

“The right to freedom and equality of justice is the cornerstone of the Republic.”
— Reginald Heber Smith

CHILDREN IN CHAINS



In most Florida juvenile courtrooms, children appear wearing bright orange or brown jumpsuits, metal handcuffs, belly chains connected to the handcuffs and metal leg shackles, regardless of age, size, gender or alleged offense.

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A Season of Opportunity: Pursuing Quality in the Civil Justice System

By Don Saunders, director of Civil Legal Services

As Spring has arrived in Washington, the civil equal justice system stands at the door of a rare opportunity to take stock of who we are as a community of advocates and how we go about the business of improving the quality of civil justice available to the 37 million people living in poverty today in this country.

NLADA, its members and allies have spent the last several years engaged in an astounding array of initiatives establishing a series of standards and benchmarks defining in great detail our aspirations for America's civil justice system. These efforts were undertaken in the midst of the many challenges we face in trying to address the legal needs of such a large number of people with so few resources.

We should all step back and take stock of this particular moment in the history of the legal aid movement in this country. And, be proud of the fact that the entire equal justice community has been willing to begin a conversation about what justice in America should look like, raising our vision beyond the day-to-day limitations we all face.

A great debt is owed to the American Bar Association for its deep commitment to justice as evidenced by its adoption last summer of three policy positions establishing a very broad, detailed vision of a system that would fulfill the promise of justice for all:

- Standards for the Provision of Civil Legal Aid.** These aspirational standards aimed at legal aid providers were developed by a diverse group of experts during several years of intense deliberations. They denote a virtual Wikipedia of current insight and advice on hundreds of quality-related issues, such as board relations, unbundled legal services, client involvement and impact advocacy. They capture in a very helpful manner the numerous changes in the civil delivery environment that have occurred since the last iteration of the ABA Standards in 1986. The Civil Standards can be viewed at <http://www.abanet.org/legal services/sclaid/downloads/civillegalaidstds2006.pdf>
- Principles of a State System for the Delivery of Civil Legal Aid.** These principles, developed by a presidential task force appointed by then-ABA President Mike Greco, define how a full functioning state civil delivery system should look like. They are addressed to a broad range of stakeholders in that system, including access to justice commissions, the judiciary, the private bar and funders, in addition to the legal aid provider communi-

ty. The Civil Principles contain a detailed self-assessment tool to allow states to gauge their progress toward the expressed goals. They can be viewed at <http://www.abanet.org/legal services/sclaid/downloads/06A112B.pdf>

- Defined Right to Counsel Where Basic Needs are at Stake.** This bold statement of a civil right to counsel was likewise developed by the Greco task force and adopted last summer by the ABA House of Delegates. While this right has yet to be recognized broadly in any state, the ABA resolution strengthens efforts underway nationwide to move this issue forward in courts and legislatures. On the criminal side, the *Gideon* decision resulted only after many years of strategic advocacy toward the right to counsel. This vision of a fully functioning civil justice system should be pursued with similar passion on the civil side. To view the resolution, visit <http://www.abanet.org/legal services/sclaid/downloads/06A112A.pdf>

Likewise, the focus on quality has been intensified significantly by Legal Services Corporation (LSC) President Helaine Barnett's commitment to making quality the cornerstone issue of her tenure at LSC. The recent issuance of the revised *LSC Performance Criteria*, footnoted to reference relevant parts of the ABA Standards, provide grantees with a clear, concise set of standards and protocols designed to help grantees improve and measure their performance.

The development of these new standards and tools to assess performance do not suggest that civil legal aid programs are not already high performing institutions in addressing the needs of their client communities. Rather, they serve as our expression of a commitment to doing much better – to aspiring to a vision of justice that meets the huge “Justice Gap” facing people in poverty. The “quality agenda” at its essence provides a strong voice decrying a system that continues to fail in meeting a large majority of their legal needs.

Making These Values a Reality

How, then, do we go about making these expressions of values real at the provider and state justice community levels? What steps must we take to seize this important moment in time and ensure that these new tools and values do not take up

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New Congress Takes up Important Civil Legal Aid Issues

By Julie Clark, vice president of Strategic Alliances & Government Relations

The switch in the majority party of both the House and Senate has provided immediate opportunities for stalled legislative initiatives. NLADA and its partners have been busy on a number of fronts and we welcome the enthusiasm and the energy of the 110th Congress. Having said this, we are constantly mindful that the “balance of power” shifts unpredictably and often. We never lose sight of the need to build bipartisan support on behalf of our clients, our causes and our communities.

As mentioned in the last issue of Cornerstone, the first business of the 110th Congress was to pass a Joint Resolution containing those FY 2007 appropriations measures that had not been completed in the second session of the 109th Congress. The Legal Services Corporation (LSC) received a \$22 million increase in funding, the first in four years. All of the increase went to the basic field programs. LSC is presently funded at a level of \$348 million, well below its highest level of funding (\$400 million) achieved in FY 1995.

FY 2008 Appropriation for LSC

On February 5, President Bush sent his budget to Capitol Hill. On the heels of the LSC increase in the joint resolution, the President recommended a \$5 million decrease in FY 2008 funding from his FY 2007 recommendation of \$316 million to \$311 million. The architect of the FY 2007 increase, Rep. Dave Obey (D-WI), chairman of the Appropriations Committee, issued a six-page statement criticizing the President’s budget request. Congressman Obey specifically noted the President’s \$38 million cut to the LSC and highlighted how “50 million Americans qualify for this aid, but a 2005 study by LSC found that 50 percent of the eligible Americans seeking assistance are turned away for lack of resources.”

LSC delivered its FY 2008 budget request to Capitol Hill on February 5 as well. LSC is seeking \$430.6 million, an increase of \$82 million more than that included in the joint resolution.

On March 29, 2007, the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies (CJS) heard testimony from LSC. In their opening remarks, LSC Chairman Frank B. Strickland and

President Helaine M. Barnett argued the importance of approving this increase to fulfill LSC’s mission and to close the justice gap. A gap, they emphasized, that will only widen in the wake of another natural disaster or with the influx of immigration.

Subcommittee Chairman Alan B. Mollohan (D-WV) began the hearing by commending LSC for their work in securing justice for all and was joined by subcommittee members Rep. Adam Schiff (D-Calif.) and Rep. Michael Honda (D-Calif.). Rep. Rodney Frelinghuysen (R-NJ), ranking member of the subcommittee, had been detained during the hearing but arrived at the very end, acknowledging “the fantastic work done by programs in his home state of New Jersey.”

In responding to the budget request increase, which he noted was far below that received in FY 1980 if adjusted for inflation, Chairman Mollohan invited LSC to provide a standard or benchmark describing how much of an increase is needed to close the gap. President Barnett noted that LSC’s strategic plan called for a 20 percent budget increase over each of five years, supplemented by attorney involvement, but acknowledged that it will take more than five years. She noted that LSC funding is only 46.2 percent of overall funding for legal services recipients and that it would take a comparable increase in non-LSC funds to even approach closure of the justice gap. She also argued that the increase in funding would help to raise attorney salaries, which are substantially lower than their counterparts in the criminal justice arena and public sector across the board. President Barnett stated that LSC’s commitment to increasing attorney salaries and supporting loan repayment assistance programs is “absolutely important” to the recruitment and retention of attorneys in legal services.

Rep. Schiff focused his line of questioning on the LSC restrictions and particularly the restriction on non-LSC funds and class actions. He stated that he did not think that “the restrictions are appropriate.”

Rep. Honda questioned LSC about the ongoing investigation of California Rural Legal Assistance (CRLA). He noted that the Inspector General’s interim report on CRLA criticized the program for doing “impact work” and asked if there was any LSC regulation or restriction that prohibited programs from “pri-

“We never lose sight of the need to build bipartisan support on behalf of our clients, our causes and our communities.”

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Defenders Fight for Justice on Numerous Fronts

By Richard Goemann, director of Defender Legal Services, and Maureen James, staff attorney of Defender Legal Services

As many of you know, NLADA staff advocate on many different fronts to support excellence in public defense. Some of our efforts require us to call upon our members for help and support. These projects require a wide variety of talents and experience. So do not be surprised if we give you a call one day and ask for your help. It might be that your combination of talent and experience is the one that we need to ensure success.

Federal Loan Repayment Assistance Bill

As the 110th Congress convenes, NLADA's efforts to secure passage of a loan repayment assistance bill for public defenders have kicked into high gear. Senator Richard Durbin of Illinois has introduced S.442 and Representative David Scott of Georgia has introduced H.R. 916. The bills are titled "The John R. Justice Prosecutors and Defenders Incentive Act of 2007," and, as introduced, were identical. To access the text of the bill, please visit www.thomas.gov. A search by the bill number will quickly give you the most up-to-date information. The Act includes the following highlights:

- It establishes a program of student loan repayment assistance for public defenders and prosecutors who agree to remain employed for at least three years.
- The Attorney General will administer the program through the Department of Justice.
- Loan Repayment is capped at \$10,000 per calendar year, and at \$60,000 total.
- The repayment program is subject to appropriations, with the bill calling for funding in the amount of \$25,000,000.
- S.442 has bipartisan support and passed the Senate Judiciary Committee with amendments. Likewise, an amended version of H.R. 916 passed the House Judiciary Committee with bipartisan support.

This year presents our best opportunity to secure passage of this important legislation. A victory for this bill would be a victory for improved criminal justice across the country. Loan repayment assistance would:

- Encourage young lawyers to seek public service careers as prosecutors and public defenders
- Provide relief from overwhelming law school debt that often prevents people from seeking careers in public service
- Enhance public safety by encouraging highly qualified law school graduates to seek and maintain employment as prosecutors and public defenders

- Bridge the gap between experienced prosecutors and public defenders and new prosecutors and public defenders.
- Lessen staff turnover so that offices can maintain full staffing.
- Increase efficient use of taxpayer money and support efficient court systems by lowering the cost of and disruption caused by constant training of new employees.
- Increase overall experience level within offices so that attorneys qualified to handle more complex and serious cases are available.
- Support the ability of prosecutor and public defender offices to attract diverse applicant pools.

Please contact your senators and representative and encourage them to support and co-sponsor the John R. Justice Prosecutors and Defenders Incentive Act of 2007.

Blue Ribbon National Committee on the Right to Counsel

NLADA continues to support the work of the Blue Ribbon National Committee on the Right to Counsel (NCRC) and is looking forward to the release of the committee's report. The NCRC is an ongoing initiative of NLADA and the Constitution Project. Originally convened in 2004, the bipartisan NCRC is comprised of high-visibility former government officials, opinion leaders, academics and leaders of business and other constituencies, and is co-chaired by former United States Vice President Walter Mondale and William Coleman, former Secretary of Transportation during the Ford Administration.

The NCRC's goals are, in the short-term, to call attention to specific areas of deficiency in indigent defense systems around the country, and in the long-term, to foster national consensus regarding the specific elements of reform and bring about systemic, statewide reform, including in many of the states that have proven the most resistant through time. We hope this report will shine a national spotlight on the strengths and weaknesses of our country's public defense systems, helping to educate policymakers and inspire reform.

Fair Health Movement

NLADA is partnering with the Joint Center for Political and Economic Studies to advance their fair health movement. Last year, the Joint Center issued the final report of the Dellums Commission entitled "A Way Out: Creating Partners for Our Nation's Prosperity by Expanding Life Paths of Young Men of Color." The report identified failed public policies and made recommendations to improve the health of young men of color. The Dellums Commission's work was unique in that it studied the full range of factors determining

See **DEFENDER** on page 20

Montana Legal Services Association:



The Little Program that Could

Photo Courtesy of Montana Legal Services Association

Lessons Learned by a Small, Rural Program

By Tara Veazey

Montana Legal Services Association (MLSA) operates in an extraordinarily beautiful state, where the task of providing meaningful access to justice can be as daunting and foreboding as the great Montana landscape. As the sole provider of free civil legal services in the state, MLSA has just 13 attorneys providing direct representation in a geographic area larger than 145,000 square miles — a size that could accommodate Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Vermont and still have room for 16 Rhode Islands! The state encompasses seven Native American Reservations with diverse geographies, characteristics, cultures and needs. Montana’s median household income is tied for the lowest in the nation, and one in every five Montanans live at or below 125 percent of the federal poverty guidelines.

In the face of these daunting — but certainly not unique — challenges, MLSA has spent the last several years pursuing innovative solutions and restructuring core services. In this effort, MLSA has unabashedly “borrowed” ideas and practices from leading programs across the nation and, in a few areas, has been proud to spearhead new and innovative ideas. Under the leadership of Executive Director Klaus Sitte and Deputy Director Alison Paul, MLSA’s greatest strength has been a willingness to revisit goals and purposes, ask hard questions about the efficacy of existing delivery models and, when necessary, step out of MLSA’s institutional comfort zone and restructure services.

Restructuring as a Statewide Law Firm

At the height of Legal Services Corporation (LSC) funding, MLSA had 39 attorneys and more than a dozen local offices. At the time, a loose affiliation of community-based offices sufficed to meet much of low-income Montanans’ legal needs. However, in eras of dwindling resources, offices and staff, this model led to severely inequitable access to legal services across the state. Recognizing this geographic inequity, MLSA has recently restructured into an integrated statewide law firm, offering an array of services from community education, legal advice, self-help assistance, direct representation and impact litigation. In all of these areas, MLSA employs innovative technology to increase efficiency and maximize benefits to clients.

MontanaLawHelp.org

Like most states in the country, MLSA has worked with other statewide stakeholders to develop a Web site, MontanaLawHelp.org, to provide the public with legal information, forms and location specific legal and community referrals. MLSA hopes that in some cases, individuals are able to find the information they need online avoiding a call to MLSA and saving scarce resources for those individuals who do need further assistance. In contrast, many people in Montana’s most rural regions are first informed about the availability of MLSA services through the Web site. Through an LSC Technology Initiative Grant (TIG) grant, MontanaLawHelp.org now has a “live chat” feature helping users find the online information they need. During most weekdays, MLSA

staff is available to answer instant message “chat” requests from site users. The staff cannot provide legal advice, but they do show users where to find the information they are seeking on MontanaLawHelp.org and other Web sites that contain legal information. MontanaLawHelp.org has helped transform public access to legal information in Montana.

HelpLine

MLSA no longer relies on local offices to conduct client intakes, a procedure that burdened understaffed offices and largely ignored the needs of clients living hundreds of miles from the closest office. Rather, the MLSA HelpLine, a single toll-free number staffed with three paralegals and one intake specialist, provides the central entry point for all Montanans accessing legal services. Callers to the HelpLine are screened for eligibility, and eligible clients receive a call-back appointment with an MLSA attorney or paralegal. All eligible callers receive at least advice and are then referred to one of MLSA’s statewide units to be screened for further assistance.

Self-Help Law Unit

Five years ago, self-help assistance was only available in a few of Montana’s more urban locations. Now, self-help assistance in family law cases is provided through a centralized, statewide Self-Help Law Unit. The Self-Help Law Unit is one example of an area where technology has transformed our practice and expanded the reach of our services while keeping

the quality of those services high. Family law clinics are provided once each month in one of Montana’s more populated regions with live broadcast via video conferencing to four rotating, remote locations. With almost every district courthouse in the state equipped with videoconferencing technology, the clinics now reach clients living in the most rural and remote regions of Montana. After the clinics, each client is given assistance in completing automated dissolution and/or parenting plans developed with another TIG grant. Each set of documents is then reviewed by an MLSA or pro bono attorney, who then answers any client questions or concerns and walks the client through the process for completing the action. Similarly, bankruptcy clinics, previously offered only in Billings and Helena, are now available to clients statewide using videoconferencing technology.

At MLSA, the Self-Help Law Unit is seen and treated as an integral and high-quality mechanism for delivering legal services, with an emphasis on client education and empowerment. In addition to increasing access to the justice system for those Montanans MLSA is unable to directly represent, the Self-Help Law Unit has been integral to systemic statewide efforts to make the courts and the law more accessible to the public.

Substantive Law Units

Previously, the type of services a client could receive in

See MLSA on page 23



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Schriro v. Landrigan (Can a Capital Defendant Waive Mitigation?) *Cunningham v. California* (Ginsburg/Apprendi Redux?)

By Marshall J. Hartman and Laurence A. Benner

In this issue we discuss two important sentencing cases. In *Schriro v. Landrigan*, the Court addresses an ineffectiveness claim where an obstreperous client purported to waive the right to present mitigation evidence in a capital case. In *Cunningham v. California*, (decided January 22, 2007) we finally hear from Justice Ginsburg on judicial fact-finding. Was her silent joinder to Justice Breyer's "remedial" holding in *U.S. v. Booker* for real or has she defected and returned to the fold?



