final product. The National Legal Aid and Defender Association was instrumental in disseminating the draft Guidelines nationwide and the assistance of its leadership and staff is gratefully acknowledged.

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**Hon. Deborah Hankinson (former)
Chair, Standing Committee on
Legal Aid and Indigent Defendants
2006-2009**

**Resolution adopted by American Bar Association House of Delegates,
August, 2009:**

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.

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 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.

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 (Nat'l Assoc. Crim. Defense Lawyers 2009) [hereinafter MINOR CRIMES], available at www.nacd1.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].

ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS

Black Letter

GUIDELINE 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.

GUIDELINE 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.

GUIDELINE 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.

GUIDELINE 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.

ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS

Black Letter

GUIDELINE 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.**

GUIDELINE 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.

GUIDELINE 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.

GUIDELINE 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.

ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS

Guidelines with Commentary

GUIDELINE 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 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

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

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.

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 standards⁹ and in professional responsibility rules governing the conduct of lawyers in all cases.¹⁰

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.

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, Nat’l Legal Aid and Defender Assoc., 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.’” A portion of the language last quoted is from ABA MODEL RULES, *supra* note 3, 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)(Nat’l Legal Aid and Defender Assoc. 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.

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.

GUIDELINE 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 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 counsel¹⁷ 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.

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

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).

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

GUIDELINE 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 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

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.

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.

faith, express concerns about their workloads.

GUIDELINE 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 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

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 ASSOC., 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. 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 in note 23 *supra*.

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 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.

GUIDELINE 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

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.

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

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.

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-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

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.

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).

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 statutes³⁸ or is otherwise deemed inappropriate.

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 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.

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.

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).

GUIDELINE 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 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

⁴² See ABA MODEL RULES, *supra* note 3, R. 1.16 (a)(1), quoted in note 32 *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.

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

GUIDELINE 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 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 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

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 supervisory 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 ... 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).

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

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 legal representation “guarantee the integrity of the relationship between lawyer and client.”⁵⁶

GUIDELINE 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

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 appellate 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.*

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.

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 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

⁶⁰However, 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.

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.

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