IN THE SUPREME COURT OF PENNSYLVANIA

No. 57 MAP 2015
No. 58 MAP 2015

ADAM KUREN and STEVEN ALLABAUGH,

on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

v.

LUZERNE COUNTY of the Commonwealth of Pennsylvania and
ROBERT C. LAWTON, County Manager, in his official capacity,

Defendants-Appellees

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLANTS

On Appeal from the October 14, 2014 Order of the Commonwealth Court at Nos. 2072 CD 2013 and 2207 C.D. 2013 (consolidated), Reargument Denied, December 2, 2014, Affirming the October 22, 2013 Judgment of the Court of Common Pleas of Luzerne County, No. 04517, April Term, 2012

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I. INTERESTS OF *AMICUS CURIAE*

The American Bar Association ("ABA"), as *amicus curiae,* respectfully submits this brief in support of Appellants and the class they seek to represent with respect to the first question presented:

> In a matter of first impression, do petitioners [i.e., Appellants] state a claim for constructive denial of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 9 of the Pennsylvania Constitution, based on chronic and systemic deficiencies in the operation of Luzerne County's Office of the Public Defender ["OPD"] that deprive them and the class they seek to represent of their right to effective assistance of counsel?

The ABA urges the Court to answer this question in the affirmative. All criminal defendants—regardless of their means—are entitled to representation at all critical stages of the proceedings against them that meets the constitutional mandate of *Gideon v. Wainwright*. But here, Appellants have asserted that chronic and systemic funding deficiencies, and the resulting excessive workloads and lack of resources, prevent OPD and its attorneys from providing all clients with the competent and diligent representation required by the Pennsylvania Rules of Professional Conduct and articulated in ABA professional standards. In such a situation, a cause of action for prospective relief based on constructive denial of counsel should be recognized to ensure that, at all critical stages, indigent criminal defendants receive the actual, non-trivial representation that *Gideon* demands.

The ABA is one of the largest voluntary professional membership organizations and the leading association of legal professionals in the United States. It has more than 400,000 members, who come from all fifty states and other jurisdictions, including over 12,000 attorneys

in the Commonwealth of Pennsylvania.[1] Members include attorneys in private law firms, corporations, nonprofit organizations, federal, state and local governmental agencies, and prosecutorial and public defender offices. They are also judges,[2] legislators, law professors, law students, and non-lawyers in related fields.

Since its founding in 1878, the ABA has taken a special responsibility for advocating for the ethical and effective representation of all clients. In 1908, the ABA adopted its first Canons of Professional Ethics, setting out the duties owed by lawyers to their clients. Continually revised and updated over the years, they are now the ABA Model Rules of Professional Conduct.[3] Although the Pennsylvania Rules of Professional Conduct control in the present case, they were derived from the ABA Model Rules. *See* Pa.R.P.C., Preamble at ¶ 20. The Pennsylvania and ABA Model Rules pertinent to the issues before the Court are identical. *See, e.g.*, Pa.R.P.C. 1.1 & ABA Model Rule 1.1 ("A lawyer shall provide competent representation to a client[, which] includes the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Pa. R.P.C.1.3 & ABA Model Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

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[1]Based on ABA membership records for fiscal year 2015-2016.

[2]Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division prior to filing.

[3]Available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html. Each iteration of the ABA's professional conduct rules has been adopted as ABA policy. Only resolutions adopted by vote of the ABA's House of Delegates become ABA policy. Today, the ABA's House of Delegates is composed of over 560 delegates representing states and territories, local and state bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States, among others. *See* ABA House of Delegates - General Information, http://www.americanbar.org/groups/leadership/delegates.html.

Neither the Pennsylvania Rules nor the ABA Model Rules provide an exception to Rules 1.1 and 1.3 for public defenders.

Indeed, in 2006, the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") issued Formal Opinion 06-441 ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation") (attached as Exhibit A), which concluded that ABA Model Rules 1.1 and 1.3 apply equally to public defenders.[4] Created in 1913, the ABA Ethics Committee is charged with publishing formal ethics opinions on lawyer and judicial conduct, providing informal responses to ethics inquiries, and, upon request, assisting courts in their development of professional rules and in the interpretation of ethical standards, such as the ABA Model Rules and the ABA Model Code of Judicial Conduct.