Laurence A. Benner

Schriro v. Landrigan

This upcoming case appears at first glance to present only a straightforward habeas issue regarding whether the state court made an unreasonable application of *Strickland v. Washington*. However, as the debate between Justices Scalia and Kennedy revealed during oral argument, the real underlying issue concerns what standards should be employed by a trial court to determine whether a capital defendant has validly waived his right to present mitigation evidence.

Jeffrey Landrigan escaped from an Oklahoma prison in 1989 and murdered a man in Arizona. He was convicted and sentenced to death. After his case was affirmed on direct appeal in 1993, he filed a post-conviction petition, alleging that his lawyer was ineffective for failing to investigate and present mitigating evidence at the sentencing hearing concerning fetal alcohol syndrome and history of childhood abuse. The Arizona Superior Court denied his petition and request for a hearing on the theory that the defendant had instructed his attorney not to present any mitigating evidence.

After the Arizona Supreme Court affirmed, defendant filed a writ of habeas corpus in federal district court which was also denied. Relying on *Rompilla v. Beard*, 545 U.S. 374(2005), however, the en banc 9th U.S. Circuit Court of Appeals held, with two dissents, that the defendant had made a "colorable claim" that his counsel was ineffective at sentencing, and remand-

ed to the District Court to conduct an evidentiary hearing.

Circuit Judge Hawkins began his analysis for the majority by clearing away the first hurdle posed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The state claimed defendant could not develop the factual basis for his ineffectiveness claim in federal court because he had failed to do so in state court. See 28 U.S.C. sec. 2254 (e) (2). However, Judge Hawkins found that this restriction did not apply because Landrigan's state post conviction petition had raised the issue. Counsel furthermore had requested the appointment of an expert to assist in establishing mitigating evidence relating to the effects of drugs and alcohol on a fetus in utero, but the state court refused to make the appointment and denied the petition without a hearing.

Finding Landrigan had attempted to develop his claims in state court, Judge Hawkins then addressed whether he had a "colorable claim" for relief which entitled him to an evidentiary hearing in federal court. To establish his "colorable claim," Landrigan had to show that his counsel's representation fell below an objective standard of reasonableness, and that there was a reasonable probability that his conduct undermined confidence in the outcome of the sentencing hearing which resulted in his death sentence.

Landrigan alleged that counsel's investigation was minimal despite the fact he was given clues that would have uncovered Landrigan's tortured family history. His birth parents both abused drugs and alcohol, his father was on death row in Arkansas, his mother abandoned Landrigan in a nursery when he was six months old, and his adoptive mother was also an alcoholic who frequently slapped him, once with a frying pan. Landrigan himself had behavioral problems as a child which were consistent with fetal alcohol syndrome, had abused drugs and alcohol at an early age and overdosed in eighth or ninth grade. After a thorough neuropsychological examination, post conviction defense expert Dr. Thompson concluded that the convergence of "Landrigan's genetic makeup, in utero exposure to teratogenic substances, early maternal rejection, and his troubled interactions with his adoptive family" left Landrigan unable to "function in a society that expects individuals to operate in an organized and adaptive manner." In short, the expert concluded that this history of childhood abuse had significantly impaired Landrigan's ability to control his behavior.

Landrigan alleged that his trial counsel had only



Marshall J. Hartman

briefly interviewed the birth mother and his ex-wife. While counsel had employed a psychologist, he did not provide him with any of the subsequently discovered childhood background information and allegedly also failed to authorize follow-up testing as recommended by that expert. He also failed to consult an expert on fetal alcohol syndrome prior to the sentencing hearing.

At the start of the sentencing hearing, trial counsel indicated that he had planned to call defendant's birth mother and ex-wife and then seek a recess to consult with an expert on the effects of alcohol on the fetus. However, counsel then told the court his client did not agree to this stating: "he does not wish anyone from his family to testify on his behalf today I'm at a loss. I don't know what this Court wishes to do." The trial court then questioned Landrigan:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish him to bring any mitigating circumstance to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I am concerned.

Judge Hawkins found that Landrigan's resistance against calling the mother who abandoned him and his ex-wife, did not extend to other witnesses, including experts, which counsel could have put forward after conducting a more thorough investigation. Moreover, Judge Hawkins noted, citing ABA Criminal Justice Standards 4-4.1, "prevailing standards suggest that a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes." Finding the attorney's performance deficient for failing to investigate further, Judge Hawkins then ruled that the defendant's allegations, if established, also satisfied Strickland's prejudice prong, observing that the undeveloped mitigating evidence

might have tipped the balance for life. The en banc Court therefore concluded that defendant had raised a colorable claim and remanded for an evidentiary hearing.

Circuit Judges Bea and Callahan dissented. Conceding that the lawyer's investigation was inadequate, the dissent nevertheless found that Landrigan had not shown prejudice. To satisfy this requirement, the defendant had to show that the sentencing judge would have imposed a sentence other than death if he was made aware of the mitigating evidence. The dissenting judges noted that the mitigating effect of an anti-social personality disorder is greater when the disorder controlled the defendant's behavior or impaired his mental faculties. However, in the dissent's view the evidence showed that Landrigan had the ability to control himself at the time of the crime.

Secondly, the dissent doubted that the mitigating evidence would have outweighed the aggravating factors, which included the fact that Landrigan had murdered his best friend and stabbed another inmate in prison. Finally, the dissent noted that during counsel's summation to the judge at the sentencing hearing, Landrigan repeatedly interrupted whenever his counsel attempted to cast his past behavior in a more favorable light. Contradicting his counsel, the defendant would instead cast his behavior in the worst possible light. At one point Landrigan told the trial judge "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." Therefore, the dissent concluded, it is unlikely that the outcome of the sentencing hearing would have been different.

While this case may ultimately turn on whether the state court's decision was an "unreasonable" application of Strickland, the issue that surfaced during oral argument in the Supreme Court was whether the defendant's apparent waiver of the right to present mitigation evidence was valid in light of counsel's alleged failure to investigate and develop that mitigation fully. A debate arose over what the responsibilities of the trial judge ought to be to insure a knowing waiver:

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"While counsel had employed a psychologist, he did not provide him with any of the subsequently discovered childhood background information and allegedly also failed to authorize follow-up testing as recommended by that expert. He also failed to consult an expert on fetal alcohol syndrome prior to the sentencing hearing."

Whorton v. Bockting: No Retroactivity for Crawford

In a unanimous opinion by Justice Alito, the Court held that *Crawford v. Washington's* new procedural rule barring testimonial hearsay would not be applied retroactively to cases on collateral review because it failed to qualify as a "watershed" rule. See Supreme Court Watch, Volumn 28, Number 3 *Cornerstone* (2007) page 6 for previous discussion of this case.

LEGAL HELP FOR SPEAKERS OF OTHER LANGUAGES:

Je ne comprends pas.

Ne rozumijem.

Non capisco

I don't understand.

No comprendo

Ich verstehe nicht

chan eil mi a' tuigsinn

wakayabiran

Ma nifhemx

Es nesaprotu.

No ho entenc

Nie rozumiem

Za na pohidam

Я не понимаю

MA EI SAA ARU

Ik begrijp het niet.

No capiso

Agko natatalusan



THREE ETHICAL TRAPS

“Lawyers, especially if themselves not trained in the accepted interpreting methods, may be blissfully ignorant of the miscommunication which is occurring in plain view.

At least until they wake up in a cold sweat.”

By Paul M. Uyehara

In providing services to clients with limited English proficiency (LEP), legal services staff must be sensitive to lurking ethical issues. Although programs have realized that the old ways of serving clients with LEP are no longer acceptable, this article will introduce possibly overlooked ethical considerations.

Let's look at five common scenarios for lawyer-LEP client communication and then consider how three of them could be hazardous ethically:

SCENARIO	LAWYER	INTERPRETER	RESULT
1	Monolingual	Not used	Neither party understands other well
2	Monolingual	Informal	Could be the same as #1
3	Monolingual	Professional	Should be OK
4	“Bilingual”	Not used	Same as #1 as lawyer not fluent
5	Bilingual	Not used	Best situation

Today, we understand that we need to be talking to clients with LEP in a common language in which both client and lawyer are fluent (scenario 5) or we need the services of a trained, truly bilingual interpreter to serve as a communication

conduit (scenario 3). So long as the lawyer in scenario 3 has been trained to effectively work with an interpreter, scenarios 3 and 5 are less likely to present special ethical issues.

Although the remaining three scenarios typi-

fy the old ways of doing business, they are still likely to be widely encountered. These scenarios should cause you to wake up in a cold sweat in the middle of the night.

Duty to Communicate

Rule 1.4 of the ABA Model Code of Professional Responsibility makes the lawyer responsible for good attorney-client communication. The rule mandates that a lawyer inform, consult with, explain and seek consent from the client about the case.

Attorneys who speak with clients in a language that one does not understand well risk a violation of Rule 1.4. Those who charge ahead in scenario 1 using English only, perhaps speaking more slowly or loudly, risk getting the facts wrong, not understanding the client's goals and not having the client understand legal advice. The situation is no different in scenario 4 when a lawyer with mediocre second language skills attempts to converse with the client in that language. Failing to seek assistance from an interpreter is asking for miscommunication when dealing with an LEP client.

The lawyer sensible enough to know that an interpreter is needed for effective communication should be a step ahead. Or not. In scenario 2, lawyers who rely upon informal interpreters may be in worse trouble for reasons that will be explained later. Informal interpreters are untrained, untested volunteers. Whether relatives or friends of the client, helpful community organization staff, or purportedly bilingual staff or law students, they may have serious deficiencies in at least one of the languages involved and have no way of knowing how to properly function as an interpreter. Learning a second language does not teach you how to interpret.

Lawyers using informal interpreters run the foreseeable risk that the interpreter will omit, change or add to what the speaker is saying or insert his own legal advice. The family interpreter may feel comfortable answering questions for the client. Lawyers, especially if themselves not trained in the accepted interpreting methods, may be blissfully ignorant of the miscommunication which is occurring in plain view. At least until they wake up in a cold sweat.

Confidentiality, Privilege and the Interpreter

Rule 1.6 provides that, with certain exceptions, a lawyer "shall not reveal information relating to representation of a client". Also, attorney-client privilege can protect communications between attorney and client from being divulged in court without the client's consent. But what happens when an interpreter is present for the conversation?

The presence of an extraneous person in an attorney-client conversation may undermine the confidentiality of the information and destroy the privilege. When used properly, the interpreter should be viewed as an agent of the lawyer whose presence is necessary to allow the conversation to occur. In those circumstances, the privilege is not lost.

The informal interpreter may play other roles in the situation — as a concerned relative expressing her own opinion, as advisor or as a witness. As the untrained interpreter strays from acting strictly as a conduit, the risk increases that a court will find that the privilege was lost.

And practical protection of the client's confidences requires that the interpreter know that he is not permitted to disclose to anyone not present what was said, or even that the client was seeking legal help.

Duty to Supervise Assistants

Model Rule 5.3 makes a lawyer responsible to ensure that any employee or contractor of the lawyer will comply with the other rules. Rule 5.3 applies to interpreters just as it applies to paralegals, law students and clerical staff. All must be trained and supervised to ensure that the non-lawyer assistant does not engage in conduct which the attorney cannot.

Rule 5.3 exposes the risk presented by the informal interpreter. Not only is the interpreter neither an employee nor a contractor of the lawyer, but the lawyer has no way of ensuring that the interpreter acts properly to protect the attorney-client relationship. The lawyer has not trained the interpreter or set any boundaries on the interpreter's conduct. Practically speaking, how can the lawyer supervise an interpreter he did not procure?

PRACTICE POINTERS

Lawyers communicating with clients with LEP should consider the following basic guidelines:

1. If you and the client are not fluent in the same language, use an interpreter.
2. Use professional interpreters and avoid informal ones, especially those supplied by the client.
3. Consider requiring the interpreter to sign a pledge to hold all information in confidence, protect attorney-client privilege, and not advise the client.
4. Get training in how to work with an interpreter and make sure that staff interpreters are trained and evaluated.

And when we use staff interpreters, ethical concerns suggest the importance of ensuring that they possess the necessary language skills and training to do the job well.

Programs would be well-advised to review ethical standards in their jurisdictions and adopt appropriate policies and training requirements. We all need our sleep. ★

Paul M. Uyehara is a senior staff attorney in the Language Access Project of Community Legal Services, Inc. and a member of the National Language Access Advocates Network (NLAAN).

Why are Children in Florida ...



Photo Courtesy of Carlos Martinez

By Carlos Martinez

Last year, after a couple of months of fruitless discussions with court administration to end the routine shackling of detained children in Miami Dade juvenile courtrooms without litigation, we filed more than 100 individualized motions to unchain the detained children. On September 11, 2006, courageous Miami juvenile court judge William Johnson was the first to conduct individualized hearings and grant the public defender motions. Today, more than 95 percent of our child clients appear without chains and shackles before all four juvenile judges. With more than 3,000 detained children having appeared in court since our first motion, we have had no incidents of a child injuring or attempting to injure anyone in court, and no detained child has escaped from the courtroom.



Carlos Martinez

Surprisingly, even after Florida Gov. Charlie Crist declared that routine shackling is wrong and that shackling should be judged on a case-by-case basis, in almost all juvenile courtrooms in Florida children appear in

court wearing a bright orange or brown jumpsuit, metal handcuffs, belly chain connected to the handcuffs and metal leg shackles, regardless of age, size, gender or alleged offense. There is no individualized factual finding of dangerousness or risk of flight. Pregnant girls and children with epilepsy have been shackled, all in the name of courtroom security.

In chains, shackles and jumpsuits, the children look just like the Guantanamo enemy combatant detainees that we have seen on television. The children are typically herded into court in large groups, each doing a short-step leg shuffle while trying not to fall. The child that is detained and shackled on day one, and is released from secure detention, appears in court without shackles at the next court hearing. Shackling is not limited to delinquency cases. Even the detained "cross-over" children (those with a delinquency offense who also have a dependency case because a parent abused, neglected or abandoned the child) are brought to dependency court hearings in chains and shackles to face the parent who is accused of abusing, neglecting or abandoning the child.

In a recent survey of defender offices in the state, we found that in some counties children have been shackled for more than 20 years, in many others less than 5

years. Jailed adult defendants are not routinely shackled in court in many Florida counties. In Miami Dade, wholesale shackling of children began in 2004. We had a situation where a child was shackled in juvenile court, but if that child were transferred (direct filed) to adult court, he would not be shackled in adult court if he did not pose a physical danger to himself or others or was not an escape risk.

Reasons for Ending Indiscriminate Shackling

For our litigation, we obtained affidavits from experts in adolescent development, childhood trauma, therapeutic jurisprudence and international law. In their opinion, the indiscriminate practice of all detained children appearing in court in chains:

- Is irrational.
- Is inhumane and degrading.
- Causes or is likely to cause the child's physical, mental or emotional health to be significantly impaired.
- Is anti-therapeutic and is troublesome because a large number of children in delinquency proceedings have suffered physical and sexual abuse, have mental illness or retardation, or have disabilities.
- May further traumatize children who have been previously victimized by physical and sexual abuse, loss, neglect and abandonment, and can trigger a flashback where restraint was a part of the abuse.
- Is an affront to the dignity of the children and juvenile court proceedings.
- Undermines the rehabilitation focus of juvenile court.

The routine shackling practice is punishment before a finding of guilt. In Florida, the practice is contrary to the legislative intent of "fair hearings by a respectful and respected court," ensuring the "dignity of the courts" and the preservation of "a sense of personal dignity and integrity." The wholesale policy is too generalized and uses one level of extreme restraints for all children alike, irrespective of their potential to cause bodily harm in the courtroom. A more reasonable approach would be for the judge to have guidelines, as to when mechanical restraints, if any, should be used, to what extent and for what length of time.

Typical Excuses for Continuing Indiscriminate Shackling of Children

This section outlines the four top reasons I have heard and responses to those arguments.

Deterrent effect. Detained children will see each other chained and shackled and will therefore not commit other crimes, because they will no longer want to be treated like they were in court. There is no data or evidence to support this deterrence argument. It is clear that proponents of this rationale see shame and humiliation as being a deterrent. It is appalling to find judges and others who practice in juvenile court who do not know about, or refuse to acknowledge, the opinion of the medical and psychological profes-

sions that deterrence does not work the same way for teens and adults. In its recent decision ruling that the death penalty is unconstitutional when applied to juveniles, the United States Supreme Court stated, "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable suggest as well that juveniles will be less susceptible to deterrence." It's worthwhile to note that when proponents for the status quo welcome chaining presumed-innocent children for "deterrent effect," they are advocating pre-trial punishment. No one who respects the American idea of justice could.

