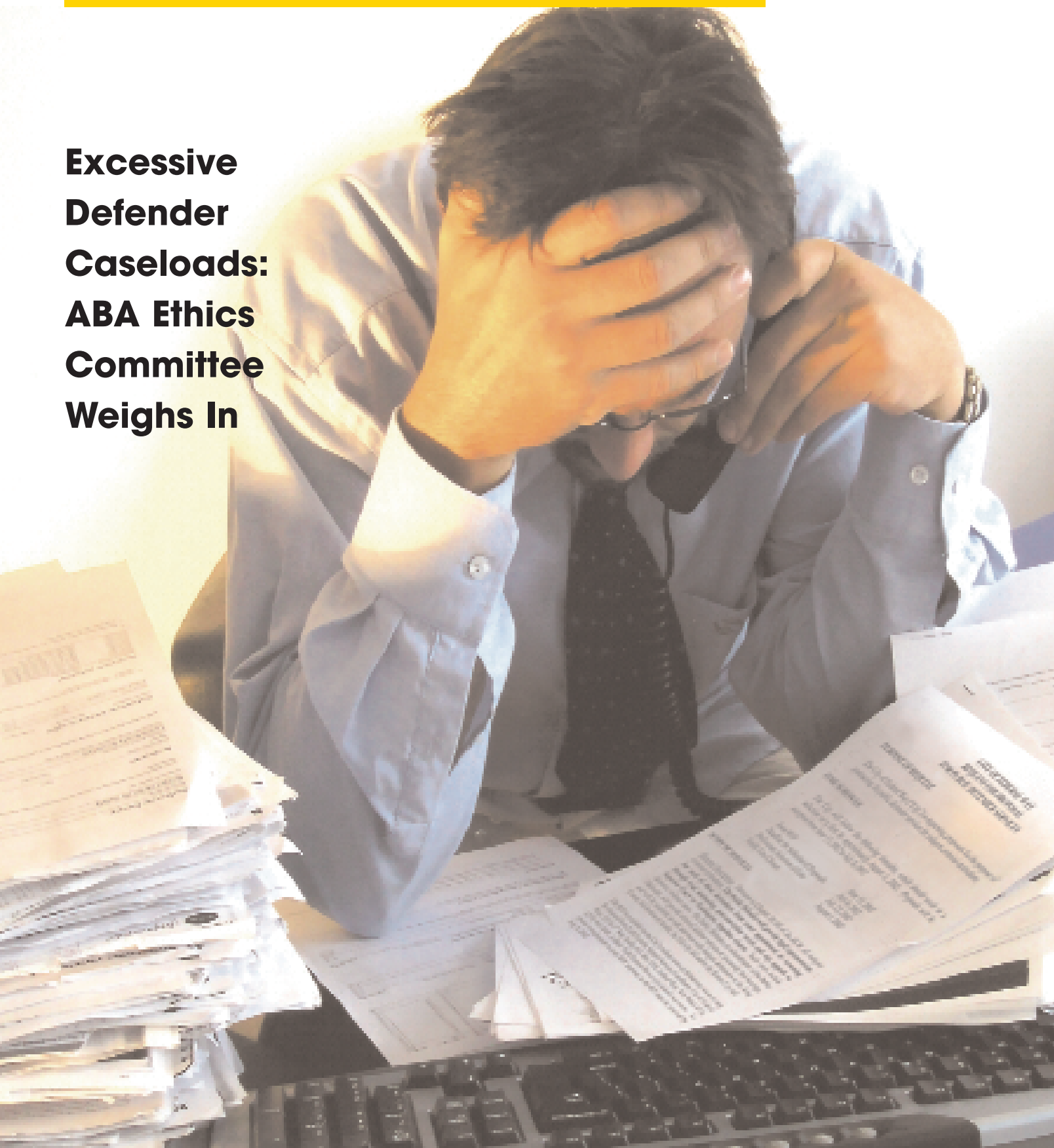


T H E National Association of Criminal Defense Lawyers

CHAMPION

December 2006

**Excessive
Defender
Caseloads:
ABA Ethics
Committee
Weighs In**



Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action



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, ethical violations routinely are ignored not only by the lawyers themselves, but also by judges and disciplinary authorities.”⁶ 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.”⁷

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,

BY NORMAN LEFSTEIN & GEORGIA VAGENAS

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 and 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 problem 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 Struggle for Effective Indigent Defense Services

Remarks Delivered Upon Receipt of NACDL's 2005 Champion of Indigent Defense Award

My commitment to the cause of indigent defense derives from a deep-seated belief that unless our adversary system of criminal justice is strong — unless it protects the weakest and least powerful members of our society as well as the rich — the great promise of the Sixth Amendment's right to counsel will remain unfulfilled.

I am sometimes asked how our country is progressing in implementing the right to counsel now that the *Gideon* decision is more than 40 years old and we are well past virtually all of the Supreme Court's other "right to counsel" landmark decisions. Clearly, we have made important progress during the past 40 years. In 1963, which was two years after I graduated from law school, organized and vigorous defense services of the kind that exist today (in at least some jurisdictions) were just beginning to be formed. But in assessing the state of indigent defense in America today, there is absolutely no reason to rejoice or even to be moderately satisfied.

Despite the wealth of this country and its historic commitment to due process of law, implementation of the right to counsel for the indigent is — overall — in sad shape!