The ABA has also worked to improve the criminal justice system and the representation of criminal defendants. This includes the development of the ABA Criminal Justice Standards.[5] Begun under the aegis of then-ABA President (and later Justice) Lewis Powell during the year after *Gideon v. Wainwright*, 372 U.S. 335 (1963), was decided, the Criminal Justice Standards are based on the consensus views of a broad array of criminal justice

[4]ABA standing committees are entities charged with investigating and analyzing "continuing or recurring matters related to the purposes or business" of the ABA. ABA Const. Art. 31.3. Further information on the ABA Ethics Committee is available at http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility.html.

[5]Available at http://www.americanbar.org/groups/criminal_justice/standards.html. The Criminal Justice Standards, which are also ABA policy, are now published in twenty volumes, based on topical area. They were developed and continue to be refined by task forces made up of prosecutors, defense lawyers, judges, academics, the public and other representatives with criminal justice interests, as well as the diverse membership of the ABA. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence,* 23 Crim. Just. 10, 14-15 (Winter 2009).

professionals, and have been recognized by the United States Supreme Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky,* 559 U.S. 356, 367 (2010).

In addition, the ABA's Standing Committee on Legal Aid and Indigent Defendants ("SCLAID"), its first standing committee, was created in 1920, and charged with the investigation and analysis of the administration of justice as it affects the poor and the promotion of remedial measures to assist them in realizing and protecting their legal rights.[6] In 2004, to commemorate the 40th anniversary of *Gideon,* SCLAID conducted four public hearings at which 32 experts representing 22 large and small states from all geographic parts of the United States presented testimony on excessive workloads, and produced a report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*.[7] Among the report's findings was that, when lack of funding for indigent defense led to overwhelming workloads, the result was "routine violations of the Sixth Amendment obligation to provide effective assistance of counsel." *Id.* at 38.

Excessive workloads have been such a pressing problem for public defenders that, in 2009, the ABA adopted the ABA Eight Guidelines of Public Defense Related to Excessive Workloads.[8] The Eight Guidelines are a "detailed action plan" for public defense programs and

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[6]Further information on SCLAID is available at http://www.americanbar.org/groups/legal_aid_indigent_defendants.html.

[7]Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf

[8]Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf.

their attorneys, "when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules." *Id.* at Introduction. The Eight Guidelines recommend various ways for public defenders to attempt to avoid excessive workloads, but recognize that, at times, it may be necessary to turn to the courts to remedy the situation. *Id.* at Comment to Guideline 5 ("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 . . . , or conceivably the filing of a separate civil action, will be necessary."); *see also* ABA Ten Principles of a Public Defense Delivery System, Principle 5 (2002) ("Defense counsel's workload is controlled to permit the rendering of quality representation.").[9]

Based on these and other results of the ABA's 100-plus years of research, analysis, and development of professional norms for effective representation of clients, the ABA has participated previously as *amicus* in other state supreme court cases that have addressed issues resulting from chronic and systemic underfunding of public defender systems. *See, e.g.*, *Public Defender v. State*, 115 So.3d 261 (Fla. 2013); *State v. Waters*, 370 S.W.3d 592 (Mo. 2012);.

As in its prior *amicus* briefs, the ABA assumes here that the public defenders are using public resources efficiently in representing indigent defendants. The ABA respectfully submits, however, that this Court should recognize a cause of action for prospective relief where

[9]Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf. The Ten Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems.

excessive workloads and lack of resources prevent public defenders from providing all clients with competent and diligent representation.

II. SUMMARY OF ARGUMENT

All criminal defendants—regardless of their means—are entitled to legal representation at all critical stages of the proceedings against them that meets the constitutional mandate of *Gideon v. Wainwright*. But here, Appellants have presented significant evidence demonstrating that chronic and systemic funding deficiencies, and the resulting excessive workloads and lack of resources, prevent OPD and its attorneys from providing all clients with the competent and diligent representation required by the Pennsylvania Rules of Professional Conduct and articulated in ABA professional standards. A post-conviction *Strickland* claim, which turns on after-the-fact identification of an error or errors that affected the outcome of an individual defendant's trial, is not a means to address such chronic and systemic deficiencies. Instead, a cause of action for prospective relief should be recognized to ensure that, at all critical stages, indigent criminal defendants receive the actual, non-trivial representation that *Gideon* demands.

III. ARGUMENT

A. This Court Should Recognize A Cause Of Action For Prospective Relief Where Excessive Workloads And Lack Of Resources Prevent Public Defenders From Providing All Clients With Competent And Diligent Representation.

The Commonwealth Court concluded that Appellants had not stated a claim for constructive denial of counsel, holding that Appellants' only recourse was to bring post-conviction claims under *Strickland v. Washington,* 466 U.S. 668 (1984), "[s]hould the legal representation assigned to the[m] prove ineffective and cause them prejudice." *Flora v. Luzerne*

County, 103 A.3d 125, 137 (Pa. Commw. Ct. 2014). Yet 52 years of post-*Gideon* history and precedent show that individual, retrospective ineffective assistance of counsel claims brought after trial cannot address chronic, systemic problems such as those alleged in this case. Therefore, the ABA respectfully submits that this Court should recognize a cause of action where excessive workloads and lack of funding prevent indigent criminal defendants from receiving the actual, non-trivial representation that *Gideon* demands. *See United States v. Cronic*, 466 U.S. 648, 654-55 (1984) ("'The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.'" (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)); *Waters*, 370 S.W.3d at 597 ("[T]he Sixth Amendment right to counsel is a right to effective and competent counsel, not just a pro forma appointment whereby the defendant has counsel in name only."); *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) ("Actual representation assumes a certain basic representational relationship.").

1. All Criminal Defendants Are Entitled To Competent And Diligent Representation, As Required By The Pennsylvania Rules Of Professional Conduct And Articulated In ABA Professional Standards.

The Pennsylvania Rules of Professional Conduct, the ABA Model Rules on which they are based, and the ABA's Criminal Justice Standards establish standards regarding the level representation that all clients should be entitled to expect—and demand. These standards can thus provide useful guides in assessing the adequacy of the representation provided by the state to indigent criminal defendants. *See, e.g., Frye v. Missouri,* 132 S.Ct. 1399, 1408 (2012) ("Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.").

First, Pennsylvania Rule 1.1 and the identical ABA Model Rule 1.1 require that *all* lawyers provide their clients "competent" representation. Each Rule defines "competent"

representation as requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." As Comment 5 to Pennsylvania Rule 1.1 and ABA Model Rule 1.1 emphasizes, an essential element of the competent handling of any matter is "adequate preparation."

Second, both Pennsylvania Rule 1.3 and ABA Model Rule 1.3 require that all attorneys "act with reasonable diligence and promptness in representing a client." As Comment 2 to both Rules states, this requires that a lawyer's "work load . . . be controlled so that each matter can be handled competently." In fact, a lawyer "shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct." Pa. R.P.C. 1.16(a); ABA Model Rule 1.16(a).

Neither the Pennsylvania Rules nor the ABA Model Rules provide any exception for public defenders. The ABA Ethics Committee, in Formal Opinion 06-441, specifically considered the ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation. That opinion states: "All lawyers, *including public defenders* . . . must provide competent and diligent representation." *Id.* at 1 (emphasis added) (attached as Exhibit A).

Third, while the Pennsylvania Rules and the ABA Model Rules provide standards for all lawyers, the ABA's Defense Function Standards—a subsection of the ABA's Criminal Justice Standards—do so for criminal defense lawyers in particular. *See, e.g.,* ABA Defense Function Standard 4-1.1(a) ("These Standards are intended to address the performance of criminal defense counsel in all stages of their professional work."). Under the Defense Function Standards, all criminal defense lawyers, among other things, should investigate the facts

(Standard 4-4.1), research the law (Standard 4-4.6), communicate with clients (Standards 4-3.1, 4-3.3, 4-3.9, 4-5.1), negotiate with prosecutors (Standards 4-6.1, 4-6.2, 4-6.3), file appropriate motions (Standards 4-5.2, 4-7.11, 4-8.1), and prepare for court (Standard 4-4.6). In addition, under ABA Defense Function Standard 4-1.8(a), criminal defense lawyers "should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations."

2. Appellants Have Alleged And Presented Evidence That Excessive Workloads And Lack Of Resources Prevent OPD And Its Attorneys From Providing Competent And Diligent Representation To All Clients.

Under the circumstances alleged in this case, the OPD and its public defenders are in an untenable position, as they cannot provide each of their clients the competent and diligent representation that the professional standards discussed above demand. Therefore, using these standards as guides, there are indigent criminal defendants in Luzerne County who are not receiving the level of legal representation to which they are constitutionally entitled. *See, e.g.*, *Frye*, 132 S. Ct. at 1408 (relying on ABA Standards for Criminal Justice and on several states' rules of professional conduct in assessing constitutional adequacy of counsel); *Padilla*, 559 U.S. at 367 (relying on ABA Criminal Justice Standards); *Commonwealth v. Hughes*, 865 A.2d 761, 814 n.56 (Pa. 2004) (relying on ABA Criminal Justice Standards); *Commonwealth v. Breaker*, 318 A.2d 354, 357-59 (Pa. 1974) (relying on ABA Criminal Justice Standards and on ABA Code of Professional Responsibility, precursor to ABA Model Rules); *see also* ABA Eight Guidelines at Comment to Guideline 5 (recognizing "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 the professional conduct rules").

The trial court concluded that "[t]o describe the current state of affairs in the Office of the Public Defender as approaching crisis stage is not an exaggeration." R. 737a. The court based its conclusion on the testimony of the OPD's chief public defender and on the expert opinion of Norman Lefstein, Dean Emeritus of Indiana University's Robert H. McKinney School of Law, regarding the excessive workloads of OPD public defenders. R. 729a-735a. As Dean Lefstein testified, due to their workloads, OPD public defenders are *unable* to comply with their fundamental duties to their clients. R. 636a-37a. According to Dean Lefstein:

> When you have over a hundred clients for whom you are simultaneously responsive, you simply cannot discharge the range of duties that you have to those clients; and what occurs . . . is a form of triage representation, where you deal only with the most immediate problem of the day, because that is really all you can do. You're going to court hearings. [You're] shuffling papers and you're doing the best you can, but you're not doing what is really necessary.

R. 637a. He explained that these extraordinary workloads *necessarily* prevent indigent criminal defendants in Luzerne County from receiving legal assistance that satisfies the most fundamental professional standards. *See* R. 636a ("[G]iven the case loads that they have, they must necessarily fail to deliver to many of their clients the kind of competent and diligent representation that is required by Rules 1.1 and 1.3 of the Pennsylvania Rules of Professional Conduct."); R. 637a ("[T]here are clients who must necessarily, given these case loads, receive representation which is not consistent with the duty to be a reasonably competent lawyer under the 6th Amendment.").

This and other testimony in the record support a conclusion that many indigent defendants receive legal representation that does not comply with *Gideon's* mandate of actual,

non-trivial representation. In fact, they support a conclusion that a professionally acceptable level of representation simply cannot be provided for each defendant at the critical period between arraignment and trial. *See Hurrell-Harring,* 930 N.E.2d at 224 ("[This period is] when a case must be factually developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pretrial motions filed. Indeed, it is clear that to deprive a person of counsel during the period prior to trial may be more damaging that denial of counsel during trial itself." (internal quotation marks omitted)).

The ABA has documented similar results of excessive public defender workloads and lack of resources in other jurisdictions, too. *See Gideon's Broken Promise* at 38 (documenting instances in which public defenders "are burdened by overwhelming caseloads and essentially coerced into furnishing representation in defense systems that fail to provide the bare necessities for an adequate defense (e.g., sufficient time to prepare, experts, investigators, and other paralegals), resulting in routine violations of the Sixth Amendment obligation to provide effective assistance of counsel"); Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* 12-13, 18 (ABA 2011) (explaining that "[t]here is "abundant evidence that those who furnish public defense services across the country have far too many cases, and this reality impacts the quality of their representation, often severely eroding the Sixth Amendment's guarantee of the right to counsel," with workloads sometimes so great that public defenders must forgo any research, investigation, client communication, or motion practice and simply plead clients guilty soon after meeting them).[10]

[10]Available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf . The ABA has issued a range of standards to help public defenders avoid situations in which their workloads make it impossible to satisfy *Gideon*'s mandate in any meaningful fashion. *See, e.g.*, ABA Eight

3. Where Excessive Workloads And Lack Of Resources Prevent Public Defenders From Fulfilling Their Fundamental Professional Obligations, Prospective, Systemic Relief Is Necessary.

The Commonwealth Court rejected the possibility of a "prospective relief" constructive denial of counsel claim for "more funding and resources to an entire office, as opposed to relief to individual indigent criminal defendants." *Flora*, 103 A.3d at 136. According to the Commonwealth Court, "[s]hould the legal representation assigned to the individual Indigent Clients prove ineffective and cause them prejudice, their recourse is to bring a post-conviction *Strickland* claim." *Id.* at 137.

But where workloads are excessive and resources are insufficient, a post-conviction *Strickland* claim is not a means for ensuring that indigent criminal defendants receive the representation to which they are constitutionally entitled. A *Strickland* claim turns on after-the-fact identification of an error or errors that affected the outcome of an individual defendant's

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Guidelines at Introduction (providing "detailed action plan" for public defense programs and their attorneys, "when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules"); ABA Formal Op. 06-441 at 1 ("If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients."); ABA Resolution 107 at ¶ 4 (Aug. 9, 2005) ("Attorneys and defense programs should, consistent with ethical obligations, discontinue indigent defense representation, and/or decline to accept new cases, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations."), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325_aba_res107.authcheckdam.pdf; ABA Ten Principles, Principle 5 ("Defense counsel's workload is controlled to permit the rendering of quality representations."). These standards recognize, however, that there are times when litigation is necessary to remedy situations in which public defender workloads prevent the fulfillment of professional standards. *See* ABA Eight Principles, Comment to Guideline 5 ("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 . . . , or conceivably the filing of a separate civil action, will be necessary." (emphasis added)).

trial, for which the remedy is generally a new trial for the defendant in that case. *Morris v. Mathews*, 475 U.S. 237, 254 (1986). Even if successful, such a claim does not require a public defender's office or the county responsible for it to do anything differently in the future. It does not compel the office, the county, or the state to make changes—funding, staffing, workload, operations, or otherwise—to remedy systemic *Gideon* failures. *See Waters*, 370 S.W.3d at 604 ("*A criminal appeal simply does not provide a mechanism for review of the caseload protocol and the issue in any post-conviction proceeding centers on whether the defendant received a fair trial, not on the broader Sixth Amendment right to counsel that is at issue when considering whether counsel was appointed for all critical stages of the proceeding.*" (emphasis in *Waters*)).

In essence, the Commonwealth Court's ruling leaves indigent criminal defendants with no meaningful way to enforce even the minimum standards for indigent criminal representation that have been developed under *Gideon*, under other rulings of the United States Supreme Court, the Pennsylvania Supreme Court, and the courts of other States, and through the work of entities such as the ABA. Yet as the Supreme Court of Missouri stated, "[n]o case suggests that a court analyze whether the Sixth Amendment right to counsel has been preserved at all critical stages only by retrospectively determining that the lack of such counsel deprived the defendant of a fair trial." *Waters,* 370 S.W.3d at 607. That is because "[t]he constitutional right to effective counsel . . . is a prospective right to have counsel's advice during [all critical stages of] the proceeding and is not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel affected the proceeding." *Id*.; *see also Hurrell-Harring*, 930 N.E.2d at 226 ("[T]he basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of

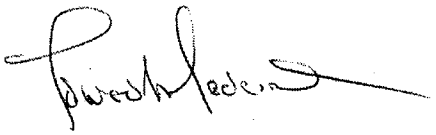
individual attorneys."). Where excessive workloads and lack of resources prevent the provision of constitutionally adequate counsel, relief, if it is to have effect, must be systemic and prospective.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association respectfully requests that, in resolving the first question presented, this Court reverse the judgment of the Commonwealth Court.

Dated: September 10, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am on this day serving the foregoing Brief of *Amicus Curiae* American Bar Association in Support of Appellants by First Class Mail, which service satisfies the requirements of Pa.R.A.P. 121 and 2187:

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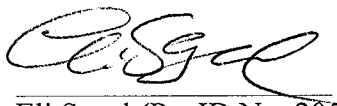

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EXHIBIT A

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.