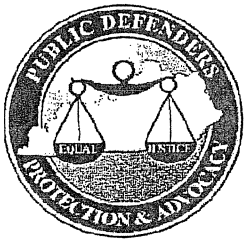
AMERICAN COUNCIL OF CHIEF DEFENDERS AND NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION: ETHICS OPINION 03-01



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?*

1. General duty of lawyer to act competently, diligently and promptly . . . 2
2. Indigent defender's duty to limit workload so as to ensure quality, and to decline excess cases 3
3. Determining whether workload is excessive 5
4. Special duties of the chief executive officer of a public defense agency . . . 6
5. Civil liability of chief public defender and unit of government . . . 7

Conclusion 8

> *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:

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[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

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[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.