In 2005, the major problems of America's indigent defense system were set forth in an American Bar Association report that I co-authored, titled "*Gideon's Broken Promise: America's Continuing Quest for Equal Justice*." The report concluded that, "40 years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction." The reasons: "shamefully inadequate funding," as well as "defense systems that frequently lack basic oversight and accountability, impairing the provision of uniform quality." The report and its conclusions were based upon public hearings held in 2004 throughout the country in recognition of *Gideon's* 40th anniversary.

In recent years, we all have witnessed a major development that has measurably strengthened the case for substantial government support of effective criminal defense services. Permit me to illustrate with a reflection from my past.

During the 1970s I headed the public defender service in Washington, D.C., and I testified annually before congressional committees on behalf of the agency's budget. But it never occurred to me then that I should argue for adequate agency funding because of our absolute knowledge that innocent people are being wrongfully convicted in our justice system, and that the risk of wrongful conviction is greatly increased when defendants are not well represented.

Today, thanks to DNA evidence and the pioneering work of Barry Scheck and Peter Neufeld, as well as many others, we know that innocent people are sometimes convicted and that miscarriages of justice are an unfortunate reality of our justice system. We also know, as Janet Reno remarked when she was attorney general: "In the end, a good lawyer is the best defense against wrongful conviction."

Thomas Jefferson once said that "eternal vigilance is the price of liberty." Our history suggests that no less vigilance is required to assure adequate defense services for the poor. Unless criminal defense lawyers are genuinely independent, adequately compensated and able to fully and effectively represent their clients, the capacity of government to overreach — and also to make mistakes — will not be challenged. And the great protections of our Bill of Rights will not be realized for all people.

The struggle on behalf of fully funded and effective indigent defense services is not won with a single victory. Rather, it is a battle that needs to be constantly waged one skirmish at a time. But it is an exceedingly vital struggle, well worth the fight.

— Norman Lefstein

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."³⁶

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 dis-

agreements 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) 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 viola-

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tion 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, consistent 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 the 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 matter. 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.* (Emphasis added).

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 Profes-

sional 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 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



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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 case-loads" that interfere with rendering "quality representation or lead to the breach of professional obligations."⁶⁹ The ABA's Defense Function standards contain a comparable provision, 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 case-loads.

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,

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NOT ALL SENTENCES END IN A PERIOD

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 subordi-

nate 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'Connor'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, standard 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 defend-

ers 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?

Notes

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/broken-promise/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 SCLAIID, 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 Ethics Committee issue a formal opinion regarding excessive defender caseloads); letter from Norman Lefstein, Indigent Defense Advisory Group (IDAG) Chair and SCLAIID 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 SCLAIID member; Bill Whitehurst, SCLAIID 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 P.3d 1249 (2002) (denial of public defender's motion to withdraw as counsel is non-appellable, 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. Cianca*, 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.js?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/1082573112.32/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. 1966); *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 constitu-

tional deprivation. *Id.* at 386. The Court, therefore, adopted the deliberate indifference requirement, holding 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_2006072

4/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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NACDL NEWS

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would shoot for the lame-duck session, which I think is going to start on November 13. But the timeline for passage is totally unpredictable. Not until next year at the earliest."

Asked whether he would have any support for the legislation, Specter quipped, "Yes, Sen. Leahy is for it."

A transcript of Specter's remarks begins on page 55 of this issue.

Lynne Stewart Sentenced to Prison, But Free Pending Appeal

Ex-criminal defense lawyer Lynne Stewart was sentenced to 28 months in federal prison Oct. 16 on terrorism charges arising out of her representation of an Egyptian sheik convicted of conspiring to bomb New York City landmarks in 1993. The government sought the maximum sentence of 30 years.

Stewart was convicted in February 2005 for allegedly helping her client, Sheik Omar Abdul-Rahman, communicate with an Egyptian terrorist organization while

representing the sheik in post-conviction matters.

Stewart did not dispute that she violated a U.S. Bureau of Prisons "special administrative measure" under which her client was held incommunicado as a threat to public safety. But in a letter to the court, she characterized her actions as "naïve" and "careless."

U.S. District Judge John G. Koeltl, of the Southern District of New York in Manhattan, said at the sentencing hearing that Stewart's actions were an "egregious and flagrant abuse" of her license to practice and that her messages could have had potentially "lethal" consequences. But the judge noted her decades of service representing the poor and the despised.

Koeltl allowed Stewart to remain free on bail pending her appeal, specifically finding that she posed no threat and that he expected she would raise substantial questions of law or fact on appeal.

Stewart has consistently denied she ever knowingly furthered any cause of violence. She has admitted she intentionally violated the Bureau of Prisons' "special administrative measures" under which her client was being held incommunicado by speaking to a reporter, which she now regrets.

NACDL was one of several organiza-

tions that filed *amicus curiae* briefs supporting Stewart over the past four and one half years. With the trial court proceedings at a close, NACDL President Martin S. Pinales released a statement.

"Any sentence of incarceration is substantial for a 67-year-old breast cancer survivor," Pinales said. "I am heartened that Judge Koeltl had the decency and courage to allow Ms. Stewart to remain free on bail while her case works its way through the federal appeals process."

"Every person accused in our courts is constitutionally-entitled to legal representation. Lynne Stewart has lived her life as a zealous advocate."

Other legal experts criticized the government, saying that the Justice Department was trying to intimidate the defense bar.

"There's no doubt the government has tried to use this case to chill effective advocacy in terror cases," NACDL Past President Neal R. Sonnett told the *Washington Post*. "I'm delighted the judge was not swayed by the frenzy over terrorism."

Jo Ann Harris, the former assistant attorney general who approved the Rahman indictment, wrote a letter to the court calling Stewart's prosecution "unwarranted overkill." ■