For the safety of the children. It is impossible to control juveniles in the courtroom because children are impulsive and may hurt each other or escape from the courtroom if they are not chained and shackled. In most of the juvenile courtrooms, sheriff's officers carry guns and tasers, accessible, to any adult who is present in the courtroom. However, the proponents of this rationale typically fail to explore reasonable inexpensive alternatives to maintaining security and decorum. They justify bringing eight or more juveniles into the courtroom at a time by saying it is more efficient. Such assembly line justice and bureaucratic expediency over individualized attention (one child at a time) does not belong in juvenile court. There are other less restrictive alternatives to protecting public safety in the courtroom while maintaining the dignity of the children and the court proceedings. For example, bringing one child into court at a time and not having guns in the courtrooms. Due process, fairness and proportionality demand that we treat children in a more humane and dignified manner in the courtroom.

Children today are more dangerous than children in the past. The detained juveniles are dangerous and have already been determined to meet secure detention criteria, which means that they pose a public safety risk. This is the argument that if made about a racial or ethnic group would be appropriately described as prejudiced and solely based on stereotyping. However, proponents of this have couched it as scientifically based by saying that routine shackling is justified on the fact that the child meets secure detention criteria. Florida uses a detention risk assessment instrument that has never been scientifically validated to measure dangerousness or anything else. Defenders should not be shy about calling it like it is – it is prejudice. A judge who has not heard any facts or valid legal argument to justify shackling a child has already prejudged that child as being dangerous. That judge should not be presiding over juvenile court cases.

It is the sheriff's and not the judge's responsibility to maintain a secure courtroom. It's up to the sheriff to maintain order in the courtroom; sheriffs don't tell us how to judge, we don't tell them how to secure the courtroom. In Florida, judges have authority over what happens in the courtroom and the juvenile courtrooms are open to the general public. Deputy sheriffs and bailiffs are there to assist the judge in maintaining order. The irony here is that allowing

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Echaveste: Law, Lawyers Should Remain Available for All

By Jeff Billington, deputy director of Communications

Without lawyers, fair justice would be ignored and those least able to defend themselves would find their rights trampled, Maria Echaveste told attendees at the Equal Justice Conference opening session on March 22.

The image of those in the legal profession has been tarnished by negative stereotypes and divisive propaganda intentionally used to sideline certain segments of our population, said Echaveste, who was a senior White House and U.S. Department of Labor official in the Clinton administration and is currently a lecturer with the University of California, Berkley, School of Law-Boalt Hall.

“I dare say lawyer is becoming synonymous with shady,” she said. “When lawyers are consistently belittled, it is only a matter of time before society begins to forget what lawyers and justice are to this society.”

People routinely blame lawyers for raising health costs, defending terrorists and getting in the way of harvesting crops, disregarding that the actions lawyers take concerning these topics are directly preserving human rights and equality.

Our legal system is our protector against the entities that selfishly stomp on the rights of people. Since legal matters are not black and white, it is vital to have lawyers help sort out these matters instead of leaving them in question.

“Face it, we wouldn’t need lawyers if all issues were clear,” Echaveste said. “Without the rule of law and the individuals who seek to uphold the rule of law, our country will cease to exist.”

But there is much more that needs to be done to create a fair and equal legal system beyond saving the position of lawyers. Our legal system has greatly improved and become more just since it was first established more than 200 years ago, but we are still not living up to the promise of equal justice, she explained.

“Our Constitution and our legal system have helped us solve most problems,” Echaveste said. “That is one reason why a strong legal system is important to our society; we resolve our conflicts in court. The law must apply to all and all must have access to it.”

By not having the resources to serve more people we are in fact saying the legal system is for some of us but not all of us. For many low-wage workers the government should be a source of help, not something to be feared.

If the legal system is working how it is intended, bad employers will clean up their act and the private bar and the government will work together to increase compliance. We must have a system where everyone can assert their rights.



Photo by Jane Ribadeneira

Maria Echaveste addresses attendees at the Opening Session of the 2007 Equal Justice Conference in Denver, Colo.

“What will it mean if there are laws on the books and some without the means can’t access them,” Echaveste said. “We need one legal system, not a two tier system.”

One major area where a segment of the population has seen their legal rights curtailed is in dealing with immigrants, both legal and illegal.

“We have seen a constant erosion of rights,” she said, adding that rather than seeking solutions to the legal challenges faced by immigrants, some would rather eliminate lawyers and the help they provide from the system. Which amounts to limiting the due process rights of illegal and even some legal immigrants, such as the right to counsel, the right to the knowing the charges against you and the right to a trial. There are also laws that have been proposed, which would limit the legal rights of immigrants.

One of these proposed laws is to limit birthright citizenship. Since the founding of this nation, persons born in the United States have been considered citizens by default; this law would eliminate this much-revered standard.

“A proposal that would immediately create a new class of people,” Echaveste said. “Who should decide who become citizens? What kind of system would we have?”

If we are already distinguishing between the rights of the citizen and the rights of the non-citizen we are already on a slippery slope.” ★

Hot Topics in Legal Aid for 2007

By Jeff Billington, deputy director of Communications

The past year has been a roller coaster for the legal aid community from Congressional hearings to long overdue budget increases and proposed bills for tuition reimbursement for legal aid attorneys.

National Legal Aid & Defender Association (NLADA)

The congressional election has created a significant change in Washington, D.C. for legal aid, according to NLADA Director of Civil Legal Services Don Saunders.

“A number of those who support legal services are now in charge,” he said.

But these changes do not mean less work or a changed approach by NLADA. For the last several years, NLADA has worked hard to build bipartisan support of issues for the legal aid community and it will continue to maintain these relationships.

Loan repayment proposals to help legal aid attorneys repay their law school loans are currently a priority for NLADA, Saunders said.

These bills will be similar to the bill being proposed by Sen. Dick Durbin (D-IL) but will cover civil legal services, in addition to public defenders and prosecutors.

“Loan forgiveness for lawyers is not the easiest thing to push on the Hill,” Saunders said, adding that many legal aid attorneys leave the field because they are unable to pay their loans.

NLADA continues to press hard for increased funding for legal aid and it is also working with the Brennan Center for Justice for the repeal of certain restrictions Congress has placed on the Legal Services Corporation.

“We have been working enormously hard on the Hill for one restriction in particular,” Saunders said.

The restriction says that the restrictions on federal money, which dictate who is eligible as well as other criteria, also applies on state and local money if the office receives any federal money. This restriction binds offices from serving a wider needy population even if the money used in restricted cases is not federally allocated.

Legal Services Corporation (LSC)

The LSC budget for 2007 is \$348.5 million, a \$22 million increase over 2006, the first increase the Corporation has seen since 2003. Though this is lower than the \$430.6 million the agency has requested, it is a start in the right direction, said LSC President Helaine Barnett.

There is still a long way to go to meet the need for legal aid across the country. In order to meet the basic needs, LSC, as well as state and local funders, need to see their funding doubled.

“Our nation is facing a justice gap of historic propor-

tions,” Barnett said. “LSC programs are turning away one eligible client needing help for every one they do help. And there are only the ones that show up at the legal aid offices.”

LSC’s quality initiative has also advanced in the last year. The agency has been working with different factions of the legal aid community to create a program that will directly improve legal aid quality on a national scale.

“We at LSC value very much our collaborative work on this issue,” Barnett said. “From every corner of the equal justice community there is energy for this idea.”

The quality initiative will provide clear performance standards that will help expand legal services by ways such as helping offices keep, retain and recruit quality attorneys and outlining performance criteria.

A March 2007 version of the quality standards has just been issued and LSC will be sending copies to every staff member and board member of LSC funded programs.

LSC has also been working on a private attorney action plan, which will help to expand private attorney involvement in LSC planning to help determine ways private attorneys, can help close the justice gap.

Action is also being taken in a leadership mentoring pilot program, which is intended to be used by the legal aid community to develop future leadership.

“We are going to design elements and models to share with our programs and to share with our national partners,” Barnett said. “We need to ensure we have a group of future diverse, well-trained leaders.”

American Bar Association (ABA)

The ABA is continuing to push for increased funding for LSC, said Deborah Hankinson, chair of the ABA Standing Committee on Legal Aid and Indigent Defendants.

The ABA is committed to making sure LSC receives the amount of funding it needs to be able to serve all of the eligible applicants who apply for help from legal aid offices.

Currently, the ABA is recommending a \$330 million increase, but done incrementally. The organization has also been able to convince many bar leaders across the country to increase their support of LSC and its funding, according to Hankinson.

“ABA will continue to use its extensive grassroots network to secure increased funding for LSC,” she said.

Loan repayment assistance programs are also being supported by the ABA. It is currently focusing its efforts on state and federal based programs, Hankinson said. “The ABA is putting all of its lobbying resources behind these bills.” ★

Disaster Lessons Serve as Planning Tools for Legal Aid Community

By Jeff Billington, deputy director of Communications

In the nearly two years since hurricanes Katrina and Rita ravaged the Gulf Coast, there are still plenty of emerging lessons to be learned to help the legal aid community be as prepared as possible for the next major disaster.

Paul Tuttle with Southeast Louisiana Legal Services said it is important for the legal aid community to remember that a disaster can happen anywhere, ranging from earthquakes and hurricanes to terrorist attacks. For this reason it is vital to have a disaster plan in place.

The disaster plan needs to cover several vital areas, including communications links and how attorneys and staff will get back in touch with each other following the disaster. This needs to include provisions for contact even if conventional communication systems have been knocked inoperable. Existing client files and backup computer services also need to be arranged. This can include creating back-up files and having a protection agreement in place to secure computer services after a disaster.

Try to plan for large scale disasters as well as smaller ones, Tuttle said.

“We had a disaster plan in place but this was so much bigger than what we imagined would happen, we had to wing a lot of it,” he said describing the aftermath of Hurricane Katrina.

It is important to remember in a disaster it is the indigent population that will suffer the most.

“If most people lost a lot of what they had, the poor lost everything,” Tuttle said. “Your ability to provide legal services for them is more vital than ever in this situation.”

And to do this, an organization has to be flexible. This might mean handling certain types of cases it does not normally handle and also handling large numbers of certain types of cases, like evictions, contractor fraud or interstate custody, where non-custodial parents take the children out of state.

There is also a vital need for collaboration between pro bono providers and legal aid agencies. These pro bono volunteers provide a real service for a lot of people, Tuttle said.

“If we ever do get out of this mess it will be because of volunteers and not our government bureaucracies,” he said referring to the work that has happened in New Orleans since the hurricanes.

It is also important not to cut off your agency from

the community when a disaster happens. “Don’t operate in a vacuum after a storm, get in touch with other people in your area after it, other nonprofit agencies, law firms, government and the courts,” he said.

Paul Furrh of Lone Star Legal Aid said disaster planning does not just include what happens after the fact.

“Poor people don’t evacuate easily or well,” he said, explaining that efforts need to be made to educate people and to help them evacuate an area if a disaster is predicted.

The legal aid community also needs to find ways to contact those in need after the disaster. Following hurricanes Katrina and Rita, there were shelters and other aid facilities that were not allowing attorneys or public interest lawyers access to those in need. This can be a huge detriment to those people in these facilities.

It is also important for legal aid organizations to remember disaster relief is a multi-year project.

“You’re probably going to be doing it for the next three to five years,” Furrh said. “There have been more people scattered by Katrina than there were in the dust-bowl.”

Lone Star Legal Aid’s Sue Sere cautioned that it is important to remember that you can get as prepared as possible, but you never know how bad it is going to be in the end.

“You have to pace everyone that’s involved,” she said. “You’re dealing with a population that has truly suffered post-traumatic stress. You can never be prepared for living with the reality.”

Though, when a disaster does happen, it is a prime opportunity for the legal community to step up.

In responding to a disaster, there are three basic steps that need to be followed, Sere said.

First is to help meet the survivors’ needs. It begins with helping them determine their short term legal needs and long term legal needs.

The second step is to help clients use the resources of the community; this includes housing, supplies and employment.

Finally, it is important to work with the receiving community. In a disaster, just because the need increases, does not mean the resources will increase, so it is important to plan for it.

Some of the ways to work around this is to partner with large law firms to handle class action litigation and with small practices and solo practitioners to handle individual clients or to provide support and help in setting up clinics for clients, Sere said. ★

SHACKLING - Continued from page 11

anyone to have guns in the courtroom increases the likelihood that the judge, courtroom personnel, the children and the general public will be killed or seriously injured. Yet, most juvenile court judges have abdicated their authority over courtroom decorum and safety. In Miami Dade, the general public is checked for weapons prior to entering the courthouse, and officers are not allowed to carry guns inside the courtrooms.

Advocacy to End Indiscriminate Shackling Practices

Our efforts did not begin or end in the courtroom. We spoke to the media, reached out to the faith community, academics, social justice groups, other defenders and child advocates of all stripes. We also drafted a bill that was filed in the Florida Senate and House. The bill establishes a presumption that securely detained children will not be chained or shackled in the courtroom, except in extraordinary circumstances, and for the shortest period of time possible necessary to protect the people in the courtroom; and that the use of exceptional restraints must be reserved for the rare case where the court makes an individualized determination that unusual facts warrant such an extreme measure. While the bill has not been heard in committee, a key legislator promised to attempt to resolve the issue administratively with the courts, the Florida Department of Juvenile Justice and the child advocates trying to end the routine shackling practice.

Audrey Edmonson, a Miami Dade County Commissioner, introduced a resolution calling for the legislature to end the practice and for the county lobbying team to lobby in favor of the bills. The resolution was unanimously approved in December 2006. We have worked with faith community leaders who have signed a resolution in support of our efforts. We succeeded in persuading The Florida Bar Board of Governors to take a position supporting a ban on the indiscriminate shackling of children through legislation, court rule or administrative procedures.

Florida's Children First, a non profit child advocacy group, also lobbied on behalf on the bill and has been instrumen-

tal in keeping the legislation and the issue alive. Another key partner has been the National Juvenile Defender Center (NJDC) because it has provided technical assistance and training to defenders who want to challenge the shackling practice. In its recent assessment of the quality of representation and access to counsel in delinquency cases, NJDC recommended that Florida end the routine shackling practice.

Conclusion

Children in Florida are treated as enemy combatants because we have not done a good job of educating the general public and demanding that our elected officials correct this unjustified mistreatment of children in our courtrooms. There has been a tremendous amount of fear mongering and knee jerk responses without facts or data to support the policies and practices that end up hurting children and making us less secure.

Miami Dade has the second highest number of securely detained juveniles in the state, about 5,000 a year. We do not have guns in the courtroom, our judges see one child at a time, few of our children are determined to be a flight risk or safety risk to justify shackling and we have had no incidents since our judges stopped the routine shackling. We hope that defenders will continue to take on this fight. Tackling this issue will not be easy and will require the effort of many of your defenders who are already overworked. It's the moral thing to do. Our appellate attorneys Andy Stanton, Shannon McKenna and Valerie Jonas were instrumental in our effort, as were Marie Osborne, administrative, appellate and juvenile division support staff. Please visit our Web site, www.pdmiami.com/unchainthechildren.htm, to view the motions, appendices, photographs, news articles and editorials.

My boss, Public Defender Bennett Brummer, said it best. "If defenders are not going to fight so that every child is treated as an individual with dignity and respect, who will?" ☆

Carlos Martinez is the chief assistant public defender, Law Offices of the Public Defender, 11th Judicial Circuit Court of Florida (Miami-Dade).



Transition

Southern Minnesota Regional Legal Services (SMRLS) announces that **Bruce Beneke**, who has served with great distinction as its executive director for the past 30 years, has decided to step down from that role effective August 1, 2007. He will continue working at SMRLS in a new senior role.

Promotion

The board of Southern Minnesota Regional Legal Services (SMRLS) is also pleased to announce its selection of **Jessie R. Nicholson** to become the new executive director of SMRLS. Nicholson has been an outstanding leader at SMRLS for nearly 22 years, including 10 years as its deputy executive director. She is the first African American woman to lead a civil legal aid program in the Upper Midwest.

Appointment

Anthony Young, a protégé in LSC's recently-completed Leadership Mentoring Pilot Project, has been named the new executive director of Southern Arizona Legal Aid. Young is currently the managing attorney of the Yuma office of Arizona's Community Legal Services.

Appointment

The Board of Directors of the Legal Assistance Foundation of Metropolitan Chicago (LAF) is pleased to announce that **Diana White** has been selected as LAF's new executive director effective July 13, 2007. White has been LAF's deputy director of Special Projects since 1997.

Handling Excessive

Both of these articles were originally published in the National Association of Criminal Justice Lawyers Journal with the permission of the National Association of Criminal Justice Lawyers. The article "Restraining Excessive Defender Caseloads: The ABA Ethics Committee's View of Excessive Defender Caseload Issues" was printed in the March 2007 issue as a regular feature.

Restraining Excessive Defender Caseloads: the ABA Ethics Committee Requires Action

By Norman Lefstein and Georgia Vagenas

The most influential ethics body in the United States has now told criminal defense lawyers that having an excessive number of cases can never be an excuse for failing to provide "competent" and "diligent" representation to their clients.¹ As stated in Formal Opinion 06-441 by the American Bar Association's Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee"), "[t]he [Model] Rules [of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes."² Until this opinion, the ABA Ethics Committee had never dealt with the pervasive national problem of excessive caseloads of public defenders and other lawyers who represent the indigent accused in criminal proceedings.

In cases where the Supreme Court has held that the U.S. Constitution requires that counsel be provided,³ excessive defender caseloads have been cited repeatedly as a major impediment to effective representation. In December 2004, for example, in *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants ("SCLAID") concluded that "[f]unding for indigent defense services is shamefully inadequate."⁴ As the committee's report further explained, "[l]awyers frequently 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."⁵

The report also found that in addition to violating the Sixth Amendment, "defense lawyers for the indigent sometimes are unable to...comply with [ethical]...requirements, and as a nation we tolerate substandard representation in indigent defense that is not acceptable practice on behalf of paying clients. However,



See ABA ETHICS on page 24

Defender Caseloads

riminal Defense Lawyers' (NACDL) publication, *The Champion*, and are reprinted in full with
Committee Requires Action" was published in the December 2006 issue and the article "A Different
response to the first article.

A Different View of Excessive Defender Caseload Issues

By Michael P. Judge

On at least a weekly basis my Personnel Reassignment Committee reviews our balance of personnel and our deployment to ensure we are capable of providing high quality representation.

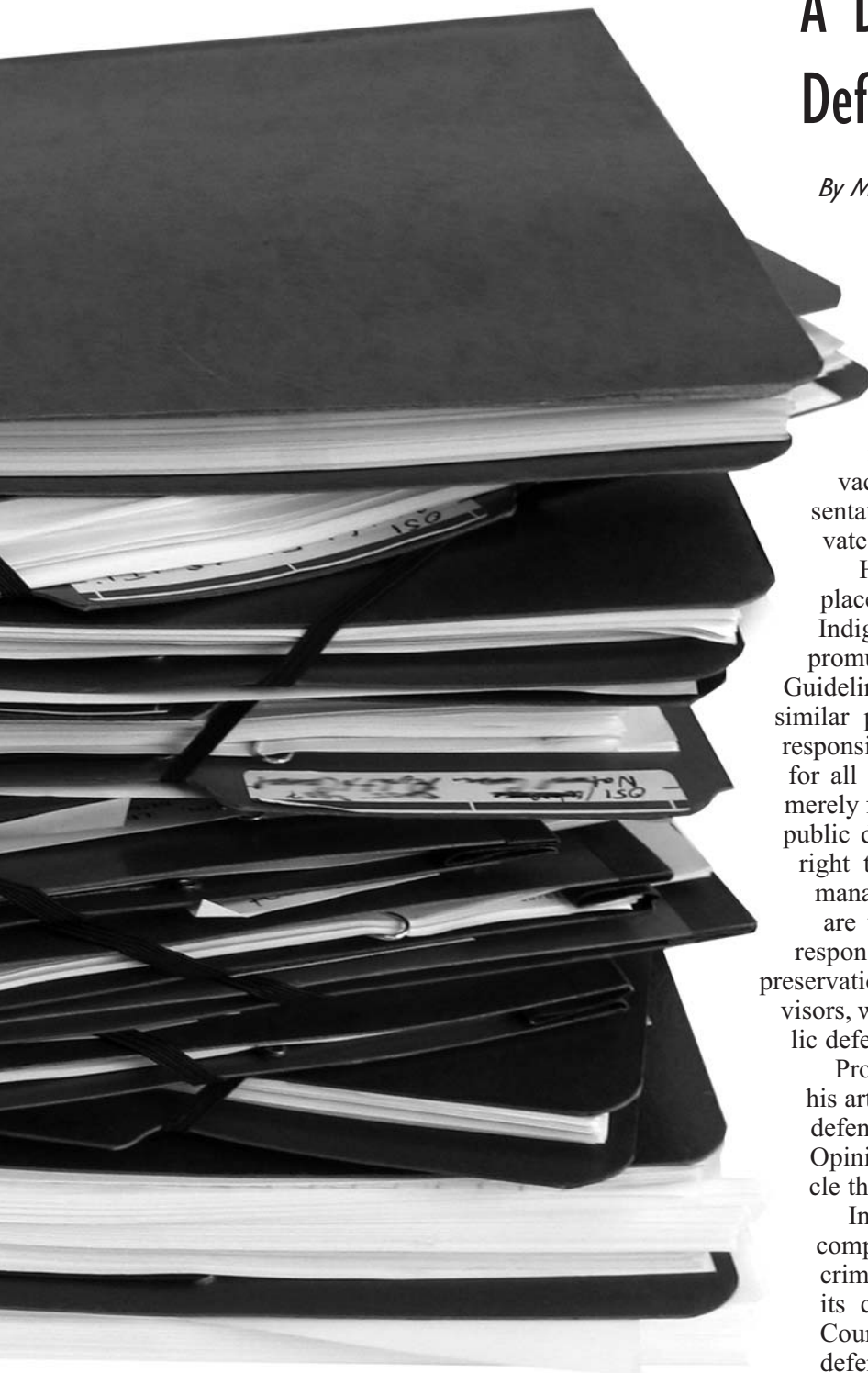
Personnel assignments are adjusted to match up the experience and skill needed for the incoming and existing cases and to properly fill vacancies. In the event that this is not feasible, representation in certain incoming cases is declined and private practitioners are appointed.

Having such a system of workload monitoring in place is required to comply with the standards of the Indigent Defense Services Delivery System Guidelines promulgated by the California State Bar in 2006. The Guidelines provide that the public defender (or one in a similar position in a private bar system) is personally responsible for ensuring that the workload is not excessive for all employees or members of the defense team, not merely for the lawyers. The Guidelines emphasize that the public defender's failure to do so jeopardizes her or his right to practice law. Public defender executives and managers in California conduct trainings to ensure all are well informed regarding how to incorporate this responsibility into sound management practices and preservation of effective relationships with boards of supervisors, which are the primary funding sources of local public defenders in California.

Professor Norman Lefstein created the impression in his article (see facing page) that several California chief defenders and I were the only ones concerned about Opinion 06-441 and the assertions expressed in the article that appeared in *The Champion*.

In fact, the California Public Defenders Association, comprised of almost 4,000 public defender and private criminal defense lawyers, officially opposes 06-441 in its current form. Moreover, so does the California Council of Chief Defenders, comprised of public defender executives.

See **DIFFERENT VIEW** on page 21



MESSAGE - Continued from page 1

space on dusty shelves, but rather become integral parts of what it means to be a legal aid advocate, manager, board member or other stakeholder in the equal justice community?

NLADA has begun extensive conversations on implementing the agenda with its national partner stakeholder groups, including the ABA, LSC, the Management Information Exchange, IOLTA funders, the Center for Legal Aid Education, national support organizations and others. All of these entities have recognized the tremendous opportunity presented by the focus on quality and are in the process of developing ideas through which institutional collaboration can move the quality agenda forward through training and conferences, funder cooperation, development of best practices resources, marketing and communications, technology innovations, and the development of new leaders.

The Program Enhancement Committee of NLADA's Civil Policy Group, co-chaired by Lillian Johnson, director of Community Legal Services in Phoenix, and Alex Gulotta, director of the Legal Aid Justice Center in Charlottesville, Virginia, met for two days on April 9-10 to develop activities for NLADA to pursue to help its member programs best implement policies and procedures consistent with the quality agenda.

The meeting produced three priority initiatives that will be pursued by diverse working groups from across the country. The initiatives include:

1. Developing and Gathering Model Policies and Procedures that Reflect the Standards.

This effort will prioritize the LSC Performance Criteria and ABA Standards by mapping out a practical process for "operationalizing" them in provider programs. An inventory of available models, protocols and procedures will be collected from providers, funders, consultants and others, and synthesized with an eye toward making them real for managers, boards, advocates and other stakeholders. Particular tool kits will be developed around various topics throughout the instruments. The working group on this issue envisioned a set of very user-friendly materials to aid implementation, akin to a "Legal Aid in a Box" tool, patterned after the National Consumer Law Center's very successful Consumer Law in a Box series.

2. Promoting a "Culture of Quality" Throughout the Community.

This working group recognized what an important and opportune time it is to reinvigorate the entire community of civil legal aid through a discussion around quality. These instruments were seen as an enormous resource to help providers with the myriad of issues they struggle with daily (e.g. connection with the client community, language access and diversity, advocacy designed to achieve lasting results,

legal information versus legal advice, etc.)

This initiative will focus on ensuring that the legal aid community takes advantage of this opportunity by discussing the important values in the delivery of high quality legal aid services at every level of a program and the system. It will promote discussions among advocacy leaders and management about the direction of a provider's advocacy efforts, about effective board involvement and true connection to the communities providers serve. The group will also look, in conjunction with NLADA's national partners, at how gaps in the national infrastructure supporting advocacy and professional development can be narrowed.

3. Distilling and Communicating a Concise Set of Core Values Inherent in the Instruments.

The indigent defense community has made great strides through the use of a very short, concise statement about the "irreducible minimum" standards below which no criminal defense system can slip and still be considered adequate. This working group addressed the importance of the civil community creating and communicating broadly a similar set of values consistent with what a quality legal aid system and provider should look like. This statement of values should be packaged to communicate to both internal and external audiences.

The group envisioned a short, readable document that captures the key values, ideals and principles inherent in all three instruments that links back to the tool kits being developed under the first initiative. The working group felt that the civil statement should establish aspirational values, rather than the defender model of establishing a set of minimal capacities that every system must contain.

Why Now?

Several important trends are converging that make this a propitious time to aggressively pursue a dialog about implementation of the four quality documents and their inherent standards and values:

- 1. A shift in the national political paradigm that offers an opportunity to reinvigorate advocacy at all levels within the system.** Above all else, the quality conversation is about the advocacy we provide for the clients we serve. In many parts of the country, that advocacy has suffered as a result of the litany of restrictions placed upon recipients of LSC funding. NLADA is engaged with a number of partners in promising conversations with new congressional leaders about the hugely detrimental impact of placing the long list of federal restrictions on state, local and private funding. If that effort is successful in removing the restriction on non-LSC funds, it will naturally invigorate discus-

sions in many states around the work that we do in partnership with our client communities.

Beyond that potentiality, a number of conversations we have had with both directors of advocacy and with executive directors have surfaced a literal yearning to reconsider the nature and direction of current legal aid advocacy efforts in many provider programs and state justice communities, even under the current restrictive regulatory environment.

All of the quality documents address strategic advocacy with a sophisticated, aggressive eye toward achieving lasting results for clients and their communities. A huge amount of direction, thought and advice is presented on issues related to effective advocacy. The quality tools, and this yearning to examine community advocacy efforts, create a potentially powerful convergence of opportunity and means for improvement.

2. **Significantly increased revenues in a number of states.** It goes without saying that no state justice system in this country enjoys remotely adequate funding to meet the legal needs of its low-income communities. Sadly, the disparities among the states in funding also remain a stark reality – the gap running from \$58.12 to \$10.24 per poor person. However, many states are currently realizing significant increases in funding for civil legal assistance for a variety of reasons, including much more sophisticated public funding campaigns, the move towards comparable rates in IOLTA programs and, we hope, continuing increased support at the federal level. Several states have already begun to consider the new quality tools in developing allocation plans for these new revenues. The standards provide a conceptual framework to rethink delivery and advocacy in exciting new ways.
3. **The emergence of a new generation of advocates and leaders in legal aid.** Perhaps the biggest trend underlying the need for a serious discussion on the issues underlying the quality agenda is the tremendous challenge the legal aid community has in “passing the torch” to a new generation of leaders and advocates. NLADA’s recent recruitment and retention survey only reconfirmed what we have been hearing on every occasion in talking with younger people. Salary

levels and student debt are certainly significant barriers to them considering careers in legal aid. On the other hand, many identified a lack of connection with and fulfillment from their advocacy work. Those of us who have made careers in the legal aid field have long enjoyed a sense of our history, of being a part of a national movement for justice.

Our experience is that younger legal aid leaders have that same desire – to feel they are part of a lasting movement in making a difference in the lives of the clients they serve. They are as interested in knowing the history of Ed Sparer or Gary Bellow as they are in creating their own similar lasting marks on the landscape of justice. Spare them tales of the good old days. Our discussions should be about what works in today’s legal and political environment, and how they can play an important role.

That seems to me to be the essence of the quality discussion and one from which the entire community would benefit greatly.

In passing along a historical perspective, I can recall how my generation, the ubiquitous “children of the 60s,” were enamored for a time by a number of writings that took a particular look at Eastern thought as applied to very mundane American undertakings. The two I remember best were Pirsig’s *Zen and the Art of Motorcycle Maintenance* and Hersey’s *The Walnut Door*. In those books, the essence of quality was found in the details of tearing apart the engine of a Harley, or making intricate carvings on a wooden door. These quality tools present the entire community of advocates with the specific details of how we can do the same for our practice.

Another earlier icon of the movement for justice, Michael Harrington, once said that “everyone knows what to do in a crisis.” We’re not in one anymore. The path to improving our work has been clearly marked. We need to aggressively walk it. ★

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oritizing specific cases.” He also noted that the LSC Performance Criteria emphasized the need to do “impact work.” President Barnett agreed that there was no restriction or regulation that prohibited “impact work” and that the Performance Criteria encouraged programs to engage in such activity.

Near the end of the hearing, Chairman Mollohan asked a follow-up question about LSC’s implementation of the recommendations in the September 2006 IG report on improving certain LSC management and financial practices. President Barnett stated that LSC had accepted all 11 of the IG’s recommendations, and that they have all either been or will be implemented. She noted that LSC takes each recommendation very seriously.

All subcommittee members who attended the hearing noted that they supported LSC’s mission and commended the work of LSC-funded programs in providing high quality legal services to low-income Americans.

Restriction on State, Local and Private Funds

Buoyed by the increase in FY 2007 funding and the changed political climate, NLADA and its coalition partners have also turned their attention to removing the

restriction on state, local and private funding. Part of a series of onerous restrictions (riders) attached to the FY 1996 appropriations bill, the restriction encumbers any funds received by an LSC grantee regardless of their source. Nationally, 53.8 percent (\$389 million) of the funds that go to LSC-funded organizations come from non-LSC sources. The removal of the rider would be a no-cost change in the language to the CJS bill that leaves the Congressionally-mandated restrictions on LSC funds intact.

Loan Repayment Assistance Bill

Don Saunders has been working very closely with the American Bar Association and the staff of Sen. Tom Harkin (D-IA) to draft a student loan repayment assistance bill for civil legal aid attorneys. The bill, which Harkin introduced as S. 1167 on April 19, would provide \$6,000 for any borrower in a calendar year, not to exceed an aggregate total of \$40,000. The borrower would be required to remain at a program for a minimum of three years. Harkin’s bill would amend the Higher Education Act of 1965 in the amount of \$10 million for FY 2008 and such sums as may be necessary for each succeeding fiscal year. ★

DEFENDER - Continued from page 3

health outcomes for men of color, including the failures of the juvenile justice and criminal justice systems. The commission’s recommendations are based on the view that systemic problems must be addressed with systemic solutions.

As momentum surrounding the Dellums Commission report and the fair health movement builds, Defender Legal Services is eager to bring our public defense expertise to this work by participating in the creation of a joint task force. Although still in the nascent stages, the joint task force will develop proactive strategies that will strengthen and sustain this movement that gives people of color the right to equal opportunity for healthy lives. To download the Dellums Commission report or for more information about the fair health movement, visit the Joint Center Web site at: www.jointcenter.org/healthpolicy.

Amicus Activities

NLADA continues to support its members and the right to counsel through amicus activity around the country. Most recently, NLADA signed an amicus brief in support of Tony Strange in the case *Strange v. South Carolina*. Strange was sentenced to two years in prison for failure to pay child support, but like many similarly situated people, Strange was never offered an attorney. The court never informed Strange of his right to counsel and made no inquiry into Strange’s employment, income or other factors relevant to his ability to pay support.

Citing landmark Supreme Court cases interpreting the

Sixth Amendment right to counsel as applying whenever physical liberty is at risk, regardless of whether the case is labeled criminal or civil, amici urged the South Carolina Supreme Court to order the state of South Carolina to appoint counsel to defendants facing incarceration for nonpayment of support. NACDL authored the brief; the American Civil Liberties Union of South Carolina Foundation, the Brennan Center for Justice, and the South Carolina Association of Criminal Defense Lawyers also signed on.

In late 2006, NLADA authored a brief in support of a motion to quash subpoenas in Cook County, IL. Two Cook County public defenders were subpoenaed to testify against their own client about an altercation that at least 15 other people witnessed.

NACDL joined the brief. Although the motion was denied, the Defender Policy Group moved with alacrity to support our members and defend the sanctity of the attorney-client relationship. The case went up on a writ of mandamus and NLADA once again filed an amicus brief. While the writ was denied, the national attention that has been focused on the case may yet yield positive results. We will keep you apprised.

NLADA’s advocacy on behalf of our members and their clients is as varied as it is aggressive. Whether we are working through the legislative process, contributing to a national report or joining litigation as amicus, NLADA is fighting for our members and for social justice. And with our membership ready to answer the call, there is no limit to what we can accomplish. ★

DIFFERENT VIEW - Continued from page 17

Furthermore, many of the public defenders in this country are similarly concerned to the extent that the American Council of Chief Defenders and the Defender Policy Group of the National Legal Aid & Defender Association have written a letter from their Joint Committee on Caseload and Ethics addressed to the ABA requesting an important revision of 06-441, although the letter has not yet been sent.

Formal Opinion 06-441 responds to the situation that may arise when a deputy public defender is dissatisfied with the response of the public defender to a request for workload relief. If this happens, of course the deputy feels she or he is being reasonable and the public defender is not. The opinion directs the deputy public defender to take additional action, and suggests petitioning the court to take cases away from the public defender in response to the deputy's beliefs. In addition, the deputy would be obligated to notify clients of the public defender that due to excessive workload, the public defender is unable to provide a proper level of service.

Such action invites judges to intervene in the governance of public defender offices. Whether the judge is sincere or cynically motivated, and is only too pleased to remove a nettlesome but zealous public defender's office, the result is similar. The independence of the public defender is compromised. For the public defender, the sole focus is what is in the best interests of the clients. The court has many other agendas that are not necessarily compatible with the clients' best interests.

The opinion and the article concede this action by an individual deputy should only be authorized if the public defender's judgment is unreasonable. But who decides what is reasonable? The effect of the opinion and article is that the deputy public defender decides. Consequently, the judgment of the public

defender is not merely challenged, but overridden by a single deputy. Once that happens, and the public defender's clients are notified by the deputy, immense harm is done. All of the public defender's clients are likely to harbor doubts about the ability of the public defender to properly provide representation to them.

Even if a judge ultimately turns down the petition of the deputy as unfounded, the relationships between the public defender and the clients are poisoned. But there is more. Formal Opinion 06-441 and the article advise a deputy whose petition is denied to continue to represent the client but also to pursue review of the trial court's decision. Pursuing review would trigger additional communication from the deputy to the public defender's clients regarding the deputy's belief that the public defender persists in being unable to provide a proper level of service due to excessive workload.

The genesis of the opinion and article is a concern about poor performance by some public defenders who fail to discharge their responsibility to refuse to tolerate excessive workloads. The response should be to confront such persons without undermining the public defenders who do live up to their responsibilities.

Instead of jeopardizing the independence of all public defenders in the nation, Formal Opinion 06-441 should be revised to provide that if there is an impasse such as that contemplated, the matter can be referred to the disciplinary entity for lawyers in the state. Thus, the matter can be sorted out by those empowered to take appropriate direct action regarding the deputy or the public defender. Such a process should deter mischief on either side. ★

Michael P. Judge has been the chief public defender for the county of Los Angeles, Calif. since 1994.

NLADA Training Events

Substantive Law Conference

San Jose, CA
July 18-21, 2007

Sub Law is designed for less experienced practitioners including relatively new advocates, those changing specialties and generalists.

NASAMS Death Penalty Mitigation Conference

Chicago, IL
August 9-11, 2007

Annual Conference 2007

Tucson, AZ
November 7-10, 2007

NLADA's annual national gathering of advocates from the civil legal aid and indigent defense communities.

Life in the Balance

Atlanta, GA
March 8-11, 2008

Equal Justice Conference

Minneapolis, MN
May 6-8, 2008

Be a Voice in Your Association's Leadership

HAVE YOU CONSIDERED RUNNING FOR NLADA OFFICE?

NLADA is currently preparing for its annual elections to the Board of Directors and Policy Groups. Be on the lookout for the official "Notice to Members" in the Nominations booklet.

Important election deadlines:

NOMINATIONS — JULY 6

BALLOT DISTRIBUTION — AUGUST 7

VOTES — SEPTEMBER 6

For more information about NLADA, visit www.nlada.org

SUPREME COURT - Continued from page 7

JUSTICE SCALIA: Some kind of waivers, like waiver to the right to counsel, we do indeed require a colloquy But it doesn't take a whole lot of smarts to answer yes or no to the question, you know, "do you agree that your counsel should not introduce any mitigating evidence?" I mean, it's clear on, on its face.

MR. CATTANI (for the state): I would agree, your honor. And I think –

JUSTICE KENNEDY: But doesn't that assume that the defendant knows what mitigating evidence is? I mean, this defendant, I suppose wants to show, "I thought mitigating evidence was just going to be what the two relatives were going to testify to. There was really much more, if my counsel had investigated." And that's not a knowing waiver. (Tr. Oral Argument 26-27)

Landrigan thus bears watching to see if the Court will provide guidance to the bench and bar regarding standards for waiver of the right to present mitigation evidence, especially in the context of a difficult and disturbed client who actively works against his counsel and his own interests.

Editors Note: On May 14, 2007, the U.S. Supreme Court decided the case and rendered a decision. By a vote of 5-4, the Court ruled the defendant was not entitled to a hearing on his lawyer's incompetence.

Cunningham v. California

In *Cunningham v. California*, 127 S. Ct. 856 (1/22/07) the Court struck down California's Determinate Sentencing Law because it placed "sentence-elevating fact-finding within the "bailiwick of a judge" rather than a jury. Cunningham was convicted of the sexual abuse of a child under the age of 14, punishable by range of three precise terms of imprisonment —16, 12 or 6 years. Under California's sentencing system the judge is required to impose the middle term of 12 years "unless there are circumstances in aggravation or mitigation of the crime." At a sentencing hearing the judge found, by a preponderance, six aggravating factors, including violent conduct by Cunningham which indicated "a serious danger to the community." Although Cunningham had no prior criminal record the judge found that the aggravating factors outweighed this sole mitigating factor and gave Cunningham the upper term of 16 years.

The Supreme Court's prior Sixth Amendment cases dealing with fact-finding affecting sentencing [*Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005)] have repeatedly insisted that "except for the fact of a prior conviction, the sentence imposed must be based on facts determined by the jury or admitted by the defendant's guilty plea." The confusion generated by these cases has stemmed from the Court's various approaches

toward defining the "statutory maximum" sentence authorized by a jury's verdict or a defendant's guilty plea.

In *Apprendi*, this issue was simple enough. The defendant was convicted in state court of possessing a firearm for an unlawful purpose, which carried a maximum of ten years imprisonment. Applying a "hate crime" enhancement statute, the sentencing judge found that Appendi's crime had a racial animus and sentenced him to 12 years imprisonment. The Supreme Court held that tacking on an additional two years over and above the maximum authorized by the jury's verdict violated the Sixth Amendment because the fact of racial animus was not found by a jury beyond a reasonable doubt.

In *Blakely*, the defendant pled guilty to kidnapping his wife after she had filed for divorce. Under the state of Washington's sentencing statute the plea authorized a range of 49 to 53 months imprisonment. However, the judge found that Blakely had acted with deliberate cruelty during the kidnapping and imposed a sentence of 90 months — three years above maximum authorized by the plea. Applying *Apprendi*, the Supreme Court reversed because the bare guilty plea did not admit to any facts constituting deliberate cruelty.

In *Booker*, the defendant was convicted by a federal jury of possessing 50 grams of cocaine base with the intent to distribute. At sentencing, the district judge found that Booker was involved in dealing a much larger amount. As required by the Federal Sentencing Guidelines, he added 100 months to the sentence Booker would have otherwise received based solely on the jury verdict. In Justice Steven's opinion addressing the merits, five justices agreed that the sentence was unconstitutional because the judge's factual determination that the amount of cocaine exceeded 50 grams was a fact "necessary to support a sentence exceeding the maximum authorized by the facts established by [the] jury verdict."

In *Booker's* second "remedial" holding, however, Justice Breyer, writing for a different five justice majority, judicially revised the Guidelines to make them "advisory" rather than mandatory. Making the Guidelines "advisory" cured the constitutional problem because it restored the original broad range of punishment authorized by statute for conviction of the bare offense. In *Booker's* case, for example, conviction for cocaine possession under 21 U.S.C. 841(a)(1) is subject to punishment ranging from a minimum of ten years to a maximum of life imprisonment. Thus life imprisonment now became the statutory maximum authorized by the jury's verdict. *Booker* was remanded for re-sentencing having achieved the ultimate in hollow victories.

The confusion created by *Booker's* Janus-headed decision was manifest in the state court's decision in *Cunningham*. The California Supreme Court held that because the statute authorized the upper term of 16 years for sexual abuse of a minor, this was the statutory maximum authorized by the jury's verdict. But Justice

Ginsburg writing for six justices, including Chief Justice Roberts, held that the “relevant statutory maximum ... is the maximum [a judge] may impose without any additional [factual] findings.” Because California’s sentencing scheme imposed the middle term unless the judge made additional fact-finding to justify the upper term, Cunningham’s 16-year sentence, based on judicially found aggravating circumstances, was therefore unconstitutional. As Justice Ginsburg explained: “any fact that exposes a defendant to a greater potential sentence must be found by a jury not a judge, and established beyond a reasonable doubt, not merely a preponderance of the evidence.”

Cunningham is significant because, for the first time, we hear from Justice Ginsburg. She had been the silent but necessary fifth vote for the two different majorities that decided the inconsistent merits and the remedial opinions in *Booker*. As Justice Alito, joined by Justices Kennedy and Breyer, complained in dissent that the result in *Cunningham* is tantamount to overruling *Booker*’s remedial opinion, which necessarily

contemplated judicial sentence-elevating fact-finding under the now advisory Federal Sentencing Guidelines, subject to a reasonableness review. We will discover whether the dissenters’ fear that Justice Ginsburg has defected is correct when two other upcoming cases are decided this term. Watch for *Rita v. United States* and *Claiborne v. United States*, both of which will address the discretion a judge has to sentence within or depart from the “advisory” Federal Sentencing Guidelines. ★

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MLSA - Continued from page 5

a particular substantive area of the law depended almost entirely on the expertise and preferences of the local attorney/s in his or her area. MLSA’s Consumer, Domestic Violence, Housing, Indian Law, Migrant and Public Benefits Units (sometimes “units” of one) are now all constituted as statewide units. All inquiries within each substantive area are screened for priority cases by the unit’s staff, regardless of the geographic location of the client. Direct representation is provided by a combination of telephone, video conferencing and in-person meetings and court appearances.

In addition to providing more geographically equitable services, the statewide units allow staff attorneys and managers a better opportunity to observe trends in client needs and identify and pursue potential impact cases.

Community Lawyering Project

With decreased funding, offices and staff, and increased restrictions, MLSA, like many programs throughout the nation, has witnessed dwindling involvement with and guidance by community members and organizations. In addition, many staff attorneys, overwhelmed with growing caseloads, have found it increasingly difficult to identify and pursue impact cases. The impact cases that MLSA has litigated have largely been done without unifying priorities or involvement from and with the affected communities. Within the last six months, MLSA has established a Community Lawyering Project to help ameliorate these troubling trends. The Project will, within LSC restrictions:

- (1) strengthen and coordinate MLSA’s work to alleviate conditions of poverty and powerlessness on a systemic level;
- (2) facilitate input from MLSA’s client communities regarding litigation priorities; and
- (3) create relationships with low-income organizing groups in the state to facilitate collaborative organizing, legislative and legal strategies that address the practices, policies and laws that harm MLSA clients.

Community Outreach

With the new emphasis on integrated statewide delivery, comprehensive community outreach becomes more essential than ever. MLSA no longer has the luxury of relying on word-of-mouth referrals to local neighborhood offices. Rather, capitalizing on the time and energy of a cadre of AmeriCorps VISTA volunteers, MLSA is working to provide consistent outreach to the far corners of the state. Just a few examples of these efforts include, placing brochure racks and MLSA brochures in all of the county courthouses, educating local law librarians about MLSA services including the MontanaLawHelp.org Web site, sending HelpLine cards to government and non profit service providers throughout the state and publishing “legal tips of the week” in local community papers with information on contacting MLSA and accessing the MontanaLawHelp.org site. Most recently, MLSA has created coasters distributed in various “client gathering places” (laundromats, libraries, social service agencies and, yes, bars). The coasters have a legal question on one side, with a short answer, the HelpLine number and the MontanaLawHelp.org Web site address on the other side. MontanaLawHelp.org saw a 50 percent increase in Web site hits after the first distribution of the coasters.

We have much to bemoan and complain about in the legal services world. It is true that we do not have enough funding to meet the ever growing needs of our clients. It is also true that LSC restrictions can hamper our ability to create systemic change for our client communities. However, our clients cannot afford for us to be paralyzed by all of the things we cannot do. Leadership at MLSA and other legal services programs across the nation have shown that with critical minds, willingness to overcome institutional inertia, the talent and dedication of staff, and the power of our clients’ voices, we can continue to become better organizations, provide better and more services to our clients, and be a part of fulfilling, finally, the noblest promises of our democracy. ★

Tara Veazey is the director of the Community Lawyering Project, Montana Legal Services Association.

ETHICS - Continued from page 16

ethical violations routinely are ignored not only by the lawyers themselves, but also by judges and disciplinary authorities.⁷⁶ Similarly, more than 20 years earlier, in *Gideon Undone: The Crisis in Indigent Defense Funding*, SCLAID complained of “public defenders [who] have too many cases and lack support personnel.”⁷⁷

Because excessive caseloads are so prevalent, several years ago the Bureau of Justice Assistance of the U.S. Department of Justice commissioned The Spangenberg Group, leading experts on indigent defense, to prepare a special report on the subject.⁸ In “Keeping Defender Workloads Manageable,” The Spangenberg Group described the nature of the caseload problem around the country:

Today, in some jurisdictions, public defender offices are appointed [in] as many as 80 percent of all criminal cases. As populations and caseloads have increased, many public defender offices have been unable to obtain corollary increases in staff. Every day, defenders try to manage too many clients. Too often, the quality of service suffers. At some point, even the most well-intentioned advocates are overwhelmed, jeopardizing their clients’ constitutional right to effective counsel.

The problem is not limited to public defenders. Individual attorneys who contract to accept an unlimited number of cases in a given period often become overwhelmed as well. Excessive workloads even affect court-appointed attorneys. Rules of professional responsibility make it clear that every lawyer must maintain a reasonable workload.⁹

Like all opinions of the ABA Ethics Committee, the new ethics opinion is based substantially upon the ABA Model Rules of Professional Conduct (“Model Rules”). But since state ethics rules largely track the ABA Model Rules, the new opinion is enormously important because it furnishes potent ammunition for defenders seeking relief from excessive caseloads before judges and from those in charge of their offices. The opinion carefully explains how the provisions of the Model Rules must be read together as an integrated whole, and the way in which they direct a course of action for lawyers with excessive caseloads and for lawyers with supervisory responsibilities.

The decision of the ABA Ethics Committee to address the problem of excessive defender caseloads resulted from efforts by SCLAID and the National Legal Aid & Defender Association (“NLADA”) to persuade the ABA Ethics Committee to prepare an opinion on the subject. In addition to submitting written requests for such an opinion,¹⁰ during the August 2005 ABA Annual Meeting in Chicago the ABA Ethics Committee met with a SCLAID delegation and an NLADA representative to discuss the SCLAID/NLADA request.¹¹

Initially the ABA Ethics Committee was reluctant to issue an opinion on the subject of excessive defender caseloads, asserting that the matter was adequately covered in prior ethics opinions related to civil legal aid lawyers.¹² Ultimately, however, the committee agreed that the prob-

lem warranted their attention and differed from burdensome caseloads of legal aid lawyers, who normally are neither court appointed nor under contracts sometimes requiring them to represent large numbers of clients.

The ABA Ethics Committee’s Opinion

The opinion addresses the ethical responsibilities of both the individual lawyer who has an excessive caseload and the supervisors of such lawyers. Although the word “public defender” is used in the opinion, a footnote explains that it “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.”¹³ The logic of the opinion, moreover, extends to juvenile delinquency and other kinds of proceedings in which the defense attorney is faced with an excessive caseload. Finally, the opinion deals with the duty of heads of defender offices, boards that oversee public defender and assigned counsel programs, if any, and private practice lawyers who serve as supervisors and managers of law firms.

The Lawyer Handling the Case

As for the individual lawyer, the opinion begins by noting that an attorney has a duty to be both competent and diligent, and also to communicate with the client concerning the representation. These obligations require an attorney 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.”¹⁴

But what is a defense lawyer to do if the current caseload assigned to the lawyer will prevent the rendering of competent and diligent representation? And what is a defense lawyer to do if taking additional cases will mean that competent and diligent representation cannot be provided?¹⁵ In response to these questions, the opinion is clear and unambiguous: “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.”¹⁶ The opinion sensibly recognizes that “[n]ational standards as to [annual] numerical caseload limits”¹⁷ cannot be controlling. As the opinion explains, whether a lawyer’s caseload is excessive “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.”¹⁸

After noting that “[a] lawyer’s primary duty is owed to existing clients,”¹⁹ the opinion suggests the courses of

action defenders should follow when that duty is threatened by an excessive caseload. This can occur (1) when a lawyer's cases are assigned by the court and (2) when cases are assigned to the lawyer by the public defender's office or other source, such as a law firm. In the first situation, when a caseload has become excessive or additional cases will render the lawyer's workload excessive, appropriate actions include asking that the court not assign new cases until the caseload permits the rendering of competent representation.²⁰ Alternatively, if the matter cannot be resolved through such a request, "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."²¹

In following these steps, must a defender inform her clients of efforts to withdraw from representation? The opinion answers this question in the affirmative, stating in a footnote that a "client should be notified, even if court rules do not require such notification."²² In support of such action, Rule 1.4 is cited: "A lawyer shall keep the client reasonably informed about the status of the matter."²³ In other words, if a lawyer seeks to withdraw because she is convinced that competent representation cannot be provided, this is an exceedingly significant development in the client's case, and the client must be told.

What should the defender do if the court denies the request to withdraw from existing cases or refuses to refrain from assigning new cases to the defender? Once again, the opinion is clear. The defender "must take all feasible steps to assure that the client receives competent representation"²⁴ and this includes "any available means of appealing"²⁵ a trial court's adverse ruling. Obviously, there are no provisions in the Model Rules that expressly require that an appeal be taken from an adverse trial court decision refusing to grant relief to an attorney claiming an excessive caseload. But diligence in representing a client, as noted in Comment 1 to Model Rule 1.3, requires that "[a] lawyer...take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."²⁶ Thus, if an attorney is convinced that she must have relief from an excessive caseload and the trial court denies such relief, the ABA Ethics Committee concluded that an appeal, if possible, is essential in pursuit of the client's interest.

However, an interlocutory appeal from a trial court's denial of a defender's motion for relief based upon an excessive caseload appears not to be available anywhere as a matter of right. Invariably, when an appellate court hears an appeal in such a case, it is because the court has decided to do so in the exercise of its discretion. For example, in Arizona appellate review of a court's denial of a defender's motion to withdraw may be reviewed only by "special action."²⁷ Similarly, in New York interlocutory appeals are not allowed as of right, and the review of a denial of a motion to withdraw is likely available only through a "special proceeding."²⁸ And in Florida, where there have been several appellate decisions dealing with trial court denials of motions to withdraw, the courts have exercised discretion in deciding whether to hear the cases.²⁹ In the event

a defender's motion to withdraw is granted, a state's appellate court may hear the case upon the petition of the county or state, which is what happened in an often-cited Louisiana case.³⁰ It remains to be seen whether the opinion of the ABA's Ethics Committee will lead to litigation in which state appellate courts are more frequently called upon to resolve claims of excessive defender caseloads.

If a defender is unsuccessful in withdrawing from current cases or in stemming the flow of new cases and an appeal is either unavailable or unsuccessful, the opinion states that the court's order must be obeyed while the defender takes "all steps reasonably feasible to insure that her client receives competent and diligent representation."³¹ The duty of counsel to continue to provide representation despite believing that competent legal services cannot be provided is consistent with Model Rule 1.16 (c): "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."³² The Model Rules do not condone civil disobedience as a means of protesting a court's decision to provide legal services, and a lawyer who resists a court's final order to provide representation risks being held in contempt.

In the second situation, where a lawyer's excessive caseload is distributed by the public defender office or other source (e.g., a law firm under contract), the ethics opinion suggests a course that is necessarily different from when the court assigns the caseload. In this situation, the lawyer, with permission of his or her supervisor, must seek a solution by transferring cases to another lawyer in the office whose workload is not excessive or "transferring non-representational responsibilities within the office."³³ The opinion states that if a defender's supervisor "makes a conscientious effort to deal with workload issues" there is a presumption that "the supervisor's resolution ordinarily will constitute a 'reasonable resolution of an arguable question of professional duty'...."³⁴ This derives both from the language of Model Rule 5.235 and Comment 2 explaining the rule, which states that a supervisor's judgment should control when a dispute between a lawyer and supervisor is "reasonably arguable."³⁵

The critical question of who determines whether a supervisor's resolution of a professional dispute is "reasonably arguable" is not addressed in the Model Rules. And, of course, there is no easy way that the rules could resolve this issue since it will always be a matter of professional judgment. Inevitably, when disagreements arise, the supervisor will claim that her resolution is "reasonable" and the subordinate lawyer will insist that it is not.

If the supervisor's decision in the matter is not reasonable, however, the opinion states that "the public defender must take further action."³⁷ "[T]he 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."³⁸ And, if relief is still not obtained, the opinion indicates that there are still two additional steps that the attorney may pursue: (1) take the issue to the governing board of the agency, if any; and, (2)

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if still no relief is obtained, the lawyer may file a motion seeking to “withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.”³⁹

The basis for a lawyer taking her concern about an excessive caseload to the agency’s governing board is not explained in the ABA Ethics Committee opinion, although in a footnote the opinion references Model Rule 1.13.⁴⁰ Apparently, the ABA Ethics Committee believes that the language of Section 1.13 (b) is sufficiently broad to cover the situation in which a defender informs an agency’s board that the chief of the office refuses to provide relief in the face of the lawyer’s excessive caseload. Subsection (b) authorizes a lawyer to go “to the highest authority that can act on behalf of the organization” when “an officer, employee or other person associated with the organization is engaged in action...or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization...”⁴¹ Thus, if the head of an agency fails to provide relief to a lawyer who has an excessive caseload, arguably the agency’s leader is failing in her “legal obligation to the organization” to assure that the agency’s lawyers provide competent client services.

Aside from the Model Rules, it makes perfectly good sense for a dissatisfied defender to seek relief from the agency’s board of directors or trustees. The purpose of such boards is to set policy for the organization, and surely there are few policies more important than determining the size of attorney caseloads. While boards of defender organizations are admonished not to interfere in the details of how lawyers represent their clients,⁴² a board’s decision to review the overall workload of an attorney to determine whether it is manageable should not be regarded as a violation of this rule.

Of course, it will not be everyday that a lawyer, in disagreement with those in authority in her own organization, files a motion with the court seeking to withdraw and/or to curtail the assignment of additional cases. For this to occur, at a minimum the lawyer would have had to be unsuccessful in appealing to her supervisor, appealing to the head of the agency, and to the agency’s governing board, assuming that such a body existed. However, the opinion of the ABA Ethics Committee, predicated on the proposition that each lawyer under the Model Rules is ultimately responsible for his or her own personal representation, is correct. The duty to provide “competent representation” is owed by every lawyer to each client, and under the Model Rules a lawyer cannot avoid this requirement when those in charge of the defender program are unwilling to provide relief or to challenge the system.

Duty of the Supervisor

The foregoing discussion makes clear that the supervisor’s judgment respecting a defender’s excessive caseload is controlling if the disagreement is “reasonably arguable,” although not otherwise. But there is more to be said about the duty of the supervisor. As the opinion points out, con-

sistent with Model Rule 5.1, “lawyers having direct supervisory authority [must] 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.”⁴³

If a supervisor determines that a defender’s workload is 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.”⁴⁴ Among the options set forth in the opinion are the following: (1) transferring non-representational duties to other lawyers in the office; (2) transferring cases to other lawyers in the office who can handle the cases competently; (3) providing additional resources to the overburdened lawyer so that she is able to provide competent service; and (4) supporting the subordinate lawyer’s effort to withdraw from client representation.

Beyond the ABA Ethics Opinion

There are a number of issues worthy of consideration in the wake of the ABA Ethics Committee opinion. We address in this section the following questions:

- Did the ABA Ethics Committee err in concluding that an individual defender should be able to challenge the judgment of her supervisor or chief defender?
- To what extent is the ABA Ethics Committee opinion consistent with ethics opinions of states and other organizations, as well as national standards related to indigent defense?
- What should be the content of a defender’s motion seeking relief from an excessive caseload and how should the issue be presented to the court?
- Do chief defenders, supervisors, and board members incur potential civil liability if they fail to support a defender’s reasonable claim of excessive caseload?⁴⁵

Challenging Supervisor/Chief Defender

At first blush, it may seem unnecessary to discuss whether the ABA Ethics Committee made a mistake in deciding that a defender, if unreasonably denied relief from an excessive caseload, is authorized to challenge a supervisor or head of a defender program by filing a motion with the trial court seeking to withdraw from pending cases and/or to avoid additional assignments. Are not the Model Rules clear about this issue?

In fact, as noted above, the rules do not leave any real doubt about the matter. Model Rule 5.2 recognizes that “[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 duty.”⁴⁶ The unmistakable implication of this language is that a lawyer violates professional conduct rules if she follows a supervisor’s instruction that is not a “reasonable resolution” of the mat-

ter. This approach, moreover, is consistent with Model Rule 1.1, which requires that every lawyer always provide “competent” representation.⁴⁷

While the ABA Ethics Committee was preparing its opinion several California public defenders sent letters to the committee and to other ABA officials, arguing that individual defenders must be absolutely bound by the decision of the head defender respecting whether a defender’s caseload was excessive. Many chief defenders were aware in advance that the ABA Ethics Committee was preparing an opinion about excessive defender caseloads because the matter was mentioned during a program at the annual meeting of the NLADA in Orlando, Fla., in November 2005. Moreover, public defenders were told that the committee was being asked to comment on the ethical duties of both the head of the defender office and the assistant or deputy defender. And it was predicted that the committee would almost certainly declare that such a defender must be allowed to challenge her supervisor’s judgment about whether the lawyer’s caseload was excessive.⁴⁸

Soon after this program, the head of the Los Angeles County Public Defender Office, which is the largest such program in the country, complained in a letter to the Chair of SCLAID and to the ABA Ethics Committee of “disastrous” consequences if the requested ethics opinion were to be issued:

It could easily make public defender offices unmanageable. It, inter alia, could substitute the judgment of a rookie lawyer, lacking experience and perspective for the discretion exercised by my attorney managers and me. Attorney managers in my office are all former trial lawyers who possess at least 15 years experience. Many like I have more than 30 years of such experience.

It would set in motion an adversarial relationship between me and my lawyers such that resort to punitive measures such as discipline would likely occur The proposed rule (sic: ethics opinion) would be the source of much grief and mischief.⁴⁹

The Los Angeles County public defender also sent a letter to Michael Greco, then president of the American Bar Association, expressing similar concerns and warning that the proposed ethics opinion “would be exploited by under performing lawyers, who instead of complying with remedial efforts...would demand caseload relief and claim retaliation if any personnel action is taken by managers or the Chief Defender.”⁵⁰ Chief defenders from several other California counties also wrote letters expressing concerns similar to those of the Los Angeles County Public Defender.

None of the letters from the California public defenders mention the Model Rules or acknowledge that Model Rule 5.2 anticipates that a supervisor’s reasonable judgment should be binding upon a subordinate lawyer. While it is understandable that a chief public defender might prefer that her authority never be challenged, the evidence of excessive defender caseloads throughout the country⁵¹ strongly suggests, just as a matter of policy if nothing else, that defenders should be permitted to challenge the leadership of their organizations. But, in addition, under rules of professional conduct, assistant or

deputy defenders everywhere jeopardize their law licenses when less than “competent” representation is provided.



At the time the California public defenders wrote their letters, the state of California had not yet adopted a counterpart to Model Rule 5.2 dealing with the duty of subordinate lawyers. This provision also makes clear that a lawyer is bound by the “Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.” However, the California State Bar has now proposed a provision almost identical to ABA Model Rule 5.2 and public comment has been invited.⁵² In response, the Los Angeles County Public Defender has strongly urged the State Bar of California not to adopt a California counterpart to Model Rule 5.2 because it could lead to the ABA Ethics Committee opinion being held applicable to California public defenders.⁵³

Just like ABA Model Rule 5.2, the proposed California rule declares that a lawyer does not have an excuse for failing to provide competent representation simply because she is acting under instructions of a supervisor. In fact, proposed Comment 1 to California’s proposed Rule 5.2 contains the following sentence, which is not included within Comment 1 to ABA Model Rule 5.2: “A lawyer under the supervisory authority of another lawyer is not by the fact of supervision excused from the lawyer’s obligation to comply with the Rules of Professional Conduct or the State Bar Act.”⁵⁴

Almost a decade before the ABA Ethics Committee issued its recent opinion on excessive defender caseloads, the California Standing Committee on Professional Responsibility and Conduct (“California Ethics Committee”) prepared an ethics opinion on the same subject. Although the California Ethics Committee opinion, Formal Opinion Interim No. 97-0007, is still available on the Web site of the California State Bar,⁵⁵ following a period of public comment, the opinion was never formally issued by the California Ethics Committee.⁵⁶ The California ethics opinion is of interest nevertheless because in answering the question of an attorney’s duty when faced with too many cases, the California Ethics Committee dealt with the roles of both a deputy public defender and chief defender, offering opinions substantially similar to those contained in the ABA’s new ethics opinion. Moreover, the California opinion invoked ABA Model Rule 5.2 as instructive for California lawyers:

But if Attorney X, the defender heading the office, disagrees, we believe that attorney Y, as a deputy defender [who complains about an excessive caseload and an inability to provide competent representation], may satisfy his ethical duties to his indigent criminal defendant clients by following Attorney X’s decision, unless that decision constitutes an unreasonable resolution of a question of ethical duty.

In the absence of California authority on point, we look for guidance to Rule 5.2 of the American Bar Association (ABA) Model Rules of Professional Conduct.... Although Model Rule 5.2 is not binding on California attorneys, we believe that the guidance it provides does not conflict with California authority and is both helpful and appropriate for California

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attorneys in the present situation.

But if Attorney Y believes that he may not rely on the decision of Attorney X respecting his ability to provide competent representation because that decision constitutes an unreasonable resolution of a question of ethical duty, Attorney Y ... must proceed to invoke, and exhaust, all the remedies available to him in the office. Ultimately, however, in circumstances that we believe are likely to occur only rarely, Attorney Y may have no alternative other than to decline to proceed.⁵⁷

Ethics Opinions and Standards

There are several approved ethics opinions of state bars (unlike the unapproved California ethics opinion) dealing with defender caseloads, and these are substantially similar to the approach of the new ABA ethics opinion. But none of the state bar ethics opinions are as comprehensive as the ABA's opinion and none of the other opinions were rendered by an ethics body of comparable prestige that speaks on behalf of the largest group of lawyers in America.

These prior state bar ethics opinions are cited in the ABA's ethics opinion. And in each of the opinions, the state bar's ethics committee concluded that a public defender is not justified in violating rules of ethics due to an excessive caseload. In a 2004 opinion, for example, the Ethics Advisory Committee of the South Carolina Bar recommended that an overburdened public defender should "first raise the matter with [the] attorney's supervising lawyer or the chief public defender."⁵⁸ In the event relief is not obtained, the committee recommended that a defender present the matter to the agency's board of directors, if any, and if that fails, the defender "should refuse to accept additional appointments until the attorney's caseload is reduced to the level that the attorney can ethically handle."⁵⁹ As for the cases of pending clients that the defender cannot competently represent, the attorney must seek the court's permission to withdraw. Significantly, the opinion recites that the attorney seeking the ethics opinion is "employed by a Public Defender's Office...[and] has a caseload of 1,000 felonies."⁶⁰

In 1990, the Ethics Committee of the Arizona State Bar issued an opinion containing conclusions virtually identical to those of the ABA Ethics Committee and the Ethics Advisory Committee of the South Carolina Bar. In addition, the Arizona opinion is noteworthy for its discussion of the deference due to a "lawyer's determination that his or her caseload is excessive and violative of his or her duties of competence and diligence...."⁶¹ In the opinion of the Arizona committee, this judgment should be given "great weight."⁶² The committee then elaborated on its rejection of any formula for deciding on the number of cases that a defender can handle:

Although the law in some contexts may treat Assistant Public Defenders as interchangeable goods, the duties of competence and diligence are peculiarly individual duties. Individual skills are not interchangeable; and what one

lawyer may comfortably handle may severely overtax another.

Just as this committee rejects any mathematically set number of cases a lawyer may handle as an ethical norm, we do not believe that the Rules of Professional Conduct allow a supervisory lawyer to arbitrarily require each lawyer in an office to handle a certain number of cases. Aside from differences in individual skill, differences in the complexity of cases, difficulties in communication with clients, variances in factual investigation and legal research render it virtually impossible to determine some ideal basket of 160 cases that an 'average' lawyer should handle in a year."⁶³

Still another opinion especially noteworthy is Ethics Opinion 03-01 issued by the American Council of Chief Defenders ("ACCD"), which is part of the NLADA. Since the ACCD is comprised of chief public defenders from across the country, its ethics opinion understandably addresses the excessive workload issue from the standpoint of a defender agency head. The opinion, however, is consistent with the ABA's new ethics opinion and the opinions of state bar ethics committees. Thus, the opinion concludes that "[w]hen confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed... capacity [to provide competent, quality representation in every case], the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."⁶⁴ The opinion also recognizes that an individual defender breaches his or her duty to provide competent representation if an excessive caseload is accepted, citing the ethics opinions from Arizona mentioned earlier and opinions from Wisconsin.⁶⁵

The ABA's Ethics Opinion cites favorably Principle 5 of the ABA Ten Principles of a Public Defense Delivery System ("ABA Ten Principles"). This principle provides that "[d]efense counsel's workload is controlled to permit the rendering of quality representation."⁶⁶ The opinion, however, does not make any mention of the ABA criminal justice standards on which Principle 5 and the other principles of the ABA Ten Principles are based. As the introduction to the ABA Ten Principles explains, "[t]he more extensive policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992)..."⁶⁷

In fact, beginning in 1979, the second edition of Providing Defense Services has contained a provision on "workload" that is substantially similar in its approach to the ABA's new ethics opinion.⁶⁸ Today, much like the second edition, the third edition of the standards published in 1992 admonishes defense organizations and individual lawyers to take such steps as may be necessary to avoid either "pending or projected caseloads" that interfere with rendering "quality representation or lead to the breach of professional obligations."⁶⁹ The ABA's Defense Function standards contain a comparable provi-

sion, so that in both of the ABA's chapters dealing with defense representation, lawyers are told to be mindful of the size of their workloads, its impact on the quality of their representation, and the risk that it "may lead to a breach of professional obligations."⁷⁰

Standard 5-5.3 of Providing Defense Services also provides that judges should not require either individual lawyers or defense programs to accept so many cases that the quality of representation is jeopardized or professional obligations violated.⁷¹ While it is obviously important that judges not force defense lawyers to accept more cases than they can represent and to consider carefully an attorney's plea of case overload, the new ABA ethics opinion does not address the responsibility of judges in dealing with defense requests for relief from excessive caseloads. The reason for this is probably because the ABA Code of Judicial Conduct on which the committee would have had to base its opinion lacks provisions that clearly apply to a judge's duty to grant defenders relief from excessive workloads. In some states, there are workload standards applicable to defenders similar to Standard 5-5.3,⁷² but there are relatively few court procedure rules that impose on judges a duty to monitor defender workloads and to provide relief if excessive workloads are likely to prevent effective representation.⁷³

Motions to Withdraw

Since the Model Rules do not deal with the content of motions to withdraw when lawyers have too many cases, it is not surprising that the ABA's new ethics opinion does not either. For defenders, however, the content of such motions is extremely important since a successful withdrawal motion may be the only way in which a defender or head of an agency can obtain relief from excessive caseloads.

What should be in a motion to withdraw based upon too many cases? Unless a defender knows in advance that the judge will grant the motion based simply on a request for relief, arguably the motion should be detailed, supported by appropriate affidavits, and contain a request for a hearing. Ideally, the affidavits should include opinions from one or more experts in defense representation who can attest to the defender's excessive caseload and is prepared to testify in person at a later hearing.

While the motion should undoubtedly express concerns for the Sixth Amendment and effective assistance of counsel, defenders should rely heavily on the state's rules of professional conduct, the ABA's new ethics opinion on excessive caseloads, ABA standards related to workload, and other relevant authorities specific to the jurisdiction. Conceivably, a judge who is reluctant to find that a defender's representation is likely to be ineffective prior to a case actually being heard may be more receptive to concerns for defenders violating their ethical duties, especially since by denying a motion to withdraw, or by refusing to curtail the assignment of new cases, the judge may be deemed complicit in forcing a defender to behave unethically.

Specifically, we suggest that the motion to withdraw include objective data such as the number of pending cases, the rate at which new cases are typically received, the extent

of support services, and similar kinds of information. In addition, either for all or a representative sample of the defender's cases, the motion should describe the range of tasks that need to be undertaken in preparation for either a negotiated settlement or trial, including investigations, research, motions, etc. Further, either within the motion to withdraw or when the motion is heard in court, a defender may wish to inform the court that if forced to continue with her current caseload (or to accept additional cases), ineffective assistance of counsel will be rendered and that she will willingly testify about her deficient representation in a post-conviction proceeding.

These recommendations may seem like nothing more than common sense, but they also reflect lessons derived from cases involving excessive caseloads. As might be expected, when appellate and trial courts have granted relief from excessive caseloads, the courts invariably have had before them detailed factual findings. For example, when the Louisiana Supreme Court ruled there was a presumption that defendants were not likely receiving the effective assistance of counsel due to defender caseloads, the court had before it detailed factual findings developed in a series of hearings in the trial court.⁷⁴ Similarly, when a federal judge held in a class action lawsuit that the caseloads of the Illinois Office of State Appellate Defender were causing inordinate delays in adjudicating appeals and violating due process, the judge conducted a lengthy hearing in order to determine the facts and heard from expert witnesses, among others.⁷⁵

In a Florida case in which the public defender sought to withdraw from 29 appeals, the Florida Supreme Court explained the difficulty of the courts in deciding such matters, while illustrating the importance of the record developed in the trial court:

We acknowledge the public defender's argument that the courts should not involve themselves in the management of public defender offices. At the same time, we do not believe that courts are obligated to permit the withdrawal automatically upon the filing of a certificate by the public defender reflecting a backlog in the prosecution of appeals. In this instance, however, we conclude that the Public Defender of the Tenth Circuit has presented sufficient grounds to be permitted to withdraw from representation of appeals.⁷⁶

There are at least two other reasons why motions to withdraw based on excessive caseloads should be as detailed as possible. As noted earlier, state rules of criminal procedure do not normally grant defenders the right to appeal the denial of motions to withdraw.⁷⁷ Thus, appellate courts that exercise discretion to hear appeals from denials of such motions are not apt to do so unless a full and compelling factual record is developed in the trial court. In addition, as one court has pointed out, "[i]f a public defender can make the requisite showing to be relieved of new cases, a record is established by which the legislature can accurately assess the manpower needs of the public defender system and the financial burdens.... Appropriate legislative responses can then be developed."⁷⁸

Civil Liability

In light of the ABA's ethics opinion, it is worth considering the possible civil liability of chief defenders, supervisors and board members who fail to support a defender's reasonable claim of excessive caseload.⁷⁹ While there are not many court decisions in this legal area, there is sufficient precedent to suggest that these persons are subject to liability if they fail to support a defender's efforts to withdraw, or otherwise fail to act, and their conduct leads to a violation of a client's constitutional rights. If the decision of the chief defender, supervisor or board is found to constitute "official policy" and amounts to "deliberate indifference," liability under 42 U.S.C. § 1983 is possible.⁸⁰

Chief Defender/Head of Office. In *Miranda v. Clark County*,⁸¹ the Ninth Circuit Court of Appeals held that the head of a public defender office is subject to civil liability under § 1983 for policies that lead to a denial of an individual's right to effective representation. After the defendant's conviction was overturned on a claim of ineffective assistance of counsel, the defendant brought a § 1983 action against the head of the county public defender's office, as well as the county and assistant public defender who represented him, alleging a violation of his constitutional rights arising from the office's policies.⁸² The office allegedly allocated minimal funding to defendants who failed polygraph tests and also assigned the least-experienced defenders to capital murder cases without providing training.⁸³

The court held that the chief defender was subject to suit under § 1983 because in allocating funds based on polygraph test results, he was performing an administrative function that constituted state action.⁸⁴ The court explained that the office was adhering to "a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt."⁸⁵ Likewise, in considering the county's liability for assigning inexperienced and untrained attorneys to capital offenses, the court held that the allegations were sufficient to create a claim that the county was deliberately indifferent to the constitutional rights of those clients accused of capital offenses.⁸⁶

Supervisor Liability. Generally, the same standards of fault and causation that apply to the head of a public defender office or to other municipal entities govern a supervisor's liability.⁸⁷ Specifically, three elements must be met to establish a supervisor's liability under § 1983: (1) the supervisor had actual or constructive knowledge that her subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury; (2) the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices;" and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.⁸⁸

Board Liability. There are no decisions specifically addressing whether members of an indigent defense board can be held liable if they elect to support the supervisor's and/or chief defender's unreasonable decision not to decrease an assistant's caseload, or for that matter, if they elect to take no action at all. However, cases regarding the liability of local municipal governing boards provide important guidance on this issue.⁸⁹

In *Monell v. Department of Social Services*,⁹⁰ a leading Supreme Court decision on municipal liability, the Court held that a local governing body cannot be held liable based simply on a theory of respondeat superior. Instead, liability arises only when there is a direct causal link between an official "policy" and the alleged constitutional deprivation.⁹¹ In *Monell*, female employees brought an action against, inter alia, the Board of Education challenging its policy requiring pregnant employees to take unpaid leaves of absence before medical reasons required a leave of absence.⁹² The Court held that a board may be sued directly under 42 U.S.C. § 1983 "where the action that is alleged to be unconstitutional implements or executes a policy statement ... or decision officially adopted and promulgated by that body's officers."⁹³ Further, the *Monell* Court found that the board's action was an "official policy" for which the Board could be held liable under § 1983 for constitutional violations.⁹⁴ Other jurisdictions have held that even a single decision by a municipality's properly constituted legislative body can lead to § 1983 liability, as a single decision may constitute official policy.⁹⁵

The heightened "deliberate indifference" standard that governs heads of offices and supervisors applies to boards as well. While *City of Canton v. Harris*⁹⁶ applied the standard to a city, there are cases applying the "deliberate indifference" standard to local governing boards, such as school district boards, which are arguably analogous to indigent defense boards.

In *Gonzalez v. Ysleta Independent School Dist.*,⁹⁷ for example, a student and her parents brought an action against a school district's board of trustees under § 1983, claiming that plaintiff was sexually molested (her constitutional right to bodily security violated) due to the board's decision to transfer to plaintiff's school a teacher who two years earlier was accused of sexual indiscretions at another school. In a two-step analysis, the court first determined that, under *Monell*, the board's decision to transfer the teacher constituted an official policy upon which liability could attach.⁹⁸ In the second stage, however, the court found that the board was not ultimately liable because in making that decision, it did not act with deliberate indifference.⁹⁹ In other words, the board did not "ignore or turn a blind eye" to the previous complaint about the teacher when the complaint surfaced, but rather, the board requested an investigation and recommended a course of action.¹⁰⁰ The court thus determined that the board's precautions reflected concern, not indifference or apathy.¹⁰¹

Accordingly, if members of a defender board take no

action in the face of excessive caseloads, the board may actually be inviting liability since it may be seen as “turn[ing] a blind eye.”¹⁰² In Justice O’Conner’s concurrence in *City of Canton*, she stated, “[w]here a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied.”¹⁰³ Arguably, if an indigent defense board fails to act by deciding not to review or investigate the denial of a staff attorney’s request to withdraw, the board is acting with deliberate indifference. For a board to incur liability, however, there must be “a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy under *Monell*.”¹⁰⁴

A Call to Action

The ABA ethics opinion should be understood as a call to action by both individual defenders burdened with excessive caseloads, as well as by supervisors and heads of defender programs. The sad truth is that it seems not to be. The opinion was issued in mid-July 2006 (although dated May 13, 2006), and we are writing this “conclusion” at the start of October. During the past two-and-a-half months, however, the opinion seems to have created barely a ripple among defenders throughout the country.¹⁰⁵

One of the few news articles dealing directly with the ethics opinion appeared in the *Chicago Sun-Times* on July 24, 2006. The legal affairs reporter for the newspaper interviewed several Cook County assistant public defenders in Chicago. One of those interviewed “working in a misdemeanor courtroom laughed and said, ‘[w]e have 400 [cases] a month! To be perfectly honest, we’re not at liberty to reject any cases.’”¹⁰⁶ Another public defender handling felony cases admitted she was “handling 140 cases at a time.”¹⁰⁷ She further acknowledged that she closed “a minimum of 20 a month. What’s that – 240 a year? They could make this work better by giving us more money to hire more people. Courtrooms that should have three people have two or sometimes one. We’ve probably had 10 people leave ... since the end of last year and not be replaced.”¹⁰⁸

By their own admissions, these lawyers have excessive caseloads and no matter how dedicated and conscientious they are, they cannot furnish the kind of competent and diligent representation required by the Illinois Rules of Professional Conduct¹⁰⁹ and that a client paying for legal services can expect to receive. Yet, as the *Chicago Sun-Times* article so vividly demonstrates, substandard defense representation that fails to comply with the rules of professional conduct is so common among defenders that it can be publicly admitted without worrying that judges, disciplinary counsel or anyone else will pay any real attention. In Chicago and elsewhere in public defense, just as in the legal profession as a whole, defenders have all too often come to accept burdensome caseloads as normal, apparently believing that representation in compliance with professional responsibility rules and the Constitution is somehow either inapplicable, unattainable, or both.

We believe, however, that defenders and their offices are

not as powerless as they may think they are. And the ABA’s new ethics opinion tells them that they have a clear duty to take action both to protect fully the legal rights of their clients and themselves from furnishing incompetent representation. But it takes courage to stand up to authority – both the authority of judges and sometimes the heads of defender programs. It also takes courage from the heads of defender programs and their boards of directors.

Nationwide, we really do not know how many defender offices are adamant in forcing their lawyers to furnish incompetent representation in violation of professional conduct rules because defenders rarely challenge the leadership of their office. Similarly, we do not know how many trial judges are willing to force defender offices and individual defenders to proceed with incompetent representation when the case for relief is fully documented. Nor do we know if judges would really force defense lawyers to proceed if the lawyers were to put on the record that they will furnish deficient representation in violation of both professional conduct rules and the Sixth Amendment. Isn’t it, finally, about time that we found out? ☆

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1 See ABA Model Rules of Prof’l Conduct R. 1.1 (2006): “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Although not mentioned in Formal Opinion 06-441, provisions of the ABA Model Rules related to conflicts of interest also are implicated when a defender has an excessive number of cases. Model Rule 1.7(a)(2) prohibits representation of multiple clients (i.e., a “concurrent conflict of interest”) when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client...” As stated by the Supreme Court of Florida, “[w]hen an attorney representing indigent defendants is required to make choices between the rights of the various defendants [being represented], a conflict of interest is inevitably created.” *In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1132 (Fla. 1990).

2 ABA Committee on Ethics and Prof’l Responsibility, Formal Op. 06-441 (May 13, 2006) (“Formal Op. 06-441”).

3 See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (Sixth and Fourteenth Amendments to the Constitution guarantee the provision of counsel to indigent persons accused of crimes in state felony proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (right to counsel applies to state misdemeanor proceedings in which actual imprisonment is imposed); *In re Gault*, 387 U.S. 1, 41 (1967) (right to counsel extended to state juvenile delinquency proceedings); *Alabama v. Shelton*, 535 U.S. 654, 662, 674 (2002) (right to counsel applies to state misdemeanor proceedings in which suspended jail sentence imposed); *Douglas v. California*, 372 U.S. 353, 355-357 (1963) (right to counsel applies to first criminal appeal to an appellate court).

4 *Gideon’s Broken Promise: American’s Continuing Quest For Equal Justice*, American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants 38 (ABA 2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> (last visited Sept. 28, 2006).

5 *Id.* at 38.

6 *Id.* at 39.

7 *Gideon Undone: The Crisis in Indigent Defense Funding*, ABA SCLAD, in cooperation with the ABA’s Criminal Justice and General Practice Sections and NLADA 3 (ABA 1982), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/gideonundone.pdf> (last visited Sept. 28, 2006).

8 *Keeping Defender Workloads Manageable, Indigent Defense Series #4*, Bureau of Justice Assistance Monograph, prepared by The Spangenberg Group (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf#search=%22keeping%20defender%20workloads%20manageable%22> (last visited Sept. 28, 2006).

9 *Id.* at 2.

10 Letter from Ross Shepard, Defender Director, NLADA (2004-05), to ABA Standing Committee on Ethics and Prof’l Responsibility (“ABA Ethics Committee”), to George Kuhlman, Ethics Counsel, and Chair, Marvin Karp (Jan. 7, 2005) (requesting that ABA

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- Ethics Committee issue a formal opinion regarding excessive defender caseloads); letter from Norman Lefstein, Indigent Defense Advisory Group (IDAG) Chair and SCLAID member; to ABA Ethics Committee Chair, Charles E. McCallum (May 13, 2005) (requesting reconsideration of denial of request to issue ethics opinion on defender caseloads). All private letters referred to in this article are on file with the authors.
- 11 The meeting with the ABA Ethics Committee was attended by James R. Neuhard, Michigan State Appellate Defender and IDAG member; Norman Lefstein, IDAG Chair and SCLAID member; Bill Whitehurst, SCLAID Chair (2003-06); and Terrence Brooks, Director, ABA Division of Legal Services.
 - 12 ABA Committee on Ethics and Prof'l Responsibility, Formal Opinions 347 (Dec. 1, 1981) and 96-399 (Jan. 18, 1996). These opinions deal with the ethical obligations of civil legal aid attorneys to provide competent representation when funding is inadequate and caseloads excessive.
 - 13 Formal Opinion 06-441 at 2 n.3.
 - 14 Id., at 3.
 - 15 These are obvious questions that cannot be avoided in view of the Model Rules requirement that a lawyer be competent and diligent in representing her clients. Moreover, Comment 2 to Rule 1.3, which is cited in the ABA's Ethics Opinion, states that a lawyer's workload "must be controlled so that each matter may be handled competently." Model Rule 1.3, cmt. 2.
 - 16 Formal Opinion 06-441 at 4.
 - 17 Id.
 - 18 Id.
 - 19 Id.
 - 20 Id. at 5.
 - 21 Formal Opinion 06-441 at 5.
 - 22 Id. at 5 n.15.
 - 23 Model Rule 1.4(a)(3).
 - 24 Formal Opinion 06-441 at 5.
 - 25 Id. at 1.
 - 26 Model Rule 1.3, cmt. 1.
 - 27 See *Ariz. Rev. Stat. Ann. Sec. 17B, R. 1(a)*, N. 41 and 25 (2005); *Haas v. Colosi*, 202 Ariz. 56, 57, 40 P3d 1249 (2002) (denial of public defender's motion to withdraw as counsel is non-appealable, interlocutory order and thus appellate review is available only by special action, which is discretionary with the appellate court).
 - 28 See McKinney's Consolidated Law of New York Annotated, C.P.L.R., Ch. 8, art. 4 (Special Proceedings) (2006); McKinney's C.P.L.R., Ch. 8 §§ 7801-06 (Nature of Proceedings) (2006); McKinney's C.P.L.R. Ch. 8, § 7803 (Question Raised) (2006).
 - 29 See, e.g., *Schwarz v. Gianca*, 495 So.2d 1208, 1209 (4th Dist. Fla. App. 1986) (trial court denied public defender's motion to withdraw and appellate court heard the case "upon an application for extraordinary relief," treating "the application as a petition for writ of certiorari").
 - 30 *State v. Peart*, 621 P.2d 780 (La. 1993). In *Peart*, the Louisiana Supreme Court held that excessive caseloads and insufficient support services for public defenders created a presumption that indigent defendants were not being provided constitutionally required effective assistance of counsel. The Louisiana Supreme Court heard the *Peart* appeal upon petition of Orleans Parish because the state's constitution gives jurisdiction to the state's high court if a statute is held unconstitutional. The trial court in *Peart* ruled, inter alia, that the state's system of indigent defense as provided for under Louisiana law was unconstitutional as applied in Orleans Parish.
 - 31 Formal Opinion 06-441 at 6.
 - 32 Model Rule 1.16(c) (2006).
 - 33 Formal Opinion 06-441 at 5.
 - 34 Id. at 6.
 - 35 "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 duty." Model Rule 5.2(b).
 - 36 Model Rule 5.2 cmt. 2.
 - 37 Formal Opinion 06-441 at 6.
 - 38 Id.
 - 39 Id.
 - 40 Id. at 6 n.21. Both sections 1.13 (b) and (c) are cited in the ethics opinion. But section (c) clearly does not apply to the situation; it deals with the release of confidential information protected by Rule 1.6 to persons outside the organization. Model Rules 1.13(b), (c) and 1.6. So the committee must have thought that the language of 1.13 (b) was applicable to the excessive caseload situation.
 - 41 Model Rules 1.13(b).
 - 42 "Boards of Trustees should be precluded from interfering in the conduct of particular cases." ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.3 (3rd ed. 1992). The commentary to this black-letter statement explains: "The primary function of a board should be to make general policy, not to attempt to dictate the conduct of particular cases. Consistent with this principle, several public defender statutes explicitly prohibit interference in the handling of specific cases by defenders." Id. at 20. See also NLADA Guidelines for Legal Defense Systems in the U.S., Standard 2.13 (1976); NLADA Standards for the Administration of Assigned Counsel Systems, Standards 3.3.3(a) and 3.2.2(c) (1989).
 - 43 Formal Opinion 06-441 at 7, citing Model Rule 5.1. See also *Attorney Grievance Comm'n of Maryland v. Ficker*, 706 A.2d 1045, 1051-52 (1998) (supervising lawyer violated Rule 5.1 by, inter alia, assigning too many cases to supervised lawyer).
 - 44 Formal Opinion 06-441 at 7.
 - 45 Another issue that we do not address in this article, but which we believe is worthy of consideration, is whether a defender has any recourse when terminated because of a disagreement over caseload with a supervisor or head of a defender program.
 - 46 Model Rule 5.2.
 - 47 Model Rule 1.1.
 - 48 This prediction was offered by Norman Lefstein, one of the authors of this article, during a November 2005 meeting in Orlando of the NLADA's American Council of Chief Defenders.
 - 49 Michael P. Judge, the Los Angeles County Public Defender, gave permission to the authors of this article to reference and quote from the letters that he sent in opposition to the then proposed ABA ethics opinion. Letter from Michael P. Judge to Bill Whitehurst, SCLAID Chair (2003-06), et al. 4 (Dec. 2, 2005).
 - 50 Letter from Michael P. Judge to Michael S. Greco, ABA President 2-3 (Jan. 11, 2006).
 - 51 See discussion supra notes 3-9 and accompanying text.
 - 52 Proposed or Amended Rules of Prof'l Conduct of the State Bar of California, Proposed Rule 5.2 (Responsibilities of a Subordinate Lawyer), available at <http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Discussion-Draft.pdf> (last visited Sept. 29, 2006).
 - 53 Memorandum and Declaration of Michael P. Judge submitted to the State Bar of California Commission on the Revision of the Rules of Professional Conduct, dated September 29, 2006 (on file with the authors).
 - 54 Id.
 - 55 State Bar of California Proposed Formal Ethics Opinions, Standing Committee on Prof'l Responsibility and Conduct, Proposed Formal Op. Interim No. 97-0007 (Duty to Provide Competent Representation), available at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=57672 (last visited Sept. 29, 2006).
 - 56 Telephone conversation between co-author Georgia Vagenas and Lauren McCurdy of the State Bar of California's Office of Professional Competence (Sept. 29, 2006) (confirming that Bar never issued Formal Opinion Interim No. 97-0007).
 - 57 Proposed Formal Op. Interim No. 97-0007, available at http://calbar.ca.gov/calbar/pdfs/public-comment/2004/2004-09-15_COPRAC_97-0007.pdf at 4-5, (last visited Sept. 29, 2006).
 - 58 Ethics Advisory Opinion 04-12, South Carolina Bar (2004), available at <http://www.scbar.org/member/ethics.asp> (last visited Sept. 30, 2006).
 - 59 Id.
 - 60 Id.
 - 61 Opinion No. 90-10, Ethics Committee, Arizona State Bar (1990), available at <http://www.myazbar.org/ethics/pdf/90-10.pdf> at 7 (last visited Sept. 30, 2006).
 - 62 Id.
 - 63 Id.
 - 64 Opinion No. 03-01, American Council of Chief Defenders (ACCD), NLADA (2003), available at <http://www.nlada.org/DMS/Documents/10825731.12.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf> (last visited Sept. 30, 2006).
 - 65 Id. at 5. Wisconsin Formal Opinion E-84-11, reaffirmed in Wisconsin Formal Opinion E-91-3, is also consistent with the new ABA opinion. Two other relevant ethics opinions include Ethics Opinion 751, N.Y. State Bar Assoc. Committee on Professional Ethics (2002) ("an attorney representing a government agency may not undertake more than the attorney can competently handle, but the attorney may accept his superior's reasonable resolution of an arguable question of professional duty"); and Legal Ethics Opinion 1798, Standing Committee on Legal Ethics, Va. State Bar (2004) (a Commonwealth Attorney with an excessive caseload that precludes competent and diligent representation and the supervisory attorney who assigns the excessive caseload violate ethics rules). These opinions, too, are obviously consistent with the ABA's new ethics opinion on excessive defender caseloads. In fact, footnote 2 of the Virginia ethics opinion contains the following sentence: "Although this opinion addresses workloads of prosecutors, excessive caseloads for public defenders and court-appointed counsel raise the same ethical problems if each client's case cannot be attended to with reasonable diligence and competence."
 - 66 ABA Ten Principles of a Public Defense Delivery System, Report to the ABA House of Delegates No. 107 (adopted Feb. 5, 2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (last visited Sept. 30, 2006).

- 67 Id.
- 68 ABA Standards for Criminal Justice: Providing Defense Services (2d ed. 1979).
- 69 ABA Standards for Criminal Justice: Providing Defense Services 5-5.3 (3d ed. 1992), available at http://www.abanet.org/crimjust/standards/defsvcs_toc.html (last visited Sept. 30, 2006).
- 70 ABA Standards for Criminal Justice: Defense Function 4-1.3(e) (3d ed. 1993), available at http://www.abanet.org/crimjust/standards/dfunc_toc.html (last visited Sept. 30, 2006).
- 71 Providing Defense Services, Standard 5-5.3 (b) ("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.").
- 72 See, e.g., Standards for Indigent Defense Services in Non-Capital Cases, Indiana Public Defender Commission, Sects. J (Caseloads of Counsel) and K (Excessive Caseloads) (1995), available at <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf> (last visited Sept. 30, 2006); Standards for Public Defense Services, Washington Defender Association, Standard Three (Caseload Limits and Types of Cases) (1989), available at <http://www.defensenet.org/resources/WDAstand.htm#Standard%20Three> (last visited Sept. 30, 2006).
- 73 But see, e.g., Ind. Sup. Ct. R. 24(B)(3) (2006) (Workload of Appointed and Salaried Capital Counsel), available at <http://www.in.gov/judiciary/rules/criminal/#r24> (The Indiana Supreme Court adopted this provision based upon a recommendation of the Indiana Public Defender Commission.); Tenn. Sup. Ct. R. 13(e)(4)(D) (2006) ("The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.").
- 74 See *State v. Peart*, supra note 30.
- 75 *Green v. Washington*, 917 F.Supp. 1238 (N.D.Ill. 1996).
- 76 *Stitka v. State*, 579 So. 2d 102, 104 (Fla. 1991).
- 77 See supra notes 27-30 and accompanying text.
- 78 *Escambia County v. Behr*, 384 So. 2d 147, 151 (England, C. J., concurring) (Fla. 1980).
- 79 This section does not address the liability of an assistant defender sued under state tort law for legal malpractice. See e.g., *Veneri v. Pappano*, 424 PA. Super. 394, 622 A.2d 977 (1993). See also *Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (a public defender representing a client in the lawyer's traditional adversarial role was not a state actor under § 1983 and is "[h]eld to the same standards of competence and integrity as a private lawyer"); *Miranda v. Clark County*, 319 F.3d 465, 468 (2003) (public defender representing a client in a traditional adversarial role is acting under the ethical standards of a lawyer-client relationship and is held to the same standards as a private attorney). Some jurisdictions, however, extend statutory immunity to public defenders, protecting them against personal liability in malpractice actions. See *Schreiber v. Rowe*, 814 So. 2d 396 (Fla. 2002). See also *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); *Dziubak v. Mott*, 503 N.W.2d 771, 773 (Minn. 1993).
- 80 Section 1983 authorizes private parties to enforce their federal constitutional rights against state and local officials and municipalities in the federal and state courts. See 42 U.S.C. § 1983.
- 81 319 F.3d 465, 469-71 (9th Cir. 2003).
- 82 Id. at 466-67.
- 83 Id. at 467.
- 84 Id. at 469-70. In contrast, the court held that unlike the county and head of the public defender office, the assistant public defender was not subject to § 1983 liability because he was not a state actor. Id. at 468. The court explained that because the assistant enters into an attorney-client relationship, it places him in a role that exempts him from liability under § 1983. Id. at 468-69.
- 85 Id. at 470.
- 86 Id. at 471 (citing *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197 (1989)). In *City of Canton*, the Supreme Court made clear that to establish liability there must be a direct causal link between a municipal policy and the alleged constitutional deprivation. Id. at 386. The Court, therefore, adopted the deliberate indifference requirement, hold-
- ing that before a local government entity may be held liable for failing to act to preserve a constitutional right, the plaintiff must demonstrate that the official policy evidences a deliberate indifference to her constitutional rights. Id. at 386-93.
- 87 See *Doe v. Independent School Dist.*, 15 F.3d 443, 452-54 (5th Cir. 1994) ("The legal elements of an individual's supervisory liability and a political subdivision's liability...are similar enough that the same standards of fault and causation should govern.").
- 88 *Shaw v. Stroud*, 13 F.3d 791, 798-99 (4th Cir. 1994).
- 89 Indigent defense boards may be deemed to have the same characteristics as other municipal boards, such as governing and policy-making functions. Indigent defense boards are general governing boards which are empowered to establish general policy, but may not interfere in the conduct of particular cases. See ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.3; NLADA Standards for Legal Defense Systems in the U.S., Standard 2.11 (Functions of the Defender Commission). Defender commissions may provide input and advice to the Defender Director and may also remove the Director from office. NLADA Standard 2.11 (c) and (f).
- 90 489 U.S. 658, 98 S.Ct. 2018 (1978).
- 91 Id. at 690.
- 92 Id. at 658.
- 93 Id. at 690. The *Monell* Court held that the language of § 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." Id. at 692. On the other hand, in a case against the actual perpetrator of a constitutional violation, the standard of liability derives from the particular constitutional provision at issue, not from § 1983. *Daniels v. Williams*, 474 U.S. 327, 329-30, 106 S.Ct. 662, 664 (1986); *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 759 (5th Cir. 1993).
- 94 Id. at 690.
- 95 See also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292 (1986).
- 96 489 U.S. 378, 386-93, 109 S.Ct. 1197 (1989) (holding that a city's failure to train subordinates may result in § 1983 liability where the failure amounts to deliberate indifference to the potential violation of a constitutional right).
- 97 996 F.2d 745, 746 (5th Cir. 1993).
- 98 *Gonzalez*, 996 F.2d at 753-54.
- 99 Id. at 756-60.
- 100 Id. at 762.
- 101 Id.
- 102 *Gonzalez*, 996 F.2d at 762.
- 103 *City of Canton*, 489 U.S. at 396 (O'Connor, J., concurring) ("The lower courts that have applied the 'deliberate indifference' standard we adopt today have required a showing of a pattern of violations from which a kind of 'tacit authorization' by city policymakers can be inferred.") (Citing, e.g., *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983)). See also *Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1988) (defendants "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must act either knowingly or with deliberate, reckless indifference").
- 104 *City of Canton*, 489 U.S. at 392, 396.
- 105 On September 16, 2006, however, an isolated, albeit significant development occurred in Oregon, where the Oregon State Bar House of Delegates passed a resolution to adopt ABA Formal Opinion 06-441 and instructed its state's ethics body to issue a similar opinion applicable to Oregon defenders. This development was due to the efforts of Ross Shepard, former Defender Director of the NLADA.
- 106 Abdon M. Pallasch, Call to Limit Cases Amuses Public Defenders, Chi. Sun-Times, July 24, 2006, available at http://www.findarticles.com/p/articles/mi_qn4155/is_20060724/ai_n16642443 (last visited on October 6, 2006).
- 107 Id.
- 108 Id.
- 109 Ill. Rules of Prof'l Conduct, Rules 1.1 and 1.4 (The Illinois Rules are identical to ABA Model Rules and require competence and diligence.)

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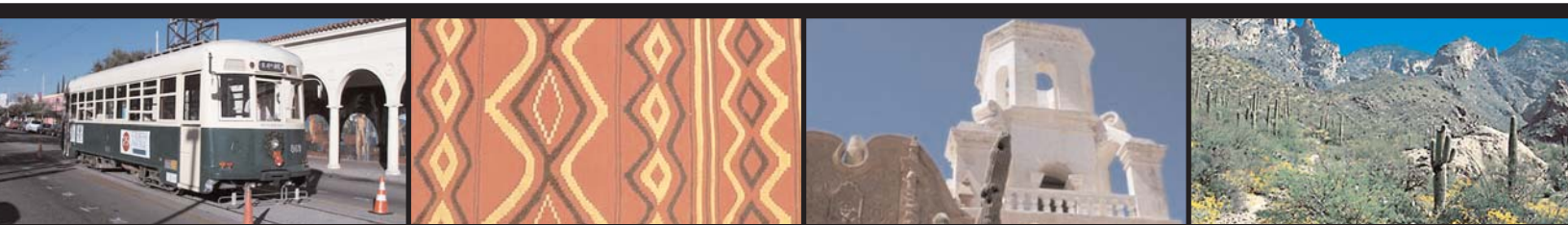


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