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November 2011

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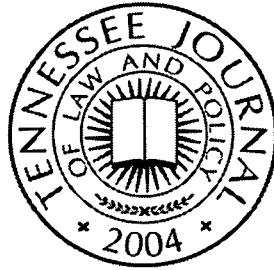
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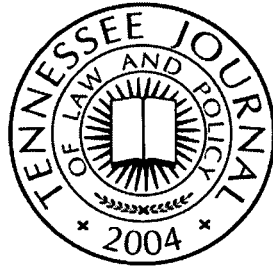
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*ESSAY*

**SYSTEMIC INDIGENT DEFENSE LITIGATION: A  
2010 UPDATE**

Cara H. Drinan\*

**Introduction**

At the American Bar Association’s National Public Defense Symposium in May, 2010, I delivered a talk on systemic indigent defense litigation.<sup>1</sup> I spoke about this kind of litigation with measured optimism. Specifically, I described two pending suits of this kind – one in Michigan and one in New York – as successful models of modern litigation in this arena. In May, both suits had just survived motions to dismiss before their respective state supreme courts. I discussed the future trials in these suits and the

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\* Assistant Professor of Law, Columbus School of Law, The Catholic University of America.

<sup>1</sup> This essay is a by-product of the talk that I delivered at the 2010 American Bar Association (“ABA”) National Public Defense Symposium on May 21, 2010. The full transcript of those proceedings appears in the same volume of the Tennessee Journal of Law & Policy as this essay and may be relevant to readers who are confronting excessive workloads or other aspects of a public defense system in need of reform. A full discussion of systemic indigent defense litigation—its history, trajectory and the current model for it—are outside the scope of this Essay. In previous works I have discussed this kind of litigation in depth. *See generally* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) [hereinafter *Indigent Defense Litigation*]; Cara H. Drinan, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, WASH U. L.R. (Oct. 22, 2008) [hereinafter *Systemic Sixth Amendment Claims*], available at <http://lawreview.wustl.edu/slip-opinions/toward-a-federal-forum-for-systemic-sixth-amendment-claims/>.

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potential for litigants to replicate the success of these suits in other jurisdictions.

Shortly after the Symposium, those who were following the progress of the Michigan and New York suits were stunned when the Michigan Supreme Court reversed itself in the same case and granted the defendants' motion for summary disposition. Not only is the decision disappointing to the defense community, but also, litigators in these kinds of suits are left wondering what impact the decision will have on future systemic indigent defense claims.

In Part I of this Essay I will describe the systemic indigent defense suits in Michigan and New York, noting their similar but ultimately divergent paths. Having done so, in Part II, I will address the question of how systemic litigation in the indigent defense arena is faring in the wake of the Michigan suit. Despite the Michigan setback, this kind of litigation may still be a powerful reform tool in certain jurisdictions. Moreover, in some jurisdictions there will always be the need for litigation simply because it is the only path to reform. I note three jurisdictions where litigation is either already happening in some fashion and/or where systemic litigation may be on the horizon. Finally, I conclude with the notion that the federal government needs to play a more active role in indigent defense reform, whether or not systemic lawsuits enjoy success in state courts.

### **Part I: The Michigan and New York Suits**

*Duncan v. State of Michigan* and *Hurrell-Harring v. State of New York* were both filed in 2007,<sup>2</sup> and in many

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<sup>2</sup> Complaint, *Duncan v. State* (Mich. Cir. Ct. Feb. 22, 2007) [hereinafter *Duncan Complaint*]; Class Action Complaint, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Nov. 8, 2007) [hereinafter *Hurrell-Harring Complaint*].

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ways both suits reflect the model for successful systemic indigent defense litigation.<sup>3</sup> In both cases plaintiffs argued that the state had abdicated its constitutional responsibility under *Gideon v. Wainwright*<sup>4</sup> by delegating the provision, financing, and oversight of public defense services to the state's counties.<sup>5</sup> Defendants in the New York suit filed a motion to dismiss in April, 2008, making three central arguments: that the named plaintiffs could only seek redress in the appellate process; that the named plaintiffs lacked standing to raise a claim of systemic deficiencies; and that the legislature was the proper forum for the plaintiffs' requested relief.<sup>6</sup> Albany Supreme Court Justice Eugene Devine rejected all three arguments, writing: "The action primarily seeks a declaration that the State has failed in its constitutional duty to provide meaningful and effective assistance of counsel to indigent criminal

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<sup>3</sup> For example, the suits were filed as a measure of last resort; they demonstrated system-wide proof of harm to clients; they reflected strategic decisions on a wide array of procedural issues; they made reference to accepted professional standards; and they relied upon a wide network of professional allies. *See generally* Drinan, *Indigent Defense Litigation*, *supra* note 1 (discussing the model for this type of litigation and the New York and Michigan examples). The following suits also reflect, in part or in whole, the model of modern indigent defense litigation: Class Action Complaint, *Rivera v. Rowland*, No. CV 95-0545629S, 1998 WL 96407, at \*1 (Conn. Super. Ct. Feb. 20, 1998); *Lavallee v. Justices in the Hampden Super. Ct.*, 812 N.E.2d 895 (Mass. 2004); Amended Complaint, *White v. Martz*, No. C DV-2002-133 (Mont. Jud. Dist. Ct. April 1, 2002); Third Amended Class Action Complaint, *Doyle v. Allegheny County Salary Bd.*, No. GD-96-13606 (Pa. Ct. C. P, Nov. 21, 1997); Complaint, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Sup. Ct. 2004).

<sup>4</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>5</sup> *See generally* Duncan Complaint, *supra* note 2; Hurrell-Harring Complaint, *supra* note 2.

<sup>6</sup> *See generally* Memorandum of Law in Support of Defendant's Motion to Dismiss, *Hurrell-Harring v. State*, No. 8866-07, 2008 WL 7801294, at \*1 (N.Y. Sup. Ct. Apr. 4, 2008).

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defendants... It would not require the judiciary to manage discretionary aspects of an essentially executive function of government. Rather it seeks a determination that the State has or is likely to violate the plaintiffs' constitutional rights."<sup>7</sup> One year later, an intermediate appellate court overruled Justice Devine, finding that the plaintiffs' claim was not a justiciable legal claim, but instead was "simply a general complaint as to the quality of legal services offered to indigent criminal defendants in this state."<sup>8</sup> In March, 2010, the New York Court of Appeals heard oral arguments regarding the state's motion to dismiss.<sup>9</sup>

The Michigan suit followed a similar path. Defendants in the suit filed a motion to dismiss, arguing that the government was immune from suit and that the case was non-justiciable on several theories.<sup>10</sup> The trial court denied the motion to dismiss, and the Court of Appeals affirmed, holding that:

[T]he role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting unconstitutional conduct. For state and federal constitutional provisions to have any meaning, we may and must engage in this role even where litigation encompasses

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<sup>7</sup> Joel Stashenko, *Suit Proceeds over Providing Criminal Defense to Poor*, 240 N.Y.L.J. 1 (2008) (quoting Justice Devine).

<sup>8</sup> *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 351 (N.Y. App. Div. 2009).

<sup>9</sup> The oral argument may be viewed at: [http://www.courts.state.ny.us/CTAPPS/arguments/2010/Mar10/Mar10\\_OA.htm](http://www.courts.state.ny.us/CTAPPS/arguments/2010/Mar10/Mar10_OA.htm).

<sup>10</sup> *Duncan v. State*, 774 N.W.2d 89, 97 (Mich. Ct. App. 2009).

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conduct by the executive and legislative branches.<sup>11</sup>

The Michigan Supreme Court heard oral arguments regarding the state's motion to dismiss in April, 2010.<sup>12</sup>

In both the Michigan and New York suits, oral argument before the high courts in each state focused on justiciability issues. At bottom, defendants in both suits made two arguments: 1) that the plaintiffs' claims were only appropriately addressed in a post-conviction proceeding and 2) that public defense reform was a legislative function.<sup>13</sup> On April 30, 2010, the Michigan Supreme Court issued a unanimous order ("*Duncan I*") stating that: "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time."<sup>14</sup> One week later, the New York Court of Appeals followed suit and denied the defendants' motion to dismiss in *Hurrell-Harring v. State*.<sup>15</sup>

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<sup>11</sup> *Id.* at 98.

<sup>12</sup> The oral argument may be viewed at the following site: <http://www.michbar.org/courts/virtualcourt.cfm>.

<sup>13</sup> See Appellants' Brief, *Duncan v. State*, Nos. 139345, 139346, 139347 (Mich. Feb. 8, 2010), available at <http://www.courts.michigan.gov/supremecourt/Clerk/04-10/139345/139345-7-AppellantBrief.pdf>; Brief for Plaintiffs-Appellants, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sept. 28, 2009) (on file with author). The oral arguments in the two cases may be viewed at the following sites:

<http://www.michbar.org/courts/virtualcourt.cfm> (*Duncan*),

[http://www.courts.state.ny.us/CTAPPS/arguments/2010/Mar10/Mar10\\_OA.htm](http://www.courts.state.ny.us/CTAPPS/arguments/2010/Mar10/Mar10_OA.htm) (*Hurrell-Harring*).

<sup>14</sup> *Duncan v. State*, Mich. Sup. Ct., Nos. 139345, 139346, 139347 (Mich. Apr. 30, 2010), available at

[http://coa.courts.mi.gov/documents/sct/public/orders/20100430\\_s139345\\_106\\_139345\\_2010-04-30\\_or.pdf](http://coa.courts.mi.gov/documents/sct/public/orders/20100430_s139345_106_139345_2010-04-30_or.pdf) [hereinafter *Duncan I*].

<sup>15</sup> *Hurrell-Harring v. State*, No. 66, slip op. at 21 (N.Y. May 6, 2010), available at

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While the April Order from the Michigan Supreme Court denied defendants' motion to dismiss, the Court declined to issue an opinion. On the other hand, the New York Court of Appeals opinion created very good law for future public defense reform suits. Despite the defendants' claim that plaintiffs had an adequate remedy in the criminal appellate and habeas process, the Court found that avenue insufficient to address the systemic claims presented in the Complaint. As the Court explained, the post-conviction approach "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State."<sup>16</sup> Where plaintiffs allege, as they did in the New York Complaint, that there has been a total breakdown of the defense system, the Court held that the post-conviction approach is not appropriate.<sup>17</sup> Moreover, the Court held that what plaintiffs alleged in the Complaint was not a "mere lumping together of 20 generic ineffective assistance of counsel claims"<sup>18</sup> but rather "a claim for constructive denial of the right to counsel" on a systemic basis.<sup>19</sup> Finally, the Court rejected the separation of powers argument with the following: "It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right."<sup>20</sup> In sum, the New York Court of Appeals opinion provides powerful precedent for any state court considering the justiciability of these suits

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<http://www.courts.state.ny.us/CTAPPS/decisions/2010/may10/66opn10.pdf>.

<sup>16</sup> Hurrell-Harring v. State, No. 66, slip op. at 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (Pigott, J., dissenting at 6).

<sup>19</sup> Hurrell-Harring v. State, No. 66, slip op. at 14-15.

<sup>20</sup> *Id.* at 20 (citation omitted).

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going forward. In particular, it alters the perception that public defense reform is a purely legislative task, and it rejects the notion that habeas review is the appropriate, let alone exclusive, avenue for systemic public defense cases.

In mid-June, public defense reform advocates cited both the Michigan and New York suits as success stories – two examples where state supreme courts seemed to recognize the crucial role that they had to play in indigent defense reform. Accordingly, court watchers were stunned in July 2010, when the Michigan Supreme Court reversed itself in the *Duncan* suit and issued an order (“*Duncan II*”) granting the defendants’ motion for summary disposition – only two and a half months after the same Court had paved the way for a trial on the merits.<sup>21</sup>

In stark contrast to the New York Court of Appeals’ opinion in *Hurrell-Harring*, the Michigan Supreme Court’s opinion in *Duncan II*, vacating its earlier Order and granting the defendants’ motion to dismiss, creates additional negative case law with which future plaintiffs in similar suits must contend. The majority in *Duncan II* simply stated that: “The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs’ claims are not justiciable.”<sup>22</sup> Justice Markman, concurring in the opinion, wrote separately and explained that the Court’s earlier

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<sup>21</sup> *Duncan v. State*, Mich. Sup. Ct., Nos. 139345, 139346, 139347 (Mich. July 16, 2010) [hereinafter *Duncan II*], available at <http://www.courts.michigan.gov/supremecourt/Clerk/04-10/139345/139345-7-Order.pdf>; see also David Carroll, *Mich. Supreme Court Reverses Course in ACLU Class Action Indigent Defense Lawsuit*, ACSBlog, July 19, 2010 (calling the decision “stunning”), available at <http://www.acslaw.org/node/16537>; *Court Rules in Favor of Unequal Justice for Poor Defendants*, DETROIT FREE PRESS, July 20, 2010, available at <http://www.freep.com/article/20100720/OPINION01/7200318/Court-rules-in-favor-of-unequal-justice-for-poor-defendants>.

<sup>22</sup> *Duncan II* at 2.



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Order had been in error for two reasons: 1) it had failed to articulate any governing standards and 2) it had incorrectly held that summary disposition was premature when, in fact, summary disposition was appropriate based on the Complaint itself.<sup>23</sup> Justice Markman then cited ten reasons why the defendants were entitled to summary disposition, including the following: that the Supreme Court in *Gideon v. Wainwright* was concerned with “results, not process;”<sup>24</sup> that plaintiffs’ claims are non-justiciable;<sup>25</sup> that there is no constitutional right to a “meaningful relationship with counsel;”<sup>26</sup> and that plaintiffs were asking the Michigan courts to violate the separation of powers doctrine by seizing traditionally legislative tasks from state lawmakers.<sup>27</sup> In short, Justice Markman’s opinion adopted wholesale the Court of Appeals dissenting opinion from June, 2009.<sup>28</sup>

The *Duncan II* decision is flawed for several reasons.<sup>29</sup> First, in order for the Court to vacate its original order and reverse its decision regarding the defendants’ motion to dismiss, the Court needed to find that its “previous ruling rested on a ‘palpable error.’”<sup>30</sup> It strains credulity to imagine what that error was since the Court’s new order comes only two and a half months after its original order and is based exclusively upon the dissenting opinion from the appellate court decision -- an opinion that was before the Court when it originally ruled unanimously

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citation omitted).

<sup>25</sup> *Id.* at 2-3.

<sup>26</sup> *Id.* at 3 (citation omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The *Duncan II* opinion, its legal underpinnings, and its implications will undoubtedly be the subject of future scholarship. My goal in discussing the opinion in this essay is to offer a preliminary response.

<sup>30</sup> *Duncan II* at 5 (Kelly, C.J. dissenting).

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in favor of the plaintiffs.<sup>31</sup> As the dissenting opinion in *Duncan II* correctly notes: “we were certainly aware when we issued our previous order that, by affirming only the result reached by the Court of Appeals, we were remanding the case without a controlling standard.”<sup>32</sup> Moreover, as the dissent states: “plaintiffs correctly note that defendants’ motion [for reconsideration] merely repeats the arguments it made earlier and that defendants are effectively asking this Court to issue an advisory opinion.”<sup>33</sup> As a procedural matter, the opinion in *Duncan II* was inappropriate.

Second, to the extent that the Court’s decision rests upon adoption of the appellate court’s dissent, the decision rests on misguided legal foundations. For example, it is simply not the case that the Sixth Amendment right to counsel is “concerned with results, not process.”<sup>34</sup> In fact, the contrary is true -- no defendant has the right to an *outcome* of a certain verdict or sentence; but every defendant has the right to certain *procedural safeguards*, including zealous defense representation, throughout the entire adversarial process.<sup>35</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2; U.S. CONST. amend. VI.

<sup>35</sup> See *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (reaffirming that Sixth Amendment right to counsel attaches at the initiation of adversarial proceedings in order to protect the defendant’s rights as the state moves forward with its case). There are other ways in which the *Duncan II* opinion rests on flawed legal analysis. A full discussion of those issues is outside the scope of this essay, but for example, the Court’s reference to *Strickland v. Washington*, 466 U.S. 668 (1984) and its prejudice prong is completely inapposite in a case like *Duncan* where plaintiffs seek prospective relief. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2010), SSRN draft at 22-23, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1448058](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448058).

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Third, the decision errs in its assessment that the court cannot be involved in a suit of this kind without stepping on the toes of the state's executive and judicial branches. It is the province of the courts to identify constitutional violations and to order parties to cure such violations.<sup>36</sup> If, as a result of a court doing so, a state legislature ultimately has to expend funds, so be it. That outcome in no way undermines the Court's authority to identify a constitutional defect in the first instance.

Finally, the Court's decision in *Duncan II* was premature, as the Court recognized in its own initial order allowing the case to move forward.<sup>37</sup> In order to survive a motion to dismiss, plaintiffs needed to state a legal claim on which relief could be granted.<sup>38</sup> This they did, as the Michigan Supreme Court implicitly recognized when it originally rejected the defendants motion for summary disposition in its April Order. At this stage of litigation, plaintiffs did not need to address the question of appropriate remedies, the issue of funding for indigent defense representation, or the extent to which future potential injunctive relief would interfere with ongoing criminal proceedings. All of these issues appear to have been of newfound great concern to the *Duncan II* Court,<sup>39</sup> and they are entirely outside the realm of a motion for summary disposition. This reversal is stunning, and it raises doubts about the ability of elected judges to

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<sup>36</sup> Hurrell-Harring v. State, No. 66, slip op. at 20 (citing *Marbury v. Madison*, 1 Cranch 137, 147 (1803)).

<sup>37</sup> *Duncan I*, *supra* note 14 ("This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.").

<sup>38</sup> MICH. CT. R. § 2.116(C)(8) (West 2010).

<sup>39</sup> *Duncan II* at 2-3.

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impartially rule on questions that implicate the operation of a criminal justice system which the bench itself oversees.<sup>40</sup>

**Part II: Systemic Indigent Defense Litigation in the Wake of the *Duncan* Suit**

The picture of public defense litigation may not be as bright as it was even two months ago when both the New York and Michigan suits appeared to be moving toward trial. However, there is still much to be said for systemic litigation as a tool for defense reform advocates. First, as the New York suit demonstrates, these cases can make it out of the gates – something many reformers did not think was possible even ten years ago.<sup>41</sup> The lesson of the Michigan and New York comparison may be that parties bringing these types of suits need to be very thoughtful about the states in which they choose to seek judicial reform. Second, the Michigan experience may indicate that systemic litigation can be effective, but that now, more than ever, litigants need a federal forum in which to bring these types of suits.<sup>42</sup> Third, defense reformers may need to

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<sup>40</sup> See STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 20-21 (2004) (discussing the problem of defense functions that do not have independence from judicial influence and citing examples in Michigan), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; See also Amanda Frost and Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731-40 (2010) (discussing the evidence that suggests elected judges are, in fact, influenced by majority preferences, especially in comparison to appointed judges).

<sup>41</sup> See, e.g., *Webb v. Commonwealth*, 528 S.E.2d 138 (Va. Ct. App. 2000) (rejecting challenge to statutorily-capped court-appointed attorney fee system and determining reform was legislative concern).

<sup>42</sup> I have written on the need for a federal forum for these types of claims in prior works. See also Drinan, *Indigent Defense Litigation*,

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think about a two-tiered approach to litigation where systemic suits and individual suits, challenging, for example, excessive caseloads, are brought simultaneously. In this way, when and if a systemic suit makes its way to a state Supreme Court, that court has a body of individual challenges before it that substantiate the breadth of the systemic challenge. Finally, it is important to note that, in some jurisdictions, litigation – regardless of its risks and costs – may be the only available path to meaningful indigent defense reform.<sup>43</sup> For example, Texas, Georgia, and Utah are states where the indigent defense crisis is acute. If the legislative and executive bodies in these states cannot reform the systems sufficiently, systemic litigation may be necessary,

. Texas is notorious for its public defense shortcomings. Before its passage of the Texas Fair Defense Act in 2001,<sup>44</sup> the county-run system was referred to as a “national embarrassment.”<sup>45</sup> This reputation was due to several factors: a lack of independence in the appointment of defense counsel; a lack of state financing for public defense; and a lack of statewide standards for the

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*supra* note 1, at 467-75. See generally Drinan, *Systemic Sixth Amendment Claims*, *supra* note 1.

<sup>43</sup> NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 210-211(2009) (discussing need for litigation when other options have been exhausted), available at <http://www.constitutionproject.org/manage/file/139.pdf>.

<sup>44</sup> See Diana Jennings, *Legal Defense for Poor Is Looking Better: Agencies Taking Steps Required by New Law, but the Jury Is Out*, DALLAS MORNING NEWS, Jan. 13, 2002, at 39A (describing components of the law).

<sup>45</sup> Fox Butterfield, *Texas Nears Creation of State Public Defender System*, N.Y. TIMES, April 6, 2001, at A14 (quoting state bar association report).

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appointment and performance of defense counsel.<sup>46</sup> Unfortunately, today, almost a decade after the state's enactment of public defense reform legislation, "Texas is reaching a crisis point, putting itself at risk of a civil rights lawsuit."<sup>47</sup> In particular, the state has failed to contribute meaningfully to public defense financing, and because the overall costs of public defense in Texas have nearly doubled since 2001, the counties are struggling to close a huge fiscal gap.<sup>48</sup> In 2009, statewide public defense services cost \$186.3 million dollars, but the state contributed only 15% of that amount.<sup>49</sup> The persistent lack of independence in the appointment of defense counsel in Texas<sup>50</sup> and the chronic under-funding of defense services by the state, coupled with the state's tough-on-crime reputation, make it a jurisdiction ripe for litigated reform, as local experts have already noted.<sup>51</sup>

Like Texas, Georgia has a long-standing reputation for failing its indigent defense clients, and it also has attempted to improve its defense services through legislative reform. In 2003, responding to years of

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<sup>46</sup> *Id.*; see also TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS OF INDIGENT DEFENSE PRACTICES IN TEXAS, (2000)

[http://texasappleseed.net/pdf/projects\\_fairDefense\\_fairreport.pdf](http://texasappleseed.net/pdf/projects_fairDefense_fairreport.pdf).

<sup>47</sup> Brandi Grissom, *Defenseless*, THE TEXAS TRIBUNE, May 19, 2010, available at <http://www.texastribune.org/stories/2010/may/19/defenseless/>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Editorial, *Fix the System: A Public Defender Office Would Improve the Quality of Justice Here While Saving Taxpayer Dollars*, HOUSTON CHRON., March 20, 2008, at B8 ("Although judges are supposed to use an impartial rotating list of available attorneys, in practice the system is easy to manipulate in favor of particular lawyers who might be friends or political contributors. An attorney who displeases a judge can be removed from the appointment list.").

<sup>51</sup> Grissom, *supra* note 47 (quoting the Texas Fair Defense Project's Executive Director as saying "The situation in Texas is not that different from the situation in states that have seen litigation.").

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criticism of its county-run system, Georgia enacted legislation that established a public defender within each judicial circuit, and in 2004 state funding for the system was enacted.<sup>52</sup> At the time, the state's reform efforts were cited as a model for other jurisdictions to follow.<sup>53</sup>

Unfortunately, the state has not maintained its exemplary status. Facing rising public defense costs, especially related to conflict cases, state legislators have considered returning thousands of indigent defense cases to county control – the very type of control that the 2003 legislation was designed to change.<sup>54</sup> Jamie Weis's case illustrates well the extent of the state's public defense crisis. In February, 2006, Mr. Weis was arrested and charged with a capital crime.<sup>55</sup> More than three years later, his case was finally placed on a trial calendar.<sup>56</sup> Despite Mr. Weis's claim that a lack of state funding for his defense counsel hampered his case and deprived him of his right to a speedy trial,<sup>57</sup> the Georgia Supreme Court ruled that the state may move forward with its case against Mr. Weis.<sup>58</sup> Moreover, as a result of the Court's ruling, Mr. Weis will need to work with replacement counsel, despite the fact that those public defenders are already overworked and lack the

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<sup>52</sup> GIDEON'S BROKEN PROMISE, *supra* note 40, at 30.

<sup>53</sup> *Id.*

<sup>54</sup> See also Bill Rankin, *Indigent Defense Legislation Delayed Until Next Year*, THE ATLANTA JOURNAL CONSTITUTION, Apr. 22, 2010, available at

<http://www.ajc.com/news/georgia-politics-elections/indigent-defense-legislation-delayed-484553.html>. See generally Bill Rankin, *Proposal Would Split Public Defender System*, THE ATLANTA JOURNAL CONSTITUTION, Feb. 24, 2010, available at

<http://www.ajc.com/news/georgia-politics-elections/proposal-would-split-public-326988.html>.

<sup>55</sup> Weis v. State, 2010 WL 1077418 at \*1 (Ga. Mar. 25, 2010).

<sup>56</sup> *Id.* at \*3.

<sup>57</sup> *Id.* at \*3-7.

<sup>58</sup> *Id.* at \*7; see also John Schwartz, *Murder Case May Proceed in Georgia*, N.Y. TIMES, Mar. 26, 2010, at A13.

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investigative and expert resources necessary to defend him.<sup>59</sup> The Southern Center for Human Rights has filed a petition for certiorari with the United States Supreme Court on Mr. Weis's behalf, arguing that Mr. Weis has a right to continuity of counsel and that Georgia's failure to provide funding for Mr. Weis's lawyers for over two years constitutes a "systemic breakdown in the public defender system" which "should be charged to the State for speedy trial purposes."<sup>60</sup>

Even though Georgia has had experience with systemic public defense reform litigation in the past,<sup>61</sup> its current state of affairs begs the question whether the jurisdiction may be ripe for litigated reform again. Indeed, if the state's public defense funding crisis can bring most of its capital cases to a "standstill,"<sup>62</sup> leaving defendants like Mr. Weis with no representation for years, the reform efforts of 2003 have not cured the state's fundamental defense problems, and a new round of systemic litigation may be on the horizon.

Utah remains only one of two states nationally that provides no state funding toward public defense services,<sup>63</sup> and it ranks forty-eighth in the nation for per capita spending on indigent defense.<sup>64</sup> Further, the state provides no oversight, training or quality standards for the various counties that provide representation to indigent

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<sup>59</sup> See Petition for Writ of Certiorari, *Weis v. State*, (No. 09-10715), 7-8, 23-24, (May 10, 2010),

<http://www.abajournal.com/files/WeisCertPetition.pdf>.

<sup>60</sup> *Id.* at 26 (citation omitted).

<sup>61</sup> See GIDEON'S BROKEN PROMISE, *supra* note 40, at 30 (citing lawsuits by the Southern Center for Human Rights and the NAACP designed to improve the state system prior to the 2003 legislative overhaul).

<sup>62</sup> Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, Mar. 22, 2007, at A16.

<sup>63</sup> JUSTICE DENIED, *supra* note 43, at 54.

<sup>64</sup> Tim Gurrister, *Ethridge Keeps Defenders, Waits for Dentist*, STANDARD-EXAMINER, May 8, 2010, 2010 WLNR 9568022.



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defendants.<sup>65</sup> Counties are free to choose their own systems for the delivery of public defense services, and historically, most counties have chosen a contract or assigned counsel system.<sup>66</sup> Recently, one of the two Utah counties that had been operating a public defender office closed that office and moved to a flat-fee contract system as a cost-saving measure.<sup>67</sup>

The American Civil Liberties Union (the “ACLU”) recently intervened in a Utah capital case where the state has tried to remove the defendants’ two lawyers, both of whom were previously employed by the now-defunct public defender office.<sup>68</sup> The ACLU and the public defense attorneys in the case argue that their client is constitutionally entitled to continuity in his representation, similar to the claim asserted in the *Weis* case in Georgia.<sup>69</sup> Further, the ACLU brief raises systemic concerns, in particular the fact that the state fails to fully comply with *any* of the Ten Principles that the ABA uses to measure the efficacy of a public defense delivery system.<sup>70</sup> The state’s persistent absence from the public defense function, excessive caseloads, and a high-profile capital case that drives home the cost of a broken system, make Utah a jurisdiction that may see systemic litigation in the near future.

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<sup>65</sup> David Carroll, *Gideon Alert: Right to Counsel Threatened After Utah Public Defender Office Closes*, Apr. 22, 2010, available at [http://www.nlada.net/www.nlada.net/library/article/ut\\_righttocounselanddp04-22-2010\\_gideonalert](http://www.nlada.net/www.nlada.net/library/article/ut_righttocounselanddp04-22-2010_gideonalert).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Tim Gurrister, *ACLU Accuses Weber of Cost-Cutting in Double-Murder Defense*, STANDARD-EXAMINER, April 23, 2010, 2010 WLNR 8442940.

<sup>69</sup> Request for Leave to File Brief of Amicus Curiae in Opposition to Motion for Substitution of Counsel, *State v. Ethridge*, No. 018901539 (Sec. Jud. Dist. Ct. Weber County April 20, 2010), [http://www.acluutah.org/Ethridge\\_042010\\_motion\\_amicus.pdf](http://www.acluutah.org/Ethridge_042010_motion_amicus.pdf).

<sup>70</sup> *Id.* at 3.

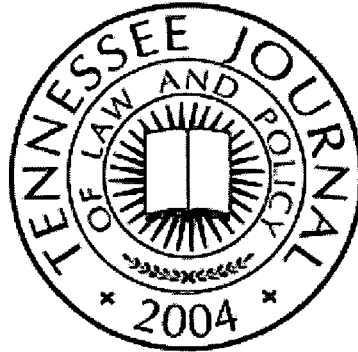
### Part III: Conclusion

Even in the wake of the Michigan Supreme Court's *Duncan II* decision, there is a role for systemic indigent defense litigation to play. Litigation can be an impetus for legislative action; it can generate media attention that informs the public; and it may, as the New York suit demonstrates, even make it to trial. Going forward, litigants need to be thoughtful about selecting jurisdictions where they seek judicial reform. At the same time, they need to continue to press for a federal forum for these types of claims in order to minimize the majoritarian pressure to be tough on crime that may weigh on elected state judges. Finally, the federal government needs to be at the forefront of nationwide indigent defense reform. It can do this in a number of ways, as scholars have discussed and as the newly created Access to Justice Initiative within the Department of Justice has explained.<sup>71</sup> For example, the federal government can file amicus briefs in ongoing state litigation like the New York suit; it can generate critical data that enables states to measure systemic defense shortcomings; and it can use its bully pulpit to inform the public as to why access to counsel is so vital to all citizens. Whatever priorities it chooses to set in this realm, it is clear that going forward, when state judicial and legislative bodies turn a blind eye to indigent defense crises, the federal government cannot stand on the sidelines.

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<sup>71</sup> On June 19, 2010, at the American Constitution Society National Convention, a panel of experts discussed the "federal role in improving indigent criminal defense." Many proposals, including some mentioned here, like the filing of amicus briefs, were discussed by panelists. The panel may be viewed here: <http://www.acslaw.org/node/16402>.

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**NATIONAL PUBLIC DEFENSE SYMPOSIUM**

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:  
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**REMARKS OF LAURIE ROBINSON  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF JUSTICE PROGRAMS  
UNITED STATES DEPARTMENT OF JUSTICE**

**KEYNOTE ADDRESS**

**THURSDAY, MAY 20, 2010**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW**

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LAURIE ROBINSON: Thank you, Norm. It's good to see you again, and it's great to be here among old friends and colleagues.

I'd like to thank the sponsors of this symposium: the University of Tennessee College of Law, the *Tennessee Journal of Law and Policy*, the Justice Project, and of course the American Bar Association—where I spent my formative years as a criminal justice professional.

I'd be remiss if I didn't begin by acknowledging all the great work the ABA has done to advance the cause of adult and juvenile indigent defense over so many decades. I know a lot of people. No small number of organizations has devoted their energies to this issue, but the ABA has really been in the vanguard. Some might say I have a little professional bias here, but I doubt many would dispute the claim.

Of course, one of the pioneers in indigent defense is seated at my table here. I don't want to embarrass him, but I don't know where we'd be without Norm Lefstein. I can think of no one who has done more to diagnose the problems in public defense and to improve the professionalization of the field.

Norm understood, early on, that the promise of counsel pronounced by *Gideon*<sup>1</sup> was not enough. The effectiveness of representation was essential. As he said back in 1982 in his report, *Criminal Defense Services for the Poor*, "If providing an attorney to the poor is to be meaningful, it is essential that the lawyers render effective legal assistance."<sup>2</sup>

Norm has always believed that our responsibilities to the disadvantaged in the justice system do not end with a perfunctory nod to the Constitution. We must work

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

<sup>2</sup> Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, American Bar Association (1982).

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diligently to overcome the obstacles to ensuring effective counsel, whether they be inadequate training, excessive caseloads, insufficient resources, or just plain apathy.

We all owe Norm a tremendous debt of gratitude for his work. So thank you, Norm Lefstein.

As you can see, I'm proud of my association with Norm and with the ABA. Their work in indigent defense is finally getting the attention and respect it deserves on the federal level, thanks in part to an Attorney General who values the role of the public defense bar. At the National Symposium on Indigent Defense that we held in February, Attorney General Eric Holder said, "the fundamental integrity of our criminal justice system, and our faith in it, depends on effective representation on both sides."<sup>3</sup>

For Eric Holder and this Department of Justice (DOJ), equal justice under law is not a mere outgrowth of important legal principles, but the bedrock of American jurisprudence. He shares the belief stated in the ABA's Standards for Providing Defense Services, that "[o]ur system of justice is a reflection of our societal development, and the furnishing of adequate defense services a measure of our justice system."<sup>4</sup>

Only a few months after he had been in office, the Attorney General revived the Department's dormant efforts to address the indigent defense crisis in our country. The Department had already taken some serious steps in the 1990s, when I served my first stint as Assistant Attorney General.

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<sup>3</sup> Eric Holder, Attorney Gen. of the U.S., Looking Back, Looking Forward, 2000-2010, National Symposium on Indigent Defense, Washington D.C., Feb. 18, 2010, *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>.

<sup>4</sup> American Bar Association Criminal Justice Standards Committee. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 26 (3rd ed. 1992), *available at* <http://www.abanet.org/crimjust/standards/providingdefense.pdf>.

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Eric Holder was part of that work when he served as Deputy Attorney General under Janet Reno. Now he's picking up where we left off.

Last June, he spoke at the American Council of Chief Defenders Conference, where he laid out the Department's goals for improving the indigent defense system. This is always something of a risky proposition—committing an agency the size of DOJ, with all its competing priorities, to a course of action on a major issue like indigent defense. But this is something that Eric Holder is passionate about. And I'm happy to say that, under his direction, the Justice Department has already taken a number of important steps.

First of all—as he promised in his speech last June and as I mentioned earlier—we've already held a National Symposium on Indigent Defense. We brought together about 500 people from across the country, and from across the criminal and juvenile justice spectrum. Then the Attorney General brought in Professor Larry Tribe from Harvard to head up the Department's Access to Justice initiative. That was sort of a bittersweet moment for me because I lost one of my key staff—a former Miami public defender—to Larry's office.

But it was for the greater good, and Larry and his staff have been working with components throughout DOJ to determine ways to bring defenders to the table on issues that affect the system as a whole. And I can assure you that the program plans emerging from this new office will feature indigent defense “front and center.”

And then in my agency, the Office of Justice Programs, we've found many ways to devote our resources to supporting public defense.

Last year, our Bureau of Justice Assistance (BJA) launched an Indigent Defense Hiring Project. We funded ten jurisdictions to hire additional public defenders to reduce case loads and improve the quality of

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representation, including a site right here in Knox County. We'll be funding four additional jurisdictions this year.

We're providing seed money for a National Fellowship Program aimed at increasing the number of qualified public defense lawyers. I'm really excited about this because this is a great field-initiated program being run by the Southern Public Defender Training Center in partnership with Equal Justice Works. It's modeled on Teach for America, which brings talented young people into schools in low-income communities. It will provide three-year fellowships to recruit and train top law school graduates to work as public defenders in underserved areas. We're also providing funding to expand the Bronx Defender Holistic Advocacy Program. This is an interesting initiative because it addresses both the causes and consequences of involvement in the criminal justice system. It offers both legal representation and social support and advocacy. The project is developing an online resource center and providing targeted technical assistance to public defender offices across the country.

BJA has several projects designed to improve the quality of access that defendants receive in court. For example, this summer we'll be making an award under a program called Improving Court Communication. This is part and parcel of a research-backed movement to ensure procedural fairness in the justice system. Basically, what the research is telling us is that defendants who understand what's going on in their encounters with the system—including in court—perceive the process as fair, and this perception of fairness leads to higher compliance with the law.

What all of you know better than anyone is that indigent defendants too often do not understand the court process. The purpose of this project is to train judges and other courtroom actors on communicating more effectively

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so that those who come into court get the information they need to fully and fairly participate in the system.

BJA is also reviewing grant proposals under its Wrongful Conviction Review Program. The purpose of this program is to try to ensure that defendants with post-conviction claims of innocence have high quality representation.

And we're looking at applications under our Capital Case Litigation Initiative, which supports training and technical assistance on death penalty issues. These funds go to state agencies, which then split the money equally for the training of defense attorneys and prosecutors. I think this is important to note because we know that public defenders have historically been severely underfunded relative to the rest of the justice system.

We're also taking great pains to address issues of defense in juvenile proceedings. If we're experiencing a crisis in indigent defense in the adult system, we should probably call what's going on the juvenile side a catastrophe.

On Monday of this week, our Office of Juvenile Justice and Delinquency Prevention released a bulletin on conditions of confinement, which summarizes findings from the *Survey of Youth in Residential Placement*.<sup>5</sup>

One of the *Survey's* findings is that just one-half of those in detention facilities have a lawyer. This is a disturbing finding given that it's been thirty years since the ABA and the Institute for Judicial Administration published their *Juvenile Justice Standards* advocating legal representation for juveniles from the outset of the court process. To be sure, the survey is based on self reports of youth in custody, but I think that only serves to underscore

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<sup>5</sup> Andrea J. Sedlak, *Introduction to the Survey of Youth in Residential Placement*, JUVENILE JUSTICE BULLETIN (U.S. Dept. of Justice Office of Justice Programs), Mar. 2010, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/218390.pdf>.



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a persistent problem—that youth in court often perceive the system as stacked against them.

We're still dealing with a host of problems in the juvenile system: Youth who are explicitly or implicitly encouraged to waive the right to counsel; courts that appoint counsel too late in the process; and sub-standard representation due to administrative impediments.

The National Juvenile Defender Center characterized it this way in its recent publication, the *Role of the Juvenile Defense Counsel in Delinquency Court*.<sup>6</sup> It said, “many juvenile courts still operate in a pre-*Gault* mode in which the defense attorney is irrelevant, real lawyering cannot occur, and the fair administration of justice is impeded.”<sup>7</sup> The result is that the situation identified by the Supreme Court forty-three years ago remains: juveniles in court still receive “the worst of both worlds . . . neither the [legal] protection[s] accorded [to] adults nor [adequate treatment].”<sup>8</sup>

Our Office of Juvenile Justice and Delinquency Prevention (OJJDP) is working to improve the juvenile justice system through a range of reforms—from detention alternatives to juvenile reentry programs. Improving juvenile defense is a critical component of our efforts.

In fact, I'm pleased that we recently posted a solicitation to fund a Juvenile Indigent Defense National Clearinghouse. We envision that this clearinghouse will provide a broad range of activities aimed at raising the level of systemic advocacy, improving the quality of representation of indigent juveniles, and ensuring necessary technical support for the juvenile indigent defense bar.

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<sup>6</sup> Robin Walker Sterling, *Role of Juvenile Defense Counsel in Delinquency Court*, (Nat'l. Juvenile Defender Ctr.) Spring 2009 at 1, available at [http://www.njdc.info/pdf/njdc\\_role\\_of\\_counsel\\_book.pdf](http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf).

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 1.

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OJJDP will make one award for as much as \$500,000. We're accepting applications until June 24, 2010. I encourage those of you who represent juveniles, or who work with those who do, to consider this opportunity and let your colleagues know about it.

There are other areas in which we're working to support public defense. For example, the President's budget for next year seeks funds to augment the Census of Public Defender Offices administered by our Bureau of Justice Statistics. Currently, the survey focuses only on publicly-funded indigent defense offices and omits the work performed by contract attorneys and assigned counsel. So there are no current data that provide national-level estimates of public defense services. The expanded survey will give us a clearer picture of the state of indigent defense and will help us to better assess the training and resource needs of the field.

The President's budget also requests funding for a National Delinquency Court Improvement Program. Addressing juvenile defense is a critical component of this. Another bit of good news is that we're close to releasing our solicitation for the John R. Justice Program. For those of you who aren't familiar with it, John R. Justice is a loan repayment program for state and federal public defenders and state prosecutors who agree to remain employed as defenders and prosecutors for at least three years. BJA is working with the governor's office in each state to designate an agency to administer the program, and we expect funds to be awarded to the states by the end of September.

I think—I hope—it's clear that our commitment to improving indigent defense is serious. The Attorney General has made a pledge to bolster the public defense bar, and we are following through. I believe that our nation's justice system is capable of great things. Unfortunately, parts of that system too often have failed

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those who have been—as Anthony Lewis put it in *Gideon’s Trumpet*—“tossed aside by life.”<sup>9</sup> The system has tremendous potential, but it needs guidance and support.

Justice Felix Frankfurter had written even before *Gideon*, “the history of liberty [is] largely . . . [the] history of [the] observance of procedural safeguards.”<sup>10</sup> Sometimes, our highest ideals fail to play out amid unwarranted fear and old habits. The way to overcome those psychological barriers is to pull together and recognize that we all share the same goal, and that is a system of law that honors the dignity of every person.

That’s what you’re doing here through this symposium, and that’s what we’re trying to achieve in our work at the Department of Justice. I commend you for the good work you do every day on behalf of the poor and disadvantaged, and I hope you’ll continue to see us as your partners in improving the indigent defense system in our country. Thank you.

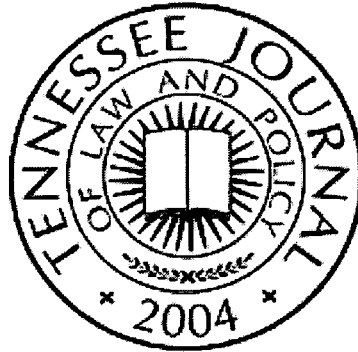
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<sup>9</sup> ANTHONY LEWIS, *GIDEON’S TRUMPET* (Random House 1964).

<sup>10</sup> *McNabb v. United States*, 318 U.S. 332, 347 (1943).

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**NATIONAL PUBLIC DEFENSE SYMPOSIUM**

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:  
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**“DEALING WITH EXCESSIVE CASELOADS WITHOUT  
LITIGATION”**

**PANEL ONE**

**THURSDAY, MAY 20, 2010  
AFTERNOON SESSION**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW**

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**SYMPOSIUM INTRODUCTION:**

PROFESSOR PENNY J. WHITE,  
Director, Center for Advocacy & Dispute Resolution  
Faculty Advisor, Tennessee Journal of Law & Policy

**PANEL ONE SPEAKERS:**

ROBERT STEIN,  
Chair, ABA Standing Committee on Legal Aid  
and Indigent Defendants  
Washington, D.C.

JOHN TERZANO,  
President and Co-Founder, The Justice Project  
Washington, D.C.

NORMAN LEFSTEIN,  
Professor of Law and Dean Emeritus  
Indiana University School of Law – Indianapolis

AVIS BUCHANAN,  
Director, DC Public Defender Service  
Washington, D.C.

ROBERT BORUCHOWITZ,  
Professor from Practice,  
Seattle University School of Law  
Seattle, Washington

DENNIS KEEFE,  
Public Defender, Lancaster County, Nebraska

JAMES R. NEUHARD,  
Chief, State Appellate Defender Office  
Detroit, Michigan

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PENNY WHITE: Good afternoon. It is my privilege on behalf of the University of Tennessee College of Law, The Center for Advocacy and Dispute Resolution, and the *Tennessee Journal of Law and Policy* to welcome you. I'm Penny White and I am the director of the Center and the faculty advisor for the policy journal. The law school community is extremely honored to co-host this significant event, because the fundamental issues which this symposium address literally and figuratively make up the bricks and mortar of this institution.

If you're a guest, you may have entered via Cumberland Avenue. If you did and you looked up at the entrance of the College of Law, you saw the phrase "Equal Justice Under Law." But if you entered instead from the White Avenue entrance and looked up you saw the words of the Sixth Amendment, "To Have the Assistance of Counsel."<sup>1</sup> It is more than coincidence that these two principles flank the University of Tennessee College of Law, and that the Sixth Amendment's specific promise is on slightly higher ground than its more inexact counterpart.

That juxtaposition should remind us that equal justice cannot be accomplished without the more certain guarantee of the right to counsel. But setting architecture aside, at the UT College of Law, home of the longest and continually existing legal clinic in the country, it is our mission to do far more than chisel those fundamental principles in the entryways of our buildings. It is our mission and indeed our privilege to seek to instill them into our students' hearts, and that is why we are so proud to be involved in this important moment in history. Sometimes great history is made in unexpected places by unsuspecting and often unsung heroes.

Last year on April 4th, 2009, hundreds of Tennessee lawyers, law students, and other volunteers spent thousands of hours in dozens of legal clinics across the state providing

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<sup>1</sup> U.S. CONST. amend. VI.

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free civil legal service to some of Tennessee's more than one million citizens who live at or below the legal services eligibility threshold—as a part of the Tennessee Bar Association's “Justice For All” campaign. They did so based on a personal and professional commitment to equal justice and the right to counsel—not for recognition. But, at the end of the day, those lawyers and law students, paralegals, and other volunteers were unsuspecting heroes in the making of history. Just last week the ABA and the National Legal Aid & Defender Association (NLADA) announced that the Tennessee Bar Association would receive the esteemed Harrison Tweed Award honoring extraordinary achievements in increasing access to legal services for the poor. Our state, our bar, and our judiciary will take great pride in the receipt of that award, as well we should. But that pride can be increased tenfold if we devote equal energy and experience to similar success in providing legal services for the indigent accused.

I would like to think that our state's success, and the Tennessee Supreme Court's present commitment to the issue of civil access to justice, can serve as a kind of dress rehearsal for the work we must now do to improve Tennessee's indigent defense system and the indigent defense systems in this country. The necessary nuts and bolts for that improvement will be in the programs of which you will hear over the course of the next day and a half—programs that will be presented by many unsung heroes. I hope that one day we all reflect back upon the symposium and realize that we played a role in the making of history by taking steps necessary to achieve the promise of the Sixth Amendment.<sup>2</sup> So thank you for being here and thank you for being a part of this crucial endeavor.

Let me close by acknowledging very briefly what a wonderful experience it has been for me personally to work with Norm Lefstein, Georgia Vagenas, and Tamaara

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<sup>2</sup> *Id.*



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Piquion from the ABA on this project. It will become abundantly clear to you how talented they are as you experience the program for which they are responsible. Also, I want to introduce you to a few extra sets of hands who work with the Center in the College of Law and who are here to help for the next day and a half should you have any needs. First, Mark Ensley, who is the Center's Administrative Assistant, and is basically responsible for the technology and the fact that we are streaming this presentation live. Behind him, simply by position at this point, is Jeff Groah who is a tech advisor for the College of Law. Also, Jessica Van Dyke, seated on the front row, is the Symposium Editor for the *Tennessee Journal of Law and Policy*, and we've even pulled Monica Miller, who is Mark's wife, and outside right now, to help out should you need more assistance.

We are transcribing the symposium proceedings with the help of able court reporting staff from Watts-Boyd, so I urge you to keep that in mind when you speak either as a panelist or a participant. For those of you who are contributing articles to the symposium which will also be published, we remind you of the June 1 deadline and ask you to get in touch with Jessica about making sure we have your manuscript. And for all of you, if you're interested in purchasing a copy of the symposium proceedings, you simply fill out the blue form that you got at registration, and we'll make sure that you get one.

Finally, all of the programs, except for tonight's dinner, will be housed in this room. For those of you who are attending the dinner, it is being held at the Howard Baker Center for Public Policy, which is two blocks west, across Cumberland Avenue on the north side of the street. It took me about ten minutes to figure that out, because I'm directionally impaired. If you, like me, are directionally impaired, it is at the corner of 17th and Cumberland and it is marked wonderfully on this map which is also at the

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registration desk.

So, I thank you again for being here. It is our honor to be a part of this symposium. And I'm now pleased to turn the podium over to Bob Stein, who is the chair of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, a major sponsor of this symposium. Bob?

ROBERT STEIN: If this works, if I can figure it out. Well, I'll stand.

PENNY WHITE: No, it will work.

ROBERT STEIN: It does work. Thank you, Penny, very much. SCLAID, the Standing Committee on Legal Aid and Indigent Defense, is really very happy to be a co-sponsor of this program because for no other reason than this is what we do. This is one of the issues that is of most concern to us.

Let me provide a little background for those of you who don't know about SCLAID. We are ninety years old this year, and it is the ABA's longest running continuous committee, which was established to examine issues related to the delivery of legal services to the poor in both criminal and civil matters. Over the past twenty years, SCLAID has provided expert support and technical assistance to individuals in organizations seeking to improve indigent defense systems throughout the nation.

SCLAID has also commissioned studies and research papers on a range of state and local defense systems. We have authored policy proposals adopted by the ABA through the House of Delegates that are used throughout the country to improve indigent defense representation. You can see the results of some of those policies with our Eight and Ten Standards (*ABA Eight Guidelines of Public Defense Related to Excessive*

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*Workloads*<sup>3</sup> and *ABA Ten Principles of a Public Defense Delivery System*,<sup>4</sup> which are available, I think, just outside the door.

Currently, in addition to our continuing work, we are beginning a project to develop language access standards for state courts and also, thanks to a grant from the Justice Department, CJA, and in partnership with the Spangenberg Project at George Mason University, we are going to be engaging in the training of public defenders. Today's symposium is a result of the really successful collaboration of many entities, including the Center for Advocacy and Dispute Resolution and our host, the University of Tennessee College of Law, the *Tennessee Journal of Law and Policy*, the Justice Project, ABA Death Penalty Representation Project, and the ABA Criminal Justice section.

We are very grateful to the Atlantic Philanthropies and the Justice Project for providing the grant that made this event possible. The program is part of a larger three-year-long project that involves the development of ABA standards on workloads and the publication of the first-ever guidebook on how to secure manageable caseloads in public defense. Norm Lefstein will make sure that you learn about the guidelines in the publication in great detail throughout this program.

I'd also like to thank those people who have worked so hard for the past year to bring together this event. It could not have been possible without their work.

I'll start with Norm, the chief architect not only of

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<sup>3</sup> ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOAD, (2009) *available at* [http://www.abanet.org/legalservices/sclaid/defender/downloads/eight\\_guidelines\\_of\\_public\\_defense.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.pdf).

<sup>4</sup> ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, (2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

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this program but of the far larger project from which this program emerged. For the past three years, Norm has been working virtually nonstop on drafting and helping to pass the ABA standards on workloads, called the *Eight Guidelines on Public Defense Related to Excessive Workloads*. As I said, those are available outside. He is currently finishing a guidebook on a how to achieve manageable caseloads. I've been told that Norm is technically retired. The word that I use, rather than retired, is re-focused. But, there is no *re* in his focus. His focus has been consistent, and the public defender community is the beneficiary of that effort. Norm has been a long-standing member of SCLAID, leading its Indigent Defense Advisory group for many years, and we sincerely hope that we will be able to continue to claim him and his talents for some time to come.

Next is Penny White, who helped plan this symposium, in particular the death penalty portion of the program, and she has already mentioned Mark Ensley of her staff. There are two people from the Justice Department: John Terzano, who is not here but I hope he will be here shortly and Joyce McGee, who administered the grant and helped with the planning. Brad MacLean of the Office of Post-Conviction Defender in Nashville and Robin Moore of the ABA's Death Penalty Representation Project assisted on that portion of the program. As chair of SCLAID, I use every opportunity that I can to thank our staff who have planned the details, assisted with the development of the guidelines and whose work really is instrumental in SCLAID's work over the past years. Terry Brooks is in the back, our counsel and director of the ABA's Division of Legal Services. *Georgia Vagenas* and Tamaara Piquion are here and also Lavernus Hall, administrative assistant with our committee, who is not here. All the number of members of SCLAID, including Jean Faria, who is the chair of the advisory group, Adele

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Bernhard, Bob Weeks, and Kim Duggan, who is not here, have worked hard on this as have the Indigent Defense Advisory Group members—Jim Neuhard, Bob Boruchowitz, Ed Burnette, Jim Bethke, and Dennis Murphy—who I think are all here. The consultants that we have worked with, I've mentioned the Spangenberg Project and Jon Gould, are here. Finally, I would like to thank all of you. We could do all of this planning and produce all of these materials, but if you didn't come to participate, contribute, and let us know of your own expertise it would not be the success that I know it will be. Thank you.

NORMAN LEFSTEIN: Good afternoon, Ladies and Gentlemen. I offer my words of welcome along with those you've already received from Bob Stein and Penny White. I want to thank Penny and Bob for their generous comments about my role in planning this conference. It's been in the making for a while, and we're glad to see so many folks here this afternoon. I know we'll be joined by others later in the program. This is an unusual program, because it combines both indigent defense in non-capital cases as well as indigent defense in the capital area. I can't recall another program that has covered both of these subjects in a single program.

There is a comment in the program announcement about my presentation which involves a bit of false advertising. It indicates that I've been working on a book dealing with caseloads in public defense and that a pre-publication copy of it would be available. In fact, the book is not finished, but much of it is finished. You've all been given a flash drive which includes six chapters of the book, and I invite your comments on my draft. If you access the flash drive and have comments on what has been prepared, I would welcome hearing from you.

There will be some additional editing of the chapters and the footnotes. I do have an admonition at the very

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beginning of each chapter in which I indicate that I ask that the material not be quoted, cited, or reproduced for publication without my written permission. But, if you have a good reason for why you want to reproduce it or to disseminate it to others, very likely I'd be glad to give my written permission. I expect to complete the book by the end of the summer and have it published, I hope, sometime later this year.

Bob Stein seemed to imply that the book will somehow solve the problem of excessive caseloads in public defense in the United States. I think that may overpromise what I'm able to deliver. But I hope it will, nevertheless, be quite helpful. There has been a review committee for what I have been drafting that has been extremely helpful to me, known as the Indigent Defense Advisory Group. Bob Stein already named the members of that group. They also are listed at the very beginning of the booklet of the *Eight Guidelines of Public Defense Related to Excessive Workloads* and chaired by Jean Faria, the State Public Defender of Louisiana. I also want to make clear, however, that if there are things with which you disagree in my drafts or find errors or mistakes of any kind, those are my doing and certainly not attributable to my review committee.

Incidentally, all of the materials for this conference are on the flash drive that you should have received when you registered. The only part that is not part of the flash drive is these *Eight Guidelines* that have just recently been printed. In fact, they arrived from the printer this week. The same version of them is on the ABA's indigent defense website, [www.indigentdefense.org](http://www.indigentdefense.org).

For many years, and especially recently, as all of you I suspect are just as aware as I am, there have been countless reports, both local and national, that have talked about the terrible problems of excessive caseloads in public defense and how they intrude upon the ability of

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lawyers to provide competent and diligent representation as required by *Rules of Professional Conduct*, and they lead, as I have often said, to the rendition of second-rate legal services in public defense, through no fault of the lawyers themselves.

Two reports of national scope were released in 2009. One of these was one on which I worked on behalf of the National Right to Counsel Committee—*Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*<sup>5</sup>—and an abbreviated version of that report is available for distribution here at today's meeting. The other report, which was published by the National Association of Criminal Defense Lawyers, deals with the lower courts in the United States, and also documented the problem in the lower courts where the caseloads are sometimes absolutely outrageous. Just this past Sunday, once again the *New York Times* editorially commented on caseloads, stating, "Public defender offices are perilously short on financing and struggling with overwhelming caseloads."

As a law professor—someone who likes to see lawyers trained properly while in school, see them graduate and go into public defender offices throughout the country, and then sees what those caseloads do to the lawyers and their ability to deliver effective representation—it is truly heartbreaking. On behalf of the Knoxville Public Defender Program here in this city, I testified as an expert witness in 2008 for Mark Stephens, the public defender who heads that program. One of my vivid memories was listening to the testimony of a recent law school graduate, who came from what appeared to be an outstanding criminal defense clinic of this law school. She explained what happened to

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<sup>5</sup> NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://2009transition.org/justicedenied/>.

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her when she went into Mark's program. Although she still had the same dedication that she had as a law student, because Mark's office was overwhelmed with cases, she was unable to provide the kind of representation that she had been accustomed to providing as a member of the criminal defense clinic here at the law school.

In the book that I'm writing, I try to illustrate the problem of excessive caseloads and explain how the idea of writing a book on the subject developed. A couple of years ago, I got an e-mail out of the blue from a public defender in a northeastern city—he had read an article of mine dealing with excessive caseloads. He said, "I've got 325 cases. People are charged with misdemeanors and some felonies and are going to jail because I cannot adequately represent them, and I need to file motions to withdraw." So I told him, "You need to go to your supervisor, to the head of the office, and then file motions to withdraw if relief is not provided." So he did what I suggested. He went to his supervisor, and he went to the head of the office. To make a very long story short, the head of the office said, "We do triage here. If you file a motion to withdraw, I'll have you fired because that would not be good for this office."

Ultimately, under enormous pressure from management of the defender office, applied over a period of about five or six months, he backed down. He never filed any motions, and he quietly left the office. But there are defenders—I'm absolutely convinced of it, and I have heard stories anecdotally—who have been fired for challenging their caseloads just like the lawyer in my story did. Excessive caseloads in this country among public defense programs have persisted for years despite all kinds of efforts to avoid the problem. There are ABA standards dealing with the subject. There is an ABA ethics opinion, with which SCLAID was very much involved. I was personally involved in that effort, as was Jim Neuhard, the State Public Defender in Michigan, and we urged the



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ABA's ethics committee to write its opinion on the subject, and they issued an opinion that was published in 2006. The most recent effort to deal with the problem has been the ABA's *Eight Guidelines on Excessive Workload*. And, of course, there have been efforts made in various states to deal with the problem both formally in court and informally. Well, what can be done about excessive caseloads?

What I want to do in these remarks is two things, and I want to try to finish as close to 2:30 as I can—when our first panel is scheduled to begin. The first thing I want to do is to give you an idea of what my book will cover. Hopefully, my remarks will give you an idea of why I have undertaken this project. Secondly, I want to talk about some of the conclusions and recommendations I have to offer on a subject that has received all kinds of conclusions and recommendations from many over a period of many years. The title of the book is what you see before you on the slide. Chapter One begins by explaining why there has been a failure to implement the right to counsel due to excessive caseloads. The reasons are ones with which you are familiar. Obviously, there's not enough money, and the defense function often lacks independence. But I'm absolutely convinced that the reasons go beyond these, because there are fundamental structural problems in the way public defense in the United States is organized. And one of the real problems for the defense is that frequently they have absolutely no control over intake. The defender program so often is at the total mercy of the prosecutor and the numbers of cases that are pumped into the system.

Chapter Two is a detailed analysis of all of the legal authority that supports defenders—both management and individual lawyers—in resisting excessive caseloads. Ethics opinions, rules of professional responsibility, and standards, for example, provide strong support for defenders.

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Chapter Three addresses the detrimental effects and risks of excessive caseloads. And, in looking at this slide this morning, I realized that I left something out—the risk of disciplinary sanction that arises from excessive caseloads. There are cases where lawyers have gotten into all kinds of disciplinary trouble and the lawyer’s caseload was the source of the problem. I also deal with Section 1983 civil rights litigation in this chapter, and its relationship to excessive caseloads. And I deal with malpractice liability, as well as ineffective assistance of counsel and their relationships to excessive caseloads.

Then in Chapter Four, I take up a subject that has long troubled me and to which I thought there needed to be an answer in this book. The subject is simply this: Why is it that there are pervasive, excessive caseloads throughout the country but there are almost no instances where individual lawyers have challenged their caseloads in court proceedings? Well, I think the answer lies in principles of social psychology and organizational culture. Perhaps my discussion of this issue will stimulate some additional lawyers to challenge their caseloads. But I have concluded that if there are going to be frequent caseload challenges, they will have to be brought by management, and hence the title of the Chapter Four is “Understanding Lawyer Behavior and Why Leadership Matters.”

Chapter Five talks about remedies for defenders terminated due to caseload challenges, and it harkens back to the story told in the book’s Introduction. When a lawyer is willing to challenge his or her caseload and is threatened with termination or is actually terminated, does the defender have any recourse available? The answer usually is yes. Although the issue, insofar as I can determine, has never actually been litigated in the U.S. This issue took me into a realm of law of which I knew relatively little, namely, employment law. Because there is a good argument to be made that a public defender who is

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dismissed for challenging his or her caseload can bring an action for wrongful termination or retaliatory discharge. And I think lawyers who are providing defense representation need to understand that area of law, and management needs to understand it as well.

Now, the rules are different if there is a union contract, as there are defenders in labor unions in a number of places in this country. In such circumstances, the union contract controls, and public defenders will not be, as are probably a majority of defenders, employees-at-will. It is really the employment-at-will doctrine that is principally involved when there is a lawsuit for wrongful termination or retaliatory discharge.

Chapter Six is a chapter I've not written yet, but it will go beyond Chapter Three in *Justice Denied*, and deal with caseload litigation. What I want to do in Chapter Six, is talk primarily about the challenges to excessive caseloads that have been launched since the ABA's ethics opinion was issued in 2006.<sup>6</sup>

Chapter Seven is a subject that could really put you to sleep at night. It has to do with weighted caseload studies, i.e., determining how you decide how many lawyers are needed and the budgets required for defender caseloads. The chapter goes into the subject of weighted caseloads and seeks to explain a subject that I don't think is well understood. Although I mainly address weighted caseload studies, I also deal with some other ideas, including tracking the time that lawyers devote to their cases. There is one public defender program in the United States that has required their lawyers to track their time since the 1980s. And that is the program in Lincoln, Nebraska, headed by Dennis Keefe. And, for this reason, I invited Dennis, who is seated in front of me, to speak on our first panel this afternoon.

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<sup>6</sup> ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

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Chapter Eight deals with programs that I have visited that substantially control their caseloads. They are all somewhat different from one another. The Massachusetts Committee on Public Counsel Services (CPCS) is a statewide defense program, and its description is on the flash drive. The D.C. Public Defender Service, which I headed back in the 1970s, is an office that has controlled its caseload for years, going back to my days there in the late 1960s and early 1970's. The Private Defender Program in San Mateo County is unique, but it is not well known. I've spent time there visiting the program, and I will be writing it up this summer.

In the time remaining, I want to talk about the conclusions and recommendations that I've come to as a result of looking at the subject of excessive caseloads. Certainly, the first thing I ought to say is, just to underscore the point, that no magic bullet is available. There's nothing that is going to resolve this issue overnight, but I do think there are some ways of thinking about the problem that sometimes have not been given sufficient attention, and there are some things individual defense programs ought to consider.

First and foremost, if you look at the defense of indigents around the country, so often what we see are public defender offices with overworked lawyers who have been asked to provide virtually all of the representation in the jurisdiction. The role of the private bar has been de-emphasized, and the caseloads of the defender offices have outstripped their budgets, leading to disastrous results.

The ABA has long said in its standards that there needs to be the substantial and active participation of the private bar in defense representation. In fact, the private bar is the essential safety valve if defender offices are to avoid excessive caseloads, but that doesn't mean simply having lawyers providing unsupervised representation and receiving wholly inadequate compensation. The private bar

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needs to be adequately compensated, and their work needs to be overseen by experienced lawyers, and new lawyers need to be mentored. Also, the experience of the lawyers needs to be matched with the cases, but that isn't done in very many places. In Chapter Eight I write about the statewide program in Massachusetts where this is done, but this is not the usual situation in the U.S.

Certainly, if you look at Massachusetts and D.C., part of the reason for their success over the years in controlling caseloads has been the involvement of the private bar. If there were few private lawyers in D.C., for example, the Public Defender Service could never have achieved what it has over the last forty years. Avis Buchanan, the head of the D.C. program is here, and she will talk about PDS shortly.

In addition, I think it's important to consider some legislative solutions for controlling caseloads. There are statutes in several jurisdictions that make a difference, and their approach deserves attention. For example, in D.C., the statute states that the agency shall determine the best practicable allocation of its staff personnel to the courts.<sup>7</sup> Basically, this language has been used by the agency in arguing that it is in charge of its own caseload.

Similarly, in Massachusetts, CPCS, which has over 200 public defenders, has language in its statute, which states that the agency shall establish “specified caseload limitation levels.”<sup>8</sup> And the one time that this was challenged, the Supreme Judicial Court in Massachusetts said essentially that CPCS is in charge of its caseload, absent any showing of bad faith on its part. In Iowa, there is language in the state’s public defender statute that says that in the event of a temporary overload of cases, the public defender—and it's a statewide program in Iowa—the public defender shall return the cases to the court for

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<sup>7</sup> D.C. CODE § 2-1605 (2001).

<sup>8</sup> MASS. GEN. LAWS ch. 211D § 9(c) (2005).

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assignment to private lawyers.<sup>9</sup> I recently talked with the head of the Iowa program, who told me that this provision has been extremely helpful to the program and that probably half the cases in the state are handled by private attorneys.

On the other hand, there are statutes that present serious problems for defenders. In Florida<sup>10</sup> and Colorado,<sup>11</sup> probably the two worst examples in the United States, the statutes provide that if there is inadequate funding or too many cases, it's never a conflict of interest for the public defender to be required to take the cases, and thus courts shouldn't permit assignments of cases to be stopped or defenders permitted to withdraw. Here in Tennessee you have Rule 13 of the Tennessee Supreme Court, which at first blush you might read and say, well, that sounds pretty good.<sup>12</sup> I actually think it is a terrible rule, because it basically says that the public defender can get out of accepting additional cases if they make a "clear and convincing" showing that effective representation might not be possible. Well, where did that standard of clear and convincing evidence come from in the first place? It isn't part of the *Rules of Professional Conduct*. And the standard should be competence, not effective representation under the Sixth Amendment.<sup>13</sup> The reality is that in Tennessee, and in so many jurisdictions around the United States, the judges become the enforcers of excessive caseloads. When, in fact, excessive caseloads ought to be an issue between the defender program and its funding authority. Despite the structure of the *Rules of Professional Conduct*, which require lawyers to obtain court approval to withdraw from cases, I think it makes far more sense for

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<sup>9</sup> IOWA CODE ANN. § 13B.9(4) (West 2005 & Supp. 2010).

<sup>10</sup> FLA. STAT. ANN. § 27.5303(1)(d) (West 2009).

<sup>11</sup> COLO. REV. STAT. § 21-2-103(1.5)(c) (2009).

<sup>12</sup> TENN. S. CT. R. 13 (2010).

<sup>13</sup> U.S. CONST. amend. VI.

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the issue of caseloads to be dealt with between the defense program and those who actually provide the funding.

In Chapter Two and in the Conclusion of the book, I write about the National Advisory Commission on Criminal Justice Standards and Goals, and caseload numbers that the Commission published in 1973: for example, defense lawyers should not represent annually more than 150 felonies and not more than 400 misdemeanors.<sup>14</sup> And I simply say, without using this exact word, that these numbers were “garbage” in 1973, and they are equally wrong today. They never were empirically based. The commission that came up with those numbers did no work of their own. As the commentary to the report explains, they relied upon an earlier committee report of NLADA and they simply, “accepted” the numbers suggested by the committee as maximum caseload numbers. Good public defense programs in the United States and private lawyers cannot normally represent adequately, even with strong support staff, 150 felony cases a year—and not all cases are identical in any event.

The primary focus needs to be on how many cases the lawyer actually has at a given time, and, in view of the caseload, can the lawyers actually provide competent and diligent representation? I also think there is a need for a new culture among defense programs, in which caseloads are routinely assessed by lawyers and management. Too often, defender offices are overrun with cases and there is no time for this to happen. And, because the offices do not have strong supervision and mentoring programs, the lawyers often don't fully appreciate what they are not doing and what they need to be doing to adequately represent their clients. And sometimes, in litigation, where challenges have been brought by the defender office, the

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<sup>14</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS - COURTS, CHAPTER 13, THE DEFENSE (1973).

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individual lawyers don't want to step up to the plate and acknowledge that they might not have been doing what they need to do. The ABA's *Eight Guidelines on Excessive Workload* deal with this issue. The *Guidelines* are aimed at changing the culture in public defense in the United States because they require management to assess the caseloads of their lawyers on a regular basis and to make adjustments if those caseloads are too high. They also deal with the training of lawyers and encourage defenders, through the training they receive, to come to management if they have concerns about their caseloads. Obviously, I think there needs to be adherence to the ABA's *Guidelines on Excessive Workload*, which are intended to help implement the ABA's 2006 ethics opinion.

I want to conclude with a few comments about litigation. I feared that there might not be time for questions, but there will be time for questions at the conclusion of the first panel. My hunch is that the next thing I'm going to say will be especially provocative to some of you. The slide before you suggests that there has been minimal use of litigation since mid-2006. It was July 2006, though dated May 2006, when the ABA issued its ethics opinion. At the time, there were some people who predicted there would now be all kinds of efforts made to challenge excessive caseloads throughout the country. The reality is that this has not happened. There have been four prominent cases brought in courts, and these were direct challenges to excessive caseloads. In three of the cases, the challenges were brought on behalf of an entire defender program. In a New Orleans case, however, the case was brought on behalf of a single defender lawyer, but the head of the New Orleans office basically brought the case. The other three cases were in Kingman, Arizona; Knoxville, and in Dade County, Florida, and in each of the cases the defenders were assisted by pro bono counsel from civil law firms: in the Tennessee case, by Max Bahner and his law



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firm in Chattanooga, which did outstanding work; in Dade County, by the law firm of Hogan & Hartson in the Miami office; and in Kingman, Arizona, by a firm headed by Mark Harrison along with his partners in Phoenix, Arizona.

The Kingman case was won in the trial court and was not appealed. The New Orleans case essentially fizzled out after it went up to an appellate court which remanded for a further hearing, and the caseloads in New Orleans are still too high. In Knoxville and Dade County, the cases are still in the appellate courts even though the hearings in the cases were held in 2008. And just this morning, I learned from Rory Stein, who is here at the conference and serves as General Counsel of the Dade County Public Defender, that the Florida Supreme Court finally decided to hear the case. A year ago a Florida intermediate appellate court reversed the trial court in Miami, which ruled in favor of the defender program and granted significant caseload relief.

There was also a declaratory judgment action brought in Kentucky. The case was ultimately dismissed, although I understand that the state program in Kentucky received some additional funding from the legislature, which was attributable to the litigation.

Overall, if you survey what has been done in this area of litigation to challenge excessive caseloads during the past few years, there have been few formal complaints filed. The nationwide response to the ABA's 2006 ethics opinion has been anemic. As a result, I have come to the conclusion, perhaps because I've gotten old and become impatient, that there need to be many more motions filed by individual defenders doing exactly what the ABA's ethics opinion says, exactly what is stated in the ABA's *Eight Guidelines*, and exactly what is stated in every state's *Rules of Professional Conduct*. If individual defenders and defense programs cannot provide competent and diligent representation and clients are receiving second- and

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sometimes third-rate legal services, relief must be sought! And that may mean either stopping the assignment of new cases, seeking to withdraw in current cases, or both. Thus, I believe that motions to withdraw or to halt assignments should be filed repeatedly in numerous cases and whenever the situation calls for such motions! But such an approach isn't going to be adopted by individual lawyers acting on their own. It is only going to happen if it is orchestrated by management. And, just to be clear, I am suggesting that motions should be filed routinely whenever they are deemed legitimately appropriate. And why do that?

Well, one of the reasons is that you protect the client in the event of a subsequent guilty plea or a trial, and you also protect the lawyer. In cases where there has been litigation, public defenders have been reluctant to sign affidavits indicating that they are not doing what they should be doing in representing their clients. Since they had never before complained in court and they had long had exceedingly high caseloads, they felt quite vulnerable by suddenly filing affidavits confessing to the inadequacy of their representation. For a long time, they had simply gone along with a system that had not allowed them to provide effective representation. I also think the filing of routine motions are useful because such an approach is bound to attract media attention. I've become convinced in this area that effective indigent defense reform requires the use of the media, and we've seen examples of this in several jurisdictions in the United States.

Let me conclude with this thought: Chief Justice Warren Burger—most certainly not a liberal justice—was involved in the ABA's Criminal Justice Standards Project, and he believed in the defense function. One of the things for which the Chief Justice is remembered is what he said about defense lawyers. As Chief Justice Burger explained, the criminal and juvenile justice systems, when properly constituted, consist of a judge, a prosecutor and a defense

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lawyer. It is much like a “three-legged stool.”<sup>15</sup> But, as a practical matter, there is no real defense lawyer doing what is required by the Sixth Amendment<sup>16</sup> and the *Rules of Professional Conduct* when the caseloads are overwhelming, as they so often are.

Accordingly, I think that there is a need for far more aggressive action in the defense community, much more than what we have seen to date, because the message has got to be sent that what we now have is simply not acceptable in the United States. And while we are not seeing a strong response from the defense community at the moment, the tools are all there. These tools are state *Rules of Professional Conduct* and the ethics opinion of the ABA, the ethics opinion of some state bars, ABA standards of various kinds and local standards, and most recently, the *Eight Guidelines*, which may be cited as the policy of the largest association of America's lawyers, the American Bar Association. You can cite the guidelines' black letter and the commentary, because both constitute the policy of the ABA. So, now you know just how radical I actually am.

With that, I want to call up our first panel, not to talk about litigation, but to talk about alternatives to litigation as a way of dealing with the caseload problem. First, we'll hear from one or two speakers and take a break, finishing up afterwards with our first panel. I'm not going to take questions now, but there will be an opportunity later. Bob Boruchowitz, Avis Buchanan, Jim Neuhard. Where did Jim go?

JIM NEUHARD: Right here.

NORMAN LEFSTEIN: I thought you'd left, because you've heard me so often before.

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<sup>15</sup> U.S. v. Goodwin, 272 F.3d 659, 679 (4th Cir. 2001) (citation omitted).

<sup>16</sup> U.S. CONST. amend. VI.

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ROBERT BORUCHOWITZ: That would apply to all of us.

NORMAN LEFSTEIN: You have the bios of all of these folks, so I am not going to give lengthy introductions. To my immediate right is Avis Buchanan, who is the director the D.C. Public Defender Service, and adjacent to her is Bob Boruchowitz, who is from Seattle, Washington, and a leader in the defense community both in the State of Washington and beyond. He was involved in writing the NACDL report about the lower courts to which I referred earlier and drafted much of the American Council of Chief Defenders statement on workload, demonstrating in the commentary to that document that the caseload numbers of the National Advisory Commission adopted in 1973 are too high. Next to Bob is Dennis Keefe, from Lincoln, Nebraska. Responding to all of these presentations will be Jim Neuhard, the State Public Defender for Michigan. Now, Avis, you're going to begin, right? You can either come up here or stay seated.

AVIS BUCHANAN: Thank you. I'm Avis Buchanan, and I am the director of the District of Columbia Public Defender Service. I'm the beneficiary of my predecessors' work, and that includes Norm, sitting to my left here, who made sure that the interests of the public defense community and the interests of indigent clients or people who cannot afford legal counsel in criminal cases were protected back in 1960 when the Public Defender's Service was created. It was the Legal Aid Agency then. It became the DC Public Defender Service (PDS) in 1970 when the District reorganized the court system.

From the very beginning PDS was set up to be a model, and as part of being a model there were several concepts or several principles that were incorporated into

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the creation of PDS and into its operations. In my view, there are five operational principles that have kept the office going, that have helped it to develop its reputation, and that have helped it to maintain its reputation during that time.

The main operational principle is independence. PDS has been able to maintain its independence from all of the branches of the government and to maintain its independence essentially from everything. We are governed by an eleven-member board of trustees, and our statute is included in your materials. And the board is this: the entity to whom PDS answers, to whom I answer. The board has a number of functions, but the main ones are to hire me, to hire the deputy director, and to protect and set policy for the office. The importance of that is exemplified by a couple instances where the importance of independence, where that independence has been threatened. The office has made an effort to make sure that all of its clientele and the quality of its operations and the quality of its litigation are all protected. One example of that, as I was saying, is that early on in the office's existence, the D.C. Superior Court tried to assign more cases to PDS than it had the capacity to handle, and being able to handle its cases was important pursuant to the criteria it had set for itself. The office responded by pushing back and refusing to take the cases. That standoff eventually was won by PDS and that has laid; it not only laid the groundwork but added to the sense of the office's independence and its ability to maintain and to distance itself from external pressures to practice in a way that's antithetical to quality representation. We are a quirky institution, so we're not quite the same as public defenders across the country. The reason for that is because we're in the District of Columbia which has its own special status. That special status led to some political considerations back in 1997 which led to our being a federally funded public

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defender. We're not a federal defender; we're a local defender, but we are now funded by the federal government. So now we're not only independent from the three branches of the government in the city, but we're independent from the three branches of government in the federal system, apart from the fact that they give us our funding. So, that has been the way that we've been able to protect our clients. We don't have interference from outside entities, and to the extent that there is an effort to do that, our board protects us. In one special set of circumstances, our board was a threat to our independence, back twenty years ago when I was a staff attorney in the office, and PDS was able to fight that off as well. The board is appointed by four members, a cross between the federal system and the DC government. The eleven-member board which consists of seven lawyers and four non-lawyers by statute, is appointed by the chief judge of the DC federal trial court, the local court of appeals for the District of Columbia, the local trial court for the District of Columbia, and the mayor. Those are the four "people." After that, they don't have anything to do with PDS. And in many ways we influence that process, because we have developed the screening process for board members, but there is no prescription in the statute for a specific nomination process. So what we do is propose board members to that panel. They are free to do the same. And, of course, they are ultimately the selecting officials, but we participate in the process of selecting board members. So independence is very important. The independence is what allows us to maintain the caseload numbers that PDS tends to be known for.

I talk with other public defenders, and my predecessors have also talked with other public defender offices. When they hear the kinds of caseloads we carry, they tend to write us off as an outlier. But I'd like to encourage you to think that it's within the realm of the

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possible, because we think it is. PDS is special but it's not an unattainable set of criteria. We have felony attorneys, senior felony attorneys, and less serious felony attorneys and we have attorneys who do juvenile practice. Right now, we have about fifty-five attorneys. On average, we target, for felony one, the most serious cases, and this is a nonsupervisory attorney. We target from fifteen to twenty cases for the felony-one level. In D.C. that's probably comparable to capital cases in other jurisdictions. For the less serious felonies—what we colloquially refer to as guns and drugs—the target numbers for those attorneys is about twenty-five to thirty cases. We don't do misdemeanors by statute except in a limited set of circumstances. We're part of a hybrid system.

PDS is taking the most serious cases on the juvenile adult levels, because we have the training and the resources to do that. So we only take a small percentage of the guns and drugs cases. The Criminal Justice Act (CJA) is what established the panel attorney system. Then for our juvenile attorneys, who are usually the least senior attorneys in the office, spend a year in juvenile court and then rotate to adult court. When they start out, because they are brand-new, we have them carry relatively low caseloads, and they build up over the course of that year. They might be handling ten to fifteen cases at any one time by the time they're rotating out of juvenile court to adult court. Those numbers are important, because they allow us to do the quality work that the other principal training helps to achieve quality representation. Before our attorneys handle a case, a real client, we have them undergo eight weeks of training, and that's an all-day, eight-week training program. We incorporate PDS alumni into the training program so that they can understand the history of PDS and how they fit into the history and the pantheon of attorneys who have gone on before them. It incorporates exercises as well as lectures, and it culminates in a full mock trial.

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We're observing their progress; we're observing their absorption of the material and evaluating them at that point. As they finish the training program, they start picking up cases and that leads to the fourth principle, which is supervision.

Our attorneys are supervised from the time they start picking up cases in juvenile court up to the time they achieve felony-one status. The supervisors at the junior level are expected to know the supervisee's cases just about as well as the supervisees know their cases. They are responsible for observing court proceedings, more at the beginning than toward the end. They observe every trial that a junior attorney is involved in until there's a comfort level with that person's performance. They go over motions and sentencing letters. They communicate the standards of practice to the junior people, which includes a Client Bill of Rights, and set out all of the points at which there is an expectation of a certain activity, whether it's filing suppression motions or visiting a client within a certain amount of time after an appointment. We review the kinds of bond hearings or detention hearings in juvenile court that they're expected to participate in and do mock crosses as well as mock directs, pretrial and listening to openings. We have a policy in the office that no opening is done in trial before a supervisor has heard it in the office first.

Another aspect of the practice that helps PDS maintain its reputation is investigation. We don't have an open discovery jurisdiction. Our opponent in adult court is the U.S. Attorney's Office, and they have, I guess, a federal standard, or they just blow us off. It doesn't matter. They don't have open discovery. We have a discovery rule, and they stick to the minimum requirements of the discovery rule. That practice varies from assistant to assistant, but, generally speaking, we don't know who the witnesses are, we don't know the witness's names. We have to find out all



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of that information on our own. So we train our own staff investigators to pursue every angle, to pursue every fact, to find out as much as they can about the government's case. And it's often the case that we know more about the government's case, than the government itself knows. We find witnesses that they're not aware of. Our investigators are trained to do things like take measurements, and they go to the crime scene at the time that the incident is supposed to have occurred. We have stories of investigators going the extra mile to work with a nickname. All they have is a person's nickname, and they've been able to trace someone out to a federal institution. That's all that they had to go on initially, but they kept trying and trying. Our investigators are investigating right up to the day of trial and through the day of the trial, because sometimes we learn things as the trial progresses. So we're continuing to add to the knowledge base of the attorney and incorporating that into the trial experience.

So all of these things together go to help us to have the respect and regard that we do have both within the District of Columbia criminal justice system and in the larger public defender community. And we value that and it helps us attract good people, which helps us again to perform well and allows me to come in here with pride and say, I'm Director of the Public Defender Service.

NORMAN LEFSTEIN: In case there's any confusion about it, the caseload of the DC Public Defender Service consists of common law crimes. These are not federal prosecutions in that sense. They are not under Title 18 of United States Code. But I wanted to state that just so everyone was aware of it. The Public Defender Service is an analog to any other public defender program in the United States in a major urban community. We're going to hear from Bob Boruchowitz and then we'll take a break. But, Bob, go ahead, and we'll ruthlessly cut you off when

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your time is over.

ROBERT BORUCHOWITZ: Thank you very much. I'm going to try to talk for twenty minutes, which was what I was promised, on what I could talk about for a couple of days. Jim told me he was going to come up here and strangle me if I actually tried to run through 100 slides. I'm going to look through 100 slides. I'm just telling you that up front, but I will not talk about many of them for very long but I will make this available to you.

I agree with what Norm said about the role of the ethics rules and the ethics opinions and the importance of individual lawyers standing up and saying enough is enough. I'm going to talk about some of the experiences that we've had in the State of Washington, particularly in the county that I come from. The things that I'm going to talk about have been evolving over the course of three or four decades, and so they all can't be done overnight. But the fact that they have been done elsewhere, I hope will be an inspiration for folks to feel that in fact you can do them wherever you are from.

What we did in Washington was to development standards focusing on caseload but with a whole range of other things including support services, training, accountability, and compensation. Other than independence, which is also key, the caseload and compensation are probably the most critical of all of those important standards. And what we were able to do was to develop standards that initially were developed by our state defender association. We have a county-based public defense system in Washington. We developed our own state defender association with a small grant from what was then called the ABA Bar Information Program. We developed standards, published them, got the state bar to endorse them, and ultimately got the legislature to say that they should be used as guidelines. We've got local

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legislation. We have a law in the City of Seattle that limits the number of misdemeanors that a lawyer can handle in Seattle Municipal Court. Because we're a non-profit organization, we have contracts with the county government that limit caseloads, and now there is a small amount of state funding provided to local governments that is linked to trying to implement the standards. We've built alliances for support, and I'm going to talk a little bit about what you can do before litigation.

There are the *Rules of Professional Conduct*. The very first rule is 1.1, Competence.<sup>17</sup> If you have too many cases, you can't be competent. We have our state bar and defender association standards and the ABA ethics opinion, the guidelines, the opinion and statement by the American Council of Chief Defenders (ACCD). Norm talked about the statement, but there's also an ACCD ethics opinion and case law that can help.

I recognize all the practical considerations that all of us face as local defenders. I was a chief defender for twenty-eight years. I understand the politics and the budget problems. But it is possible to use moments of financial crisis to our advantage. You can build support in the community, and you can get judges sometimes to help you. There's the question that Norm talked about, about whether management is going to support or oppose efforts by individual lawyers. And then, of course, there are pressures from clients.

There are a lot of informal things that you can do to increase resources. Obviously, you can reallocate cases within an office. I evaluated an office in Idaho a couple years ago. The chief defender was totally unaware that he had two misdemeanor lawyers. One had X number of cases, the other had two X number of cases. He had no idea that that was going on in his office. You can move for caseload relief. I don't consider that litigation when it's

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<sup>17</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

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done on a case-by-case basis of the sort that is going to be talked about later. There are motions for additional resources. I'm going to mention a particular example of that. You can declare that you're unavailable, which is a California practice. There is litigation which will be talked about. And then there are alternatives to traditional prosecution, because if you can persuade the prosecutor to move in that direction you can take huge numbers of cases out of the system. In many states around the country driving with a suspended license is between thirty and fifty percent of the misdemeanor caseload. That's nuts. In the State of Washington, it's 100,000 cases a year. This is not a public safety concern. It's because people generally get their licenses suspended because they didn't pay a ticket or couldn't afford to pay the ticket. And so now we're making them a criminal, giving them more fines and putting them in jail, which costs more money. They'll be back again, because they have to drive.

Possession of marijuana, which I realize is a very controversial topic—but what are those offenders doing in jail and prison? What about minor possession? I don't know about this particular university town, but there's a lot of university towns that I've visited as an evaluator of defender systems where it's a rite of passage for kids in fraternities and sororities to go to jail for minor possession of alcohol. That's also crazy. Shoplifting is another example of cases that can be diverted. Some of these cases can be reclassified, if the prosecutors are unwilling to divert them, by going to the legislature. But often you can persuade a prosecutor, who has complete discretion on all of those areas, not to file them.

Getting media interest in the state reports that Norm talked about is the problem. I would love to see more law school participation. I've been chatting a little bit today with folks here about some of the great things that are going on and other things that could go on. I'd like to see

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more law school participation in reform efforts. And as I said, suggesting ways to improve and holding litigation out is an option.

The New York Court of Appeals just very recently ruled that a systemic litigation case can go forward, and in the process, talked about how it really was more than simply ineffective assistance that was being claimed. But no lawyers at all were the effect. *Padilla*, everybody knows about that just came out, out of Kentucky states that the right to counsel includes the need for advice on the decision to plead guilty.<sup>18</sup> If you have so many cases that you can't even give your client advice on whether to plead guilty, you have too many cases.

In Washington State, we have a case, and I'm going to give you all of these briefly in a second called ANJ<sup>19</sup> in which the court said in finding effective assistance and reversing the guilty plea of a trial that standards can guide the evaluation of effective assistance of counsel. The New York case is Hurrell, H-u-r-r-e-l-l, Haring, H-a-r-r-i-n-g.<sup>20</sup> *Padilla*, I talked about. This is language that even reverses *Strickland*.<sup>21</sup> The defendant is entitled to effective assistance of competent counsel, 1.1.<sup>22</sup>

This is the Washington case that just came out. It's an amazingly good case; it reversed the conviction of a 12-year-old whose lawyer spent about an hour with him, and in the process cites to our state standard. Our Washington Supreme Court has now twice talked about standards. It was in a case of impossible caseloads. In the other case, it was in the case of judicial misconduct. I'm going to skip all this stuff. I put the constitution in there, because it is important to remember where our rights come from. The

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<sup>18</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>19</sup> *State v. A.N.J.*, 225 P.3d 956 (Wash. 2010).

<sup>20</sup> *Hurrell-Herring v. State*, 15 N.Y.3d 8 (N.Y. 2010).

<sup>21</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>22</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

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recommendations of the reports—Norm's is out there. We talked about how counsel has to spend enough time, and if they can't, they have to seek relief.

One of the things that I increasingly have been talking about in the last couple of years, and this is partly at Jim's suggestion, is that there's an ethical obligation, and we need to recognize that fundamental rights are being denied to millions of people in the places that should protect them the most—the lawyers on both sides of the table and judges. Either they are actively participating in the denial of rights or they are standing by with their eyes closed. The economic penalties, the collateral consequences, and the racial disparity that infuse this problem are everywhere.

If we go back to some of the fundamental cases like *Argersinger*,<sup>23</sup> it talked then about things that are still true today: Long calendars, speed substituted for care, casually arranged out-of-court compromise substituted for adjudication. It describes many, many misdemeanor courts today. The National Association of Criminal Defense Lawyers (NACDL) recommended that lawyers should seek to discontinue. I talked to you about the Washington experience.

First, we had our county bar develop standards, then the state defender's association, then the state bar, then legislature. There's a really good article. I like it, because it talks about how my former office is wonderful, but it talks about how lawyers can work with others, their comrades as well as the legislatures, to develop standards and get them implemented. Our statute, which is Wash. Rev. Code 10.101.030,<sup>24</sup> requires local governments to have standards and include caseload limits, and tells them that they're supposed to use the Washington State Bar Association for guidelines. This is the Seattle law; I think

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<sup>23</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>24</sup> WASH. REV. CODE § 10.101.030 (2008).

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it's the only law in the country. I know New York is talking about having one that limits the caseload of public defender attorneys to 380 cases. I think it's more than it should be, but it's way less than almost any place else.

The *ABA Ten Principles*—I think there's copies of them out there—talks about controlling workload. This is a case, *Mount Vernon v. Weston*,<sup>25</sup> in which we came in as Amicus, and the court said that these lawyers are well in excess of the standards, and they should be allowed to withdraw. This is an unbelievable case in which the public defender was also the judge. I won't take time to deal with it, but I love talking about it. The public defender in *Miranda v. Clark County*<sup>26</sup> was held liable in a 1983 action.<sup>27</sup> These are standards, Model Rules of Prof'l Conduct 1.1, everybody should look at from time to time.

Concerning billable hours, I run through this analysis of how many billable hours there are in a year. And if you use either of these numbers, 1,650 or 1,838, you can figure out how many hours you have, depending on how many cases you have. When you think about what you have to do in a case, from interviewing the client all the way through, you could persuade funders as well as people in the public that that's not enough time. Two or three hours is not enough time. If you're doing 600 cases, you've got three hours. If you have 1,200 cases you have an hour and a half. What I say to people is think about if you have a loved one that is charged with a crime. If I had people to raise their hands in here, everyone in here would have a loved one, friend, acquaintance at work who has been charged with some kind of crime. Would you want that lawyer representing that loved one to say, "I'd be happy to take your case, I'll work on it for three hours?"

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<sup>25</sup> *City of Mount Vernon v. Weston*, 844 P.2d 438 (Wash. Ct. App. 1992).

<sup>26</sup> *Miranda v. Clark Co., Nevada* 319 F.3d 465 (9th Cir. 2002).

<sup>27</sup> 42 U.S.C. 1983 (2006).

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You'd walk out the door. But that's what our clients have to face.

Obviously, you can have state bar ethics opinions. The State of Oregon did one following the ABA, the Eight Guidelines are there. So what can you do? You can move to withdraw; you can move for additional resources. We did that in King County on two different occasions, because we have something that's called the Sexually Violent Predator Law, which we imposed on much of the country. That work is funded directly by the state. We weren't getting enough money. It hadn't been changed in years and years. We went to court on two different occasions; both times we got the court to order increased funding on an hourly basis. We were able to get the resources we needed to represent the clients that we had. You can move to appoint other counsel; you can declare unavailability. The Mohave County case<sup>28</sup> in Kingman is a tremendous example of a well- prepared motion to limit caseloads. The judge at the end of it said, in the future, don't give me all of this motion stuff, just tell me you're too busy and I'll appoint somebody else. Individual lawyers can move to continue. If entire offices move to continue, and I recognize this may be hard for some clients, but if entire offices do that, then it will have an impact. There's a Washington case called *State v. Jury*,<sup>29</sup> J-u-r-y, which is good on that. The Ohio case you probably all know about involved that wonderful judge who had the gall to have Lincoln in his courtroom—who held a defender in contempt. The appellate court said that the lawyer only had two hours for the case and that wasn't enough to prepare.

You can seek legislation; we talked about that. You can set caseload limits by negotiation with a funder. You

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<sup>28</sup> *State v. Lopez*, No. CR 2007-1544, (Ariz. Super. Ct. 2007) available at

<http://www.mohavecourts.com/news/motion%20to%20withdraw.pdf>.

<sup>29</sup> *State v. Jury*, 576 P.2d 1302 (Wash. Ct. App. 1978).



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can make informal efforts to change the way the funding is provided and you get more, perhaps you get supplemental funds or grant funding. This is the Kingman case—which involved a motion for increased resources. We made a motion and put on all kinds of declaration evidence and got the court to order that we get \$85.65 an hour for attorney time and \$46 an hour for investigator and paralegal time. This was in January 2006—four years ago. That allowed us to do the job that we needed to do.

I talked about all these other things, diversion, decriminalization, marijuana, and so many of those cases. I just wanted to mention media interest. This is an editorial that we got in the state capitol's newspaper after doing a forum at the state Supreme Court. You can do that anywhere—have a forum at the state Supreme Court, get public attention, talk to the press, and get them to write about it. Then you can remind local governments that if they don't do what they should do, they're going to get sued. This was a settlement agreement in Grant County in Washington in which, as partial payment, the county had to pay half-a-million dollars in attorney fees.

And then I just want to close with these comments from William Hellerstein, who's a great defender and professor from New York. “[T]he misdemeanor court is [such] an abomination.”<sup>30</sup> This was in 1970 pre-*Argersinger*, but it's true about a lot of places I've seen since then. Our courts do not even have the appearance that justice is dispensed within them. I'm sure that all of us could give examples of courts that would fit this description. And he says, speaking to defenders, it's not enough to shuffle our feet through the courts, go through two-minute arraignments, and seven-minute trials and go home at night calling ourselves attorneys.

And then I just want to close with Margaret Mead's

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<sup>30</sup> William Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 THE LEGAL AID BRIEFCASE 151, 155 (April 1970).

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admonition that a small group of thoughtful committed citizens can in fact change the world. I've probably gone into the break time, but thank you.

NORMAN LEFSTEIN: We actually are about on time, not because of me, but because our speakers have been very disciplined. We're going to take about twenty minutes. I realize this is a long time to sit without an opportunity to interact with the audience, but when we come back we're going to have the two final presentations and then we'll open it up to the audience. And I think we'll have ample time to have some interaction then, because we're very interested to hear your views, comments and questions. So let's come back and be ready to go at 3:30. Thank you.

(A brief break was taken.)

NORMAN LEFSTEIN: Thank you all for returning so promptly. And Dennis, are you going to speak from up here or down there?

DENNIS KEEFE: I'll come up there.

NORMAN LEFSTEIN: Okay. We're going to hear from Dennis Keefe who I referred to in my remarks. Dennis has for many years been the head of the public defense program in Lincoln, Nebraska, Lancaster County, Nebraska. He can explain to you how it's been done and how it's been received because his office has been keeping time records for many, many years. Dennis?

DENNIS KEEFE: That gives you a clue how old I am.

NORMAN LEFSTEIN: No, we both are that.

ROBERT BORUCHOWITZ: Really, really, really old.

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DENNIS KEEFE: I was getting ready to come here this weekend and a friend of my wife's asked me what I was coming here to do, and I said I'm going to be talking about public defenders tracking time. And she said, well, I can see the audience yawning already.

NORMAN LEFSTEIN: I was worried about doing this after the break, I must admit.

DENNIS KEEFE: Oh, yes. Well, the only thing that keeps me awake here is that I know that Jim Neuhard is listening to what I say and he's going to respond. And that's intimidating, I promise you. I'll give you a little bit of background. I've been the public defender in Lincoln since 1979. We have a population now of about 250,000 people. My office consists of nineteen lawyers and five paralegals and a number of support staff. We handle approximately 1,500 felonies, three to four thousand misdemeanors, and around 1,300 juvenile cases a year. That's before the percentage of conflicts that come out of those.

When I first became public defender, one of the things that I realized was that the office had no system of case management of any kind, no system. My predecessor, who I worked for as a bartender, by the way, owned a bar, and he kept most of his case notes on cocktail napkins. I think that's exactly what we ran into when we hit this office. Time tracking in our office came accidentally, if you will, when the National Legal Aid & Defender Association in 1980 rolled out a new product. It was a manual case management information system called Amicus. I thought it looked better than the cocktail napkins. So they asked us to be a test site for this program. After looking it over, I thought this would be a great idea. We learned how to do case management and to produce reports. We had nothing to begin with, so we readily

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agreed to be one of their test sites.

As part of that Amicus Case Management System, the lawyers were required to track time. The way they did it was, basically, on one side of the file you have a case log sheet where you make notes about talking to your client or being in court, visiting with the prosecutor. As part of making those notes, you indicated in tenths of hours how much time you spent doing that particular activity. If you took ten misdemeanor files over to court for an hour, you divided the hour by those ten cases and assigned it to each one of those cases.

I was a relatively new manager in the office. When we started this, there was resistance. And quite frankly and honestly, the resistance, at least parts of it, was due to the fact that I did not do a very good job of explaining to people of why I thought it was a good idea that we track time and keep time. But the ultimate goal was to be able to provide some type of a weighted caseload figure so that we could not only distribute the work equitably within the office, but we could also tell our county board why we would need the money that we were requesting.

The attorneys resisted at first, but eventually, they did begin tracking time. This was around 1980 or 1981. The problem was that we didn't have a workable system for using the data that we gathered. At the conclusion of a case, there was a closing sheet as part of the Amicus system, and the attorneys would complete this closing sheet. It would have information about the client, including his or her prior record. It would have information about the case, including what the charges were, whether there were evidentiary hearings, whether the client was out on bail—those types of issues. The closing sheet had an area for recapping the attorney time, which we kept in six simple categories: court-related matters, negotiations for client contacts, waiting, travel, research, and fact-finding. So it wasn't complicated, but during the first few years of using

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the system nobody saw a real benefit from keeping the time, because we didn't really have a way to produce any information or to use or analyze the information. The one thing that did affect the attorneys and their willingness to use the Amicus case tracking time system was one of my senior attorneys—who probably was part of the core of the resistance. This attorney went into a post-conviction hearing with a file that had been created in the old system and realized that he had no independent recall of virtually anything that happened in the case, talking to the client or the prosecutor, and had no system for giving him notes that would refresh his recollection. So he became a big fan of the Amicus system, particularly the case log sheet, and that senior attorney brought along whatever resistance remained.

Over the years, our experience has been this: That the attorneys bought into the time tracking system. They did not see it as burdensome, and they eventually saw some of the big benefits, one of which I will talk about in a minute with regard to our caseload study. We actually have had attorneys who have left the office and who've taken some features of this time tracking system from Amicus into their private practice and use it still today. So that'll give you some idea about how we not only overcame the resistance, but that attorneys have bought into it completely and are using it in their practice to help their clients.

There were a couple of events—National Legal Aid & Defender Association—around 1985, which produced a report from a researcher with the National Institute of Justice. This researcher used some of our time data and other sites that had been test sites for Amicus—the State of Hawaii Public Defender System and then Jim Weatherly's office in Nashville. They produced a report on budget preparation. Many people found the book a bit confusing. I think one of the problems with it was that the researcher

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tried to take a number of variables that we tracked with regard to the case and tell people how to use that with regard to adding time to cases after they figured out how many cases that they had. I think it was somewhat confusing for folks, especially if they weren't using the Amicus system, because not everybody had access to the data that the researcher was talking about in the report. It was the first time that somebody took the closing sheets and produced averages for us in terms of hours per case and average life of the case, and so it gave us something at least to move forward on. The big break was when we were offered and actually got a mainframe case management information system. I literally told the people in our local information services office what we needed. I gave them the Amicus books, including all of the reports and all of the forms and I said this is what we want, and they created the system basically just like that. So, we didn't really change anything, other than how the information at the end of the case was being entered into a computer and how reports could be produced on a regular basis providing us with information about average lives of cases and average times per case.

What we did with that were a couple of things. Before I get into that, however, I want to talk about an important factor here. In about 1991, Bob Spangenberg came and did an evaluation of our workload in our office. He looked at the average life and average time figures that we had and actually used the average life of the cases to give us what he considered to be his recommendations in terms of workload based on the NAC standards originally. But he said, at that time, that there's two things that you need to do to make sure that these average time per case figures are good, so that you can then use them in a subsequent study to really tell you what your caseload should be. Number one is to make sure all of the lawyers are on the same page. In other words, retrain them. Make

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sure everybody is tracking everything in the same way and is tracking all of the time that they should be tracking. You should look at your averages on a periodic basis—every six months or every 12 months—to make sure that you're updating it for changes that might have occurred. For example, if prosecutors come in and change their plea bargaining practices or courts change their procedures, you're going to need to show what impact that has on the average time per case. Spangenberg said that if you do that, a subsequent caseload study will give you the information that you need in order to come up with accurate caseload figures.

So we took his recommendations very seriously, and we followed up exactly with what he suggested, including the training, making sure we were all on the same page and periodically reviewing our average times per case. We did not have the money at that time to do a follow-up study, but we internally developed from the information that he told us we could use, a pending caseload figure based upon a workload factor. And we used that in our office successfully for a number of years and actually withdrew from cases in a ten-year period, from 1995 to 2005, on a couple of occasions because we were exceeding the workload factor that we had ourselves internally developed based upon those average lives of case and average times of case.

Recently, in the past few years, there were several things that were changing that made it imperative that we carry out Spangenberg's recommendation of a follow-up study on the average times and the average life per case and have someone independently review what we had to determine whether the data was statistically reliable and could be used to build workload standards. There were several factors that made this important. My county board had changed a number of times, and I did not have any lawyers on the board. I did not have people who you

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would consider to be extremely sympathetic to public defender issues and that was a problem. The budget was getting tighter—all budgets were getting tighter—and adding staff to offices was becoming more and more difficult. I persuaded the county board that having someone outside of our office come in and look at our figures that we had been collecting for almost thirty years in designing caseload standards would help us determine what the proper caseload and workload should be. But, it would help them so they didn't have to guess whether I was trying to pull a fast one on them and trying to get some more lawyers that I didn't really deserve. Although, I don't know why they would think that. But, it benefited them because they had a science-based report to tell them. Yes, here we are with these figures, and this is a legitimate request. And they did. They funded a study and Elizabeth Neeley and the University of Nebraska, Public Policy Center did the study.

There were a number of things that they did, but the one that I was most interested in was to tell us whether or not the figures that we had been collecting were validated. And we were assured that the average times were validated and that they, across years and across attorneys, were consistent. The only exceptions were brand-new attorneys, which you would expect. They're spending considerably more time per case than others.

One of the things that we did, I think that was very important as part of this workload study, was that I asked the county board, when they funded it, to appoint an advisory committee consisting of judges, someone from their staff, and whomever else they wanted to appoint, including private attorneys in the community. We had a really good advisory committee that reviewed the researcher's work and eventually came up with recommendations, basically, for me to adopt the caseload standards that the report recommended. We did that as an



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office; we adopted it, and we have been using it now for almost two years. And it has had a positive impact both in terms of morale within the office. We have not withdrawn from as many cases as I projected that we would, only because the crime rate is down, the filings were down, our appointments were down. But we did, in the first year, withdraw from—I believe the numbers were 29 felonies, almost 400 – 275 misdemeanors and 46 juvenile cases, and that's with the caseload being down.

Just to show you how the advisory committee helped us—when we went to the judges to ask and talk to them about the caseload standards, once we'd adopted them, I had one of their brethren who served on the advisory committee, arguing with me as to why these standards were reasonable. And my question to the judges was: “How do you want us to handle the technical part of this.” I said, “Well, what we've done in the past is, I filed an affidavit saying that, based upon our caseload standards and ethical standards, we can't represent this client. We ask you to appoint counsel other than our office, under a statute that says that the courts can appoint anybody other than the public defender for conflicts or other good cause. This is other good cause.” The judges said to me, “You file the affidavit, or have one of your supervisors file the affidavit, and we'll appoint another attorney.” So, it ended up being a very easy process and has ended up being a very easy process for us in the last almost two years that we've been doing it to this point.

I know people say it's not in the culture of public defenders to track time or keep time. Maybe we're unique, maybe this is really different. I don't think it's as big a deal as people think it is. And if they see that the ultimate benefit is some type of caseload limit that is going to benefit their clients and them, they'll buy into it. In other words, they need to be educated about the purpose and the reason for it. I think that the caseload study that we just did

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recently answers the question about people who suspect that lawyers won't keep accurate time. Again, across years and across attorneys, it was consistent. There are several other arguments with regard to attorneys not keeping time accurately. My experience has been that, if they're trained properly and they're educated about the reasons for it, it's not a problem or a burden. It has, in my example, helped us immensely.

I'm not saying this is for everybody. I'm just telling you what our experience is. Some people have told me, "Oh, time-based standards aren't really needed because we have the NAC Standards." I think the answer is that, if the NAC Standards worked to keep caseloads reasonable, by all means use them.

I had a few problems in my jurisdiction using national standards, especially in tight budget times, because they want to know how that applies to us. Some of the criticisms of the NAC Standards is that I'm not sure that they can all be justified jurisdiction by jurisdiction. I don't think a felony in Lincoln, Nebraska is the same as a felony in New York City or Eagle River, Alaska. I don't believe they're the same. I'm not even sure those three jurisdictions would call the same thing a case. That's one issue.

The other issue is with regard to juvenile cases. I'm not disparaging the NAC Standards, because I think they have benefited the people in the past. So, if they work, use them. But the [NAC] standard for juvenile cases is 200 juvenile cases a year. Well, my informal observations, which is backed up by the caseload study is, 200 would be way too many if you're talking about representing children as guardian ad litem in abuse cases. It would be way too few if you're talking about other cases like law violations. So, my point is, if the NAC Standards, or any other method of setting caseload standards works, then use them.

The final issue, which is more problematic, involves time studies. There are a number of professional

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organizations around the country that track attorney time. But, if all it is doing is telling you how much time an attorney is spending in an overworked situation, then you're really just defining bad practice. That is a danger, and the professional researchers try to handle it by making adjustments to the numbers after the fact by talking with the attorneys and focus groups to see what it is that they should have been doing that they weren't doing and adding an appropriate amount of time. This is not a perfect solution, but there is no perfect answer.

In our situation, whether we were overloaded or not overloaded—and we've never gotten to some of the horrible scenarios that I've heard in other offices—across the years and across attorneys, this time was consistent. What was happening was that the attorneys were taking their work days into the evening hours on a consistent basis, and into the weekends on a consistent basis. This was hurting morale, and that is where we cut. We cut the time based upon the averages that attorneys shouldn't have to spend on case-related work. And we came up with numbers. We can argue about the numbers, but the average attorney in my office is assigned to around nine new felonies per month. The misdemeanor cases, depending upon what type of case it is, would be assigned to approximately forty new cases per month. As for juvenile attorneys, if they're brand-new, we have one number, if they're not, we have another. It would average at about thirty to thirty-five new cases per month.

I have a happier staff than I had two years ago, so I have to say that this has been a very positive thing for us. I'm not saying that time recording is the only way to do it, or even the best way to do it for everybody, but it has worked successfully for us.

NORMAN LEFSTEIN: Two very quick comments I want to make. One is that there is a write-up of the time work: a

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time study that Lincoln, Nebraska does. It's in Chapter Seven of the draft that's on the flash drive if you want to read about it. Dennis has seen it and has essentially said it's accurate.

Secondly, I think it's worth mentioning that the research arm of the National District Attorneys' Association a few years ago spent several years trying to determine if you could come up with any kind of national standards for prosecutors throughout the United States. After working on that subject for several years, they threw up their arms and said it simply can't be done. My own view is that it can't be done in public defense either; but in public defense the mistake that was made dates back to 1973 when it was suggested that there should be maximum caseload numbers in public defense. The problem is that once you start talking about maximum numbers, they're translated into the norm. That doesn't mean that you still can't use them when you're way above them, but I do think that calling them national caseload standards is a disservice and a mistake to the public defense community.

Jim Neuhard will give our final remarks and then we'll have time to hear from all of you with your questions, comments and suggestions. I asked Jim to do this because I've known him for many years, and I've never been in a situation where he's been at a loss of words about what to say—even when I'm asking him to comment on three prior disparate presentations. Jim?

JAMES NEUHARD: This is simply a way of Norm controlling how long I can talk.

NORMAN LEFSTEIN: Somebody has to.

JAMES NEUHARD: It worked effectively. At first, I thought this was going to be very difficult to do. I didn't know what I'd have to say. But, I read through the write-

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ups that all of them did beforehand, and as Bob said it, I reviewed thirty years of his life rather than a write-up, but I did that. What began to emerge was something that I found quite interesting. There was a pattern to it. And since I was the principal author of the ABA Ten Principles in the Public Defense System, my mind tends to gravitate to pull out bullet points and simplify and see the relationships between things. That's just the way my mind works.

What I'd like to do is to go through what they said and perhaps, based on their writings and my knowledge of their offices and what they said today, just sort of pull out of it things that I see that are common to all of this. I'm going to start with an observation.

Between Norm and the remainder of us on the panel, you've got well over 125 years of management experience sitting here. But that's not so much the interesting part; it's that you've got represented up here public and private defenders, you've got appointed and elected defenders, you've got trial and appellate attorneys, you've got local and statewide offices providing their services.

The second interesting thing is, most programs that you go to that talk about how you should run your office better, frequently they're talking about theory. The difference is, all of us have done it. We've all declared not available, we've all refused cases, and we were employed—and still are employed—for over 125 years as chief defenders. And I've heard many times saying you can't do this. It can't be done. These are living testimonies, and we're starting the program with people who have done it and are doing it as we're speaking. That's the number one point I wanted to make.

The second thing, I want to give a brief background of my office. I'm not going to talk about my office except these points that are going to come out later, and my office is representative of this.

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We have statutory controls over our caseload, we have standards, we have time studies, we have differential case management, we have weighted caseloads, and we now have a computer program that literally moderates our intake based on our capacity. So we don't have to declare an unavailable anymore. It literally is moderated by my putting in what our capacity is at the start of each quarter. So that's how far we've evolved.

And I want you to understand the concept of evolution. That is what you've seen up here in all of these: you've heard it from Dennis and you heard some of it in all the other presentations. It's not been a static process, and I don't know how it started. I doubt any of us started doing the things that we did that we later drew on to control our caseloads. We were out to just manage our offices. We were all young and learning how to run a program and create a program in many cases. And case management became part of that—the wars among our lawyers who wanted the fair distribution of cases. With all kinds of reasons we began to develop a system to run our offices better. Then the crisis came and we had to literally go in and either commit to quality or not commit to quality. These are some of the things that I want to talk about before I go through each of the individual presentations.

First thing is, as I mentioned previously, there's a process that you've heard here of evolution. That is what people have been talking about for a long period of time, and it's ongoing.

The second is each of these programs has a commitment to quality and a perception of being quality offices. And I cannot underestimate how important that is. Because, at the end of the day, is 150 cases appropriate? You heard Dennis refer to it. In one sense, what is the appropriate number of cases? It means, in some respects, what I ought to be doing in a case. What does a “quality representation” mean? And if I'm doing quality, how many

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of these qualities can I do in a given time period? So you've got to have some basic commitment at all levels in your office to the idea that we're going to do a good job. Now, an external person might not think we're doing as good a job as we could be doing, but that's not the same as saying we've committed to doing a quality job. And when that's imperiled, we're going to take steps to control workload. So that's what's common across this spectrum: that there was literally a commitment to quality and the offices are perceived both internally, externally, and perhaps nationally as being high-quality programs. That's a great part of it.

I would hazard a guess that it is good data if you went into all of these offices, as we heard explicitly from Dennis. And I can say the same in the other cases as well. Now, it doesn't have to be perfect data. I'm not a believer that the perfect should be the enemy of the good. But, their data is better than anybody else's to describe what we're talking about. They have good data records, whether they're automated or manual or a hybrid of it. They've got the ability to talk about quantity. So those are common factors that we've looked at.

Now I'm going to look at each individual program and see what I took out of it. There are three different ways in which you can approach this. Obviously, all of us have done a hybrid of the things I'm going to talk about. But I'm going to look at some of the essentials that each of them have that I think differentiates them from the others.

First, let's look at Avis' program. In her enabling legislation, it says that they shouldn't do more than 60 percent of the work. Now, 60 percent is an interesting number. I mean, you can look at it in a lot of different ways. Most people perceive that the conflict number is around 80 percent, plus or minus. 60 percent is a clear statement that you're not going to do all the cases. Said differently, there is going to be a significant presence of the

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private bar in the system.

Now, this is important for the following reason, aside from making it a healthier system for reasons we won't talk about here. The question always comes up: if you declare unavailable, who is going to do the work? Secondly, who is going to be paid? And third, are they going to get a quality lawyer? And you'll hear this even on your own programs. If we say, "No," my lawyers will say, "Who are you going to get to do this work?"

So, reasons that I indicated for committing to having a quality-assigned counsel program are there. But also, as an alternate place they can go, you struggle over the question of how do these lawyers get paid? But if you're committing, you're going to have a mixed system, and a substantially enriched mixed system. The ingredients are there for literally moving cases to another place from the public defender office. So I think while it may not have been the reason why it was put in initially to deal with case conflicts, it has that residual impact.

The second thing is—even if you have in your legislation, like I did, language that says I shouldn't take more work than I get appropriations to perform, or in Avis' case the language is in there—there's the moment at which you've got to take the next big step. You've got to do it. And all of these programs did it. That is, you took that moment, wherever it came from, in which you either moved to withdraw or declared unavailable, whichever way it went. There's that moment that they took that particular step.

In Avis' case, they did that back in the 1970's. They had the commitment to quality in place, and they literally did it. And from that point on, once they won that battle, there was a respect and an acceptance that grew greater and greater over time. Somewhere in here was the issue of there's too much work for this office to handle, and they have a right to say no. That's not to say that when you do



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it, there is going to be no disputes about it or it may not create consternation. But, there's an acceptance of the fact that you have that right. That is a huge issue to recognize. You have that right.

Internally what you've got to do—again, to deal with the issue of what is an appropriate amount of work to do on one case—is to learn about ethics. You heard Avis talk about their training program, in which they train about what's quality representation. They train about ethics.

One of the ethics is: you can't do a case unless you can perform quality work. You can't take it individually. Once you get that commitment on the part of your staff lawyers you've now got the secondary support of the staff lawyers being involved in a canary in the cave, if you will, or some commitment to the idea that there's too much work in a moment at which that staff is going to start to rumble. And if you've got a management that's committed to it, you now have the two ingredients that Norm has been talking about. It is not necessarily pretty when your staff comes in and starts arguing about it, but you've got management and you've got staff and at some point you've got this history with the ability to take action. So training your staff, understanding what quality representation is, and being able to articulate that well to outsiders about what is a quality job is absolutely critical.

And the final one is a commitment to monitoring. That is literally having what you call supervision—where you're watching the numbers, where you pay attention to how much work is coming in and the fact that your attorneys are on a bell curve. There are some lawyers who are handling workloads out here, doing it quite well, and there are others on your staff who are going to be the first ones imperiled when the work gets to be too great. But, you've got to have a system that distributes the work appropriately and at some point says, “The office can't distribute the work anymore. We're out of the case.” And

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you heard all of that coming out of Avis' commitments.

In Bob's case you've got a different approach. He's a private contractor's office where he's managed as a private contract office. He had an enabling ability to negotiate contracts on what the workload would be for his office, which presents a slightly different situation for the public defender. But, he's actively engaged in going in and negotiating a particular contract. Secondary to what you heard, they've done exceptionally well in Washington, which is what I called external controls and support. That is to look at enforcing the ethical rules and requiring them to be enforced. Also, it looks at getting the ACLU and other lawyers involved in terms of litigation—to bring litigation against systems that are not performing. They get that external statement coming in and saying this is an office that's not performing.

This reverberates across and gives strength to the other programs to say, “See, we can't get to there, we've got to have either more funding or we can't take this kind of work.” But, you seek legislation that puts through and requires standards, and the standards are passed. You have something to point to, external to your office that says, “These are the reasons why that I can't do this work.” Something that's real and local and been adopted by the court, the legislature, the state, and others in terms of why it's important for me to control my caseload. But, it's to work in the legal community or legal culture you're in, to create, as best you can, standards against which you can point that aren't national in nature, but that are local. And so that's really a critical process to be involved with—as well as having a data system inside to document what you're doing—to negotiate or to get your budgeting from the local funding unit as to what my appropriate funding should be for the kind of work that I am doing.

In Dennis' case, what you found was that he didn't have around him the enabling legislation language about

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caseload, or the external support from the State of Nebraska. But, he began a process internally of determining locally, through his own time studies, “How many cases can my lawyers do and still do a quality job?” He has decades of data backing him up on that particular issue.

But again, it doesn't matter unless you're committed to providing quality in that local culture. So he had a third approach to it, which is to use time studies, which I think ultimately everyone has to do. I mean, you have to have those to look at where your time is going in a case, to better manage, and to do so many other things. Ultimately it is the backbone when you articulate to someone else that my office has too much work to do, and we can't do a quality job.

One point I want to make, which Dennis talked about—and Norm and I have talked about this a lot—is the conflict that exists in overload. The conflict is that you're forced to choose which of your clients is going to get the quality time. You've got to choose and that is an inherent conflict. It's not just two clients pointing at each other saying the other one did it. But, when you have to choose if this client gets my time and this one doesn't need it, that's a conflict. And I can't tell you the number of times I've done an evaluation when a program person, particularly the staff lawyer or even the director tells me, “Well, that's true, we're dealing with 600 felonies a year, but I know which cases really need the work.” The courts are only open, by the way, 238 days a year. And you hear that coming from them, which mean that they've decided this client is going to get the work and these other ones don't need it. They're not going to do the investigation, they're not going to do the things that lawyers are paid to do, which is do exactly what—let me ask you a question out there, by the way, as an aside. All of you when you download those updates to your programs from Microsoft, you all read every word of

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those agreements before you say I agree, right? If someone paid you to read that, would you read it? Of course you would. That's what lawyers do. We do boring, boring things. We read everything. That's if you're doing it right. And if you aren't doing that, that's the first indicator you're not doing it right, because we're boring people. That's the best example I've ever had of explaining to a funder why he had to read all this stuff and do all that basic work in every case. That's what you're paid to do. So what you see in Dennis' case is an internal approach that worked. He got the data that he could go to his funders and say, "I'm, declaring unavailable and they've accepted it."

Now, what you see that's universal in this process is longevity. We've been at it for a long time. But you also see this continuing effort on improving our offices. That is, we take great pride as managers in doing lots of things that are improving our offices. There's been an evolution in the process. And I think the best example of it is Dennis's, because he talked about going from the manual system to a mainframe system and now this existing system. But, each of those is an evolutionary step that provided greater capacity for him to manage his office. There's an effort to garner support at all levels. That part I can't emphasize too much. That is, you do it within your office, the locality in which your local legal culture exists. You do it on a state level, and you do it on a national level. But, it's getting plugged into that and constantly using all those resources and trying to get them to adopt positions that support the ability to control your caseload.

And as Dennis said, the final end of this is, the value of this isn't just controlling your caseload—although that is a crucial reason for doing it. The value of developing a system that can control the workload coming into your office—you heard it coming out of here before—is that it's an essential part of a commitment to a quality office. It's an essential part of a staff esprit de corps that

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you're fairly distributing the work and that you're conscientiously trying to do differential management and match the amount of hours you expect a case to have—such as giving additional time when a case goes and becomes a US Supreme Court case, which in my case happens regularly. You have to have the ability to adjust and provide time for people to do a quality job. And to do that, you have to have a structure in place. And that kind of a commitment pays off with your staff in ways that you just can't even begin to imagine. So it pays off on so many levels beyond, for example, simply going to a funder and saying I need X amount of dollars to do Y amount of cases. It is a commitment, and its basis to just a commitment to quality. And it's why we should be doing this work. Thank you.

NORMAN LEFSTEIN: Well, you've been a very patient audience and you've been exposed to an awfully lot of ideas since about 2:30 this afternoon, and I want to throw it open for comments, suggestions, questions. You can address it to anyone you'd like, but we'd be real interested to hear from you. And I suspect some of you, once we get the ball rolling, would be interested in commenting.

[Long pause]

Well I have seen some law school classes that are less reticent than all of you.

ROBERT BORUCHOWITZ: There's a hand. There's three hands.

NORMAN LEFSTEIN: All right. Let's start with Laura Sager, and then we'll go up, up in back. You're going to take the microphone around; right?

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JESSICA VAN DYKE: Sure. Where are we starting?

NORMAN LEFSTEIN: We're starting with this lady right here, Laura Sager. You can state your name and where you're from and what you do for identification. We are taking this down with the court reporter. We will edit this in the end, but we're interested in publishing the full proceedings of this conference, unless you say something really obscene.

LAURA SAGER: I don't know who this should go to, and obviously I'm in a different position from most of you. I don't have an office. I'm with the Campaign for Justice, and we're struggling to get a state—

NORMAN LEFSTEIN: In the State of Michigan.

LAURA SAGER: —in the State of Michigan—a state public defense system. In the meantime, I'm hearing from public defenders and attorneys and various whistle blowers. And I just got a call from a public defender that heads a small office in the north part of the state who said, "My partner and I have 1,100 cases. There's one legal secretary. The county commission doesn't believe we need even the help we have, or to hire anyone else." When I asked her what she has tried to do with it, she said, "Well, my county commissioner's been saying to me, 'so you're saying you're providing ineffective counsel.'" And she said, "I can't do that." The other thing I hear is from judges, "Well, the better attorneys can handle very large caseloads. They're very efficient."

UNIDENTIFIED SPEAKER: [Unintelligible]

LAURA SAGER: Yes, thank you very much. Some of the attorneys say the same thing. So, I'm in a position of trying

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to talk and to encourage some of these people to come up and stand up with some of this stuff. Fear is just rampant. So, if people want to talk about how they've combated that just plain terror of "I'll never work in this county again,"—which sometimes is true—or of having to declare myself as doing a bad job—which I just can't bring myself to do—how you can use these cases to generate some sort of higher profile of "yes, you can stand up to this?" Who would be most helpful?

NORMAN LEFSTEIN: Obviously, a function of a lack of independence, but, Jim, you're from Michigan, so why don't you answer that question?

JAMES NEUHARD: I think Laura has hit it. I don't think it's unique to the small lawyer in a small county in Northern Michigan. I think that's at the core whether it's an office that has 500 lawyers in it, or an office that has 2 lawyers in it. That's the fundamental question, "Are you willing to give up your job?" I mean, it gets down to that level.

Now there are strategies that you can do to lessen the possibility of that. NACDL has a strike force that will come in and work with you on those kind of questions—coming out of the *Peart*<sup>31</sup> case out of Louisiana where a lawyer did just that—stood up and said no. But, I think you've got to find the support that I talked about outside of your office. You've got to be committed to trying to find people outside, across a broad spectrum, but willing to commit and stand beside you at the end of the day. The biggest threat isn't just what the lawyer implied about their job. We've heard this any number of times. Well if the public defender can't do it, we'll go back to assigned counsel, or we'll go to a low-bid contract, or if the low-bid contract wants more money, we'll go to a public defender. They have one pitted against another. And the only answer

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<sup>31</sup> *State v. Peart*, 621 So.2d 780 (La. 1993).

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to that, of course, is the standards you have for all three of those entities within it, so that they can't play that kind of game with you. But, that's what they're involved with—bidding aside—the ability to get those standards in place. You've got to find safety in numbers. So, the only thing you can do is begin to bring in more and more people to validate what's going on here or you simply can't—

NORMAN LEFSTEIN: Is that a public defender office in Michigan?

LAURA SAGER: Yes, it's a county.

NORMAN LEFSTEIN: It's a county office, hired by the county board?

LAURA SAGER: Yes.

NORMAN LEFSTEIN: And obviously, in that circumstance, you don't have the requisite independence. But, I think Jim is exactly right. And we've seen illustrations, wonderful illustrations, of private lawyers serving pro bono. NACDL, for example, became involved in the case from Ohio, which incidentally is cited in a footnote in the Excessive Workload Guidelines<sup>32</sup> that we've talked about here this afternoon. The lawyer in that case where the trial court judge in Ohio, as I recall, wanted to hold him in contempt because he wouldn't proceed with the trial, was he not, Bob—

ROBERT BORUCHOWITZ: Yes.

NORMAN LEFSTEIN: And NACDL came in with its lawyers and had the thing set aside, resulting in a very good opinion of the Court of Appeals, which is what's cited in a

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<sup>32</sup> ABA EIGHT GUIDELINES, *supra* note 3.



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footnote in the ABA's Excessive Workload Guidelines. Apparently it's cited in one of the 100 slides that Bob Boruchowitz exposed you to.

ROBERT BORUCHOWITZ: Three of the hundred slides.

NORMAN LEFSTEIN: But, you know, at base, it requires a certain amount of courage. There's no doubt that in a system where you don't have the kind of independence that the DC Public Defender Service has, it's much more difficult.

ROBERT BORUCHOWITZ: Let me add this, Norm. I think it's not practical to say to that lawyer that tomorrow you have to go in and say you're ineffective. But, I do think that anybody in that situation should do what Jim is talking about in terms of garnering support. And in our state, what I tell people is, call the Washington Defenders Association, call the Washington Association for Criminal Defense lawyers, call me because I have my fantastically huge Defender Initiative Program at Seattle University School of Law. And there are things that we can do, whether it's come in as Amicus, represent you in a hearing, or make motions for you. But, the other thing is there is real risk to public defenders of losing their license, not just their job, if they don't pay attention to RPC 1.1.<sup>33</sup> And it's true that we look around, we don't see very many public defenders who've been disciplined, but it is happening. It's happening more and more, and it's going to happen more and more. And Bob Spangenberg—in a meeting that I was at with him a few weeks ago with a couple other people that are here today were at—said that he thinks the next step is to start bringing ethics complaints against judges and lawyers. And that's beginning to happen in our state, and I think it's going to spread.

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<sup>33</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

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And so, one of things you can say to the person who called you up is, you may be afraid of losing your job, but you also should be afraid of losing your license. And if you're not providing competent representation, there's a good chance you will.

NORMAN LEFSTEIN: And in Chapter Three of the draft that is on your flash drive brings together all the authority that I could find on the issue, of potential liability for discipline, and there is some. This includes some public defenders with Missouri's statewide program, who were called before the state's disciplinary body. They didn't ultimately wind up being adjudicated, but they were investigated, and I think initially charged. But it never became a matter of public record. But, it was solely a caseload issue. The Missouri program has been overloaded with cases for a long time. And there is a very good opinion by the Missouri Supreme Court in December of last year dealing with it. Cara?

CARA DRINAN: I'm Cara Drinan from the Catholic University of America. Bob, I actually wanted to ask you to follow up on a point you made. As a law professor, I think about how to involve students in this. And you mentioned in passing, you'd like to see law schools be more involved in this reform area. Can you say a little bit more about that? What that would look like?

ROBERT BORUCHOWITZ: Yeah, I think there's lots of things. At a minimum, students can be trained to go watch courts. They do have to be trained because they don't have any idea of what they're looking at. I've had students go watch really bad things and come back and say, "Looks okay to me." This is because they've never seen it before, and they don't know what they're looking at. But, even when they're not a lot trained, they can still go and get basic

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information.

One of the things that is really useful to me in my misdemeanor work is a lot of courts have recordings. So, if you have a student go watch something and you get the recording and then you talk to the student, you can get a pretty good sense, even if you're not able to go yourself. You can also have students doing all kinds of other leg work in research. I think having students on independent study is a way of expanding the reach of a professor. I'd like to see more professors getting involved. And I think independent study is a way to do it in addition to clinic, because I recognize that it's hard to start a new clinic right up off the bat. It incurs a lot of money. But, if, let's say, three professors in every law school were to take on one independent study project relating to public defense a year. You would talk locally to folks about what's most important, whether it's a caseload issue, resources, expert witnesses, investigation, independence, flat-fee contracts, or moving to set aside guilty pleas of people that weren't adequately represented or represented at all. And if professors were to let it be known to the local bar, I'm willing to take one case a year that has a systemic impact, it would be fantastic.

I think if we could develop some sort of coordinated effort to do that—where maybe we talk to each other in professor land. You know, it's no secret to any of you that went to law school that most professors didn't practice very long before they started teaching. It's a very bizarre thing where we're teaching people how to be lawyers when the people doing the teaching don't really know how to be lawyers. And so, it's difficult in that situation because maybe a lot of professors who want to engage don't really know, for example, how to file a writ of habeas corpus. But for the ones who are willing to learn, I think it's a good system. So, for me, I've taken some projects on independent study and, and I have my little project as well,

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which I've been able to get some funding for. At a minimum, I think that's something you can do. More broadly, even in places where you don't have access to the folks in this panel, if there are professors who'd be willing to spend five to ten hours a week consulting with local defenders, being expert witnesses on motions to withdraw—whether they are experts or they could make themselves experts—those local professors who can get up to speed can provide that kind of assistance. There was a question over here and Jean has her hand up too.

NORMAN LEFSTEIN: Yes, the lady in the back row known as Jean Faria.

JEAN FARIA: (Inaudible). You can probably hear me, can't you?

NORMAN LEFSTEIN: No, use the mic, Jean.

JEAN FARIA: Cara, one of the things that we've done in Louisiana, is we developed an internship/externship on the state level. We're interested not only in getting young help, but it's available to 2Ls and 3Ls to go into offices or work with us on the policy level in the state office and we pay. It's competitive. We go to each law school and take two people from each law school. The first year we paid them \$2,000 a piece, and we are continuing that. The first year we had to scrape together to get people, and this year we have 110 applicants for eight places. So, we subsidize that because we want to have them see what the offices are like, but we control that. They go into the offices, but they're trained by us before they go. Then we resource them while they're in those offices. They meet with us beforehand and at the end of their experience—just another way to do it.

JAMES NEUHARD: Let me add one thing to what

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happened in Michigan. As you all know, I think one of the biggest impacts on moving the ability of the public defense issue to gain a much higher profile has been the actual indigence cases. They have proven to people that bad defense has horrific consequences. And Barry Scheck should get all the medals in the world for what he's been able to do there and making real the fact that innocent people have ended up in prison. Now, that was a fluke—and I use word not even guardedly—of DNA, that he alone and was able to do so convincingly.

One of the things that began in Michigan is a non-DNA Innocence Project. David Moran is running it out of the University of Michigan. I think, they have passed five cases, to show that there are people who are going in and are actually innocent. They're doing it using students in a clinical approach very similar to what DNA cases have done, but it's taking it to another level. And that one looks at, again, how did this happen? How did these people get convicted? Almost invariably, it goes back to the quality, or lack thereof, of defense representation they had. So that's a fairly unique clinic that will not take a case if there's DNA involved. It's looking at the cases differently.

NORMAN LEFSTEIN: I think Barry Scheck deserves enormous credit, but I think as well his very close partner, Peter Neufeld, deserves great recognition as well. And as I say that, his wife who is sitting back in the room—

ADELE BERNHARD: Thank you.

NORMAN LEFSTEIN: Adele Bernhard, smiles broadly. Adele is on the program tomorrow.

JAMES NEUHARD: I apologize, Adele.

NORMAN LEFSTEIN: While I'm thinking of it, until we

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see another hand, let me tell you that the ticket for dinner tonight is on the back of your name tag. So please bring your name tag along with your ticket to dinner tonight so we can make sure that you get something to eat. Now, who else would like to be heard from? It's been a long afternoon. Anyone? Yes, Jerry Black, a professor here at Tennessee. She'll bring the mic over.

JERRY BLACK: I think when the question was raised about what do you tell the lawyers, that's only part of the problem. If the county commission is willing to recognize that quality of representation, then they just find another lowest bidder. And how do you deal with that? I think that part of the problem is—something we don't take very seriously—the Sixth Amendment right to counsel<sup>34</sup>—that we're willing to accept second rate representation.

NORMAN LEFSTEIN: Well, there really are no easy answers obviously, but one of the reasons why I take some time in Chapter Three of what I have drafted is to talk about the liability of communities under Section 1983.<sup>35</sup> Bob Boruchowitz mentioned the most prominent 1983 action involving public defense, which is *Miranda v. Clark County*.<sup>36</sup> Here, they had prioritized cases, as many of you know, based upon polygraph examinations in deciding upon the cases to which they were devote their resources and energies. The rest of the cases they didn't do much work on at all. But, those are not the only 1983 recoveries. And when you're running a program— especially in a county which doesn't have any defense to a 1983 action— when you're running a program like that, you are exposing yourself over and over again with the potential of being

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<sup>34</sup> U.S. CONST. amend. VI.

<sup>35</sup> 42 U.S.C. 1983 (2006).

<sup>36</sup> *Miranda v. Clark Co.*, Nevada 319 F.3d 465 (9th Cir. 2002).

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sued. One of my goals in putting all of this together is to give lawyers the ammunition to drive the case home as to what all the reasons are for why excessive caseloads ought not to be tolerated.

I worry more, or just as much, about assigned counsel programs, where you pay the smallest number of dollars and you attract the least experienced lawyers who then take maximum numbers of cases in order to generate income. And it's an enormous problem. And that's why I stressed in my remarks earlier, that, while I believe strongly that you need the substantial participation of the private bar, it cannot be solely an ad hoc system where the compensation is totally inadequate. Otherwise, you'll wind up with defenders saying, "Look, I've got all of these cases, but if I don't take these cases, look who the lawyers are to whom the cases will be assigned." And that becomes the excuse for defenders piling on still more cases. But, in the end, it is not a defensible position. It frankly is not. Because the first obligation, as the ethics opinion of the ABA drives home, is to your existing clients, to your current clients. By simply taking more and more cases because you worry about what may happen to these clients jeopardizes your own representation and jeopardizes your standing as a member of the bar and the quality of representation that you can provide to your clients.

**ROBERT BORUCHOWITZ:** I want to expand on my answer to Laura in light of the professor's question. Dennis and I were talking with Mark Stephens this morning about the impact that one or two people can have, whether it's a judge or somebody else in the system. And there are two thoughts that I wanted to share.

One is that almost everywhere you can find one person who is in a position of power or in the media or maybe both, who does care and for whom these arguments resonate. And so you've got to figure out how to work with

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that one person to develop some other people. For example, years ago in the city, before David Hocraffer, who is now in the job, somebody else was in the job in the county. This person was really trying to mess with us in the city and trying to have our funding cut and caseload increased. But, there was one person on the city council staff who was an aid to a council member, who's a former fire chief, who never in a million years would we have predicted would be in favor of public defense. But he had a staff person who was a former city prosecutor in another town who totally cared about this. And there was one person in the mayor's office, who was his counsel, who had come from a total noncriminal background. And those two people were able to get it to the point where the city basically said to the county, "You go away. We're going to hold to our standards, and we're going to pay these people what we want to pay them." You can always find somebody who does care, who these arguments resonate—somebody in a bar association, someone in a faith-based organization. You can find somebody who is willing to stand up and help you.

The other thing I want to say is in response to a question from Upper Michigan. Get somebody else involved to help you. Don't do this by yourself. Whether that's the local ACLU or it's some group of volunteer lawyers, you go see the head of the local bar association. Tell them you have 1,100 cases that you pick up off the floor because he can't even imagine that any lawyer would ever do that. Get those people to start helping you, and you go talk to community groups. It's possible to do it. You can sometimes get an editorial writer in the local paper or somebody on TV news that cares about this and sees it as a story, as well as something to care about. I know Jim wants to talk before Barbara.

ADELE BERNHARD: Oh, but I have the mic.



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ROBERT BORUCHOWITZ: How'd you get it?

ADELE BERNHARD: I was just going to ask also—

NORMAN LEFSTEIN: Do you want to identify yourself?

ADELE BERNHARD: I'm Adele Bernhard, and I just wanted to also respond to the professor saying that people don't really care that much about the Sixth Amendment right to counsel<sup>37</sup>, which I think is true. I think one of the themes that we're all here discussing is, "How is it that we're going to change that?" And it's not going to change quickly, and it's not going to change overnight. But there are strategies which folks here and folks in this room have used, which I think will sort of slowly, over time, make a difference.

One thing, of course, is the use of the media, which they've used very effectively in Michigan. It is something which Laura has used and has been used in New York to build around bringing of litigation. There was a huge story about, who is it that's affected by these bad lawyers? Who are those people? What are their cases like? What does happen as a result of someone not having enough time or not being willing to stand up, or not bad lawyers, but overburdened lawyers?

So there's media issues, and then also in terms of the school, students going and watching court or students going and working in the public defender offices. You know, you're getting out there. You're getting people to care because they haven't seen this. Once they see it, once they're involved with it, it makes a difference. Those are lessons that they're not going to learn. So you can have the students also start thinking about writing letters, editorials, doing documentary movies. Our clinic students this year

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<sup>37</sup> U.S. CONST. amend. VI.

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went out into the community and did a “Know Your Rights Symposium.” After spending a year in criminal court, they learned about who got stopped, why people get stopped. They went and did a community lawyering, a session for kids in this public housing project talking to them about how they should respond to the police. So, that all builds on itself.

JAMES NEUHARD: Just to put a sort of an end on this thing. It's been referred to, and I don't want to underestimate the role litigation plays in this. We are at a moment where you can look at it and say the failures we know about, if you're in Knoxville. But for those who haven't been following it, in the last couple of weeks, two big cases came down. My supreme court in Michigan ruled that a 1983 action to go against a systemic challenge to the entire system. It's the first one that ever did that. And then New York, right after that, ruled the same way. And there's two major systemic challenges happening in two of the biggest states in the union. At the core of the failure in almost all of those cases, what they're looking at, are systems that are grossly, grossly underrepresenting their clients—gross case overload, across the board going on.

Secondarily, federal courts, in fact one of the federal courts in my eastern district, we won a case where they actually cited the Ten Principles. And they're finding structural denial of counsel for lawyers who do not talk to their clients in a confidential setting. They just started listing off the number of principles that were violated, and they said it's a structural denial of counsel. I'm sure you studied it in court, the difference between a post-conviction denial of counsel and a structural denial of counsel, where it's lawyer not present. It's appearance reversal—there's no need to show harm. And they've done it now in three habeas cases that we've won pretrial. These are—if you look at the bad systems—what they're not able to do. They

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can't visit their clients, they're not doing any investigation—on and on it goes. And those things are literally structural denial of counsel. And as that body of case law builds up, as these systemic challenges come forward, they tend to have a domino effect in other jurisdictions as time goes on. So I would not underestimate the role that litigation plays. And what we do better than lobbying is we're lawyers. I mean, that's what we do for a living.

NORMAN LEFSTEIN: I think tomorrow Cara Drinan is on the panel on litigation. We'll probably talk about the New York and Michigan cases. Yes? You have a comment or question?

BARBARA HURST: Yeah, well, I want to follow up on what Jim said maybe and—

NORMAN LEFSTEIN: Can you identify yourself?

BARBARA HURST: Yeah, I'm Barbara Hurst from Rhode Island. Practical consideration may be as an appeals lawyer. I'd been thinking about that statement from earlier, that rather than mass systemic litigation we ought to be focusing on motions to withdraw. It strikes me that motions to withdraw look a lot like motions for continuance. And if they're denied, you really are talking about *Strickland's*<sup>38</sup> second prong. You have to have a record that shows what you would have done if you had that continuance. There's a real focus on prejudice in the individual case. And the appellate court—at least the court I'm used to practicing in front of—will issue opinion after opinion saying, “Boy, it looked pretty good to us.” Because, once that motion to withdraw is denied—if you can't get interlocutory relief, which in at least my

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<sup>38</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

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jurisdiction, you can't, or not often—then you've got a full trial. And then, you've got a lawyer who has now gone to heroic, trying to do the best job he or she could. So, when you're saying I have to withdraw because I've got so many cases that I can't canvas the neighborhood for witnesses, I can't go out and speak to the defendant's second cousin who has now moved to Nebraska, okay? If you're dealing on an individual basis now, you've got to start talking about what would that second cousin have told you. Whereas, when you're dealing on a systemic litigation basis, the weight of not being able to do that in 600 cases speaks for itself. It's a whole different kind of focus to me and a different kind of litigation. It's hard to sit here and think of systemic litigation not being a better route for that record.

NORMAN LEFSTEIN: Well, I saw you shaking your head when I talked about motions to withdraw being filed much more frequently. I understand exactly what you're saying. I did not have a chance to develop that fully in the time that I had available, and I do plan to spell it out in some detail in what I'm writing. Obviously, I have in mind requesting a hearing on what it is that the lawyer is confronting in terms of current caseload and how it inhibits performance, the discharge of professional obligations to clients. Now, I have no illusions that judges would not like such motions. Some might even try to bar them in some fashion. I don't quite know how they can prevent you from filing things of that nature. In the New Orleans litigation, which I mentioned earlier, the lawyer was given a hearing on a motion to withdraw. I don't remember how many cases in which they asked to withdraw, but it was a very large number. He had—on that day that I was in court, and I testified in the New Orleans case—185 pending felony cases, with many of his clients facing life imprisonment. And the head of the New Orleans' office said, "Let's go through the cases that you're in which you're seeking to

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withdraw,” and they then proceeded to make a record of all the things that were not being done in the lawyer’s cases. Once that record was made, the trial court judge wrote an absolutely scathing opinion about defense representation in New Orleans in general and about this particular lawyer's caseload.

So, obviously, there is a way to do this, and I didn't fully spell it out. But, I think that it becomes difficult for courts just to ignore repeated motions to withdraw. If the hearing is granted, there is that capacity to make a powerful record. What I was really getting at was that the cases that have been brought here in Knoxville and in Dade County, Florida, have really soured me on this effort. And I just think of the world of Mark Stephens and Max Bahner and his law firm because they meticulously prepared their case. Mark is going to talk about this tomorrow, so I don't want to go into great detail about it, except that initially, after the case had been heard and there was an extremely strong record prepared, he couldn't even get the trial court to render any decision at all for a very long time. And then when it was reviewed, the case again waited a very long time for a decision. The delays are tremendous. And meanwhile Mark's got a group of lawyers who are faced with incredible caseload problems.

One other point I want to make, and I don't want to monopolize this, although—

ROBERT BORUCHOWITZ: Yes, you do.

NORMAN LEFSTEIN: Now that I'm at the podium it's not that hard to do. But, there is a line in ABA guideline eight on this appeal of the denial of a motion to withdraw, and I agree with it. I've looked at statutes on this. The right of interlocutory appeal, it simply is unavailable. If it exists at all, it's a discretionary. But, there is a line in the commentary that says: "If you have a denial of a motion to

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withdraw—and it's guideline eight, second sentence of the commentary—an appeal or an application for a writ of mandamus or prohibition should properly be regarded as a requirement of diligence under Professional Conduct Rules." So we had in mind the notion that, if these motions to withdraw are denied, then maybe you need to think about an extraordinary writ.

I want to do one other thing, by the way, before we see if there's another question or comment. I'm going to embarrass somebody, but I think she can take it. There is a public defender here from Spokane, Washington who actually took a red-eye to get here from San Francisco last night because she was on a program on Wednesday in San Francisco. And she and I have been e-mailing back and forth over the last couple of weeks because she publishes a blog, and it's called *PD Revolution*.<sup>39</sup> It's all about caseloads, and that's why we've struck up this friendship through e-mail. And I was delighted that she was willing to come out here, at some personal sacrifice, to attend this meeting. And I want to—Carol, why don't you stand up and introduce yourself.

CAROL HUNEKE: Hi, everybody. I'm Carol Huneke from Spokane, Washington. Oh. Do I have to say it again?

NORMAN LEFSTEIN: Sure.

CAROL HUNEKE: All right. Carol Huneke from Spokane, Washington. And if you want to look at my blog—it was really weird yesterday when somebody introduced me as a blogger, which I had never thought of myself as—

NORMAN LEFSTEIN: You always thought you were a public defender.

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<sup>39</sup> Public Defender Revolution, <http://pdrevolution.blogspot.com/>.

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CAROL HUNEKE: Yeah, or something like that. But you can just Google “Public Defender Revolution.” I would warn you, there's some profanity on there because it's geared towards an audience of public defenders, but...

NORMAN LEFSTEIN: She was really worried that I was offended by the profanity. She told me that, and I told her I read it anyway. Carol, it's nice to have you with us. I don't know if you have a comment or question or observation.

CAROL HUNEKE: Oh, not right now.

NORMAN LEFSTEIN: Okay. Okay.

JESSICA VAN DYKE: Actually, we've got somebody over here.

NORMAN LEFSTEIN: Okay.

JESSICA VAN DYKE: So I'm going to go over here.

NORMAN LEFSTEIN: Okay.

MAUREEN DIMINO: Maureen Dimino from NACDL. I just have a question. I know all of my work has been in Florida when I was a public defender, and Florida has this different system of having elected public defenders and—

NORMAN LEFSTEIN: Dennis is also elected by the way, Dennis Keefe. And here in Tennessee, as you may know, they're all elected.

MAUREEN DIMINO: Well, then, that's helpful. What I would love to know is, in light of what's going on in Miami with the caseload litigation being held up, is this a waiting

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game to wait for another election to occur, to see what happens in that election; if new public defenders are being stayed? And I just want to know how does one support the public defenders that are doing right and doing what they should be doing as public defenders in any system that's elected?

NORMAN LEFSTEIN: I don't know maybe—do you want to cover that tomorrow morning, Rory? Rory Stein is the general counsel of the Dade County Public Defender Program.

RORY STEIN: Yes, two separate public defenders, both elected, have continued the workload litigation. Bennett Brummer was the public defender who began. He was the PD in Miami for 32 years. And then his successor Carlos Martinez, who was elected when Bennett retired, continued the litigation. So, if the legislature was waiting around to see if there was going to be a change of heart based upon a different elected official, that didn't work. And by the way, we're not stuck; the Florida Supreme Court took cert today in the first workload case. So we're moving forward again after a ten-month delay.

NORMAN LEFSTEIN: In a six-to-one decision I understand. Yes, somebody else? Bob Weeks?

BOB WEEKS: Good afternoon, I'm Bob Weeks from Santa Clara County, California. San Jose is our main city. I was a public defender there for 30 years, and I'm now on SCLAID. I just want to make one point on the two-person office in Michigan and a point raised by Professor Boruchowitz on that. We recently had an issue in San Jose that demonstrates the power of one person and the power of the press. The office had been going there for about forty-five years, and it was a news article of front page about six



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months ago. It was about not having public defenders at arraignments—this is a county of about two million people—and what was happening to people. They quoted both Professor Lefstein and Professor Boruchowitz as to the affect of that, etc. That got the ball rolling. Our public defender was quoted in the article as saying, "Well, we'd like to do it, but we don't have the staff, yada, yada." A long-time friend of mine, Mary Greenwood—as a result within a coup—struck a chord with one of the members of the board of supervisors. This kind of shook up the local judicial establishment, and legal establishment and the bar association started rumbling about having volunteers. I was on vacation, yada, yada, we came back and said, "Gee, I know all these people." So, I started talking to people and said we ought to do this.

To make a long story short, the public defender went in with a supplementary budget request, got an extra million dollars to staff—mainly the domestic violence arraignments and the felony and misdemeanor DV arraignments were combined to do that. And the board of supervisors stepped up to the plate to give them the money, and at a time when they're facing about a twenty million dollar budget deficit. The DA wanted more, but she hadn't submitted her request. But they're doing it in the DV court now, and the PD and the DA showed up. The DA has got a request in for next year to get three to five attorneys, and the public defender's going to staff the general misdemeanor calendar. So, everybody will be covered with three experienced attorneys and a paralegal.

So, that shows the power of the press and what one interest—in this case, a member of the board of supervisors and some other people working together—can do. It's possible even in these tight times.

NORMAN LEFSTEIN: In the very back.

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ANDY ROSKIND: Hi, my name is Andy Roskind, and I practice here in Knoxville. I heard Jerry Black say maybe people just don't care about the Sixth Amendment<sup>40</sup>. And I thought: "Well, I wonder if more people would care about the Sixth Amendment if there's funding to care about the Sixth Amendment." So, I guess my question to the panel, where it's applicable, is what—of everything you've talked about, about the issue of not having a staff and having too many clients—what similarities do you guys have as far as to reach out to your states or communities to increase funding to help alleviate that? Could you guys talk about that a little bit so we might get a better idea of what role you play within your local government and your state governments?

NORMAN LEFSTEIN: Bob, go ahead.

ROBERT BORUCHOWITZ: All these things work together. And by the way, I don't agree that people don't care about the Sixth Amendment.<sup>41</sup> The NLADA did a focus group—ten years ago? Ed, do you know how long ago it was?

UNIDENTIFIED SPEAKER: About eleven years ago.

ROBERT BORUCHOWITZ: And these focus groups went around the country. They went around the country and interviewed people. And guess what? People care about fairness. I really think, and I wave the flag about this, I think Americans care about fairness. And when you explain what's really going on, people don't like it. And, you know, there may be exceptions like the State of Arizona—but Kingman is in Arizona and they prevailed—but I think all these things work together. So, what I do

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<sup>40</sup> U.S. CONST. amend. VI.

<sup>41</sup> *Id.*

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when I go around saying you should provide lawyers at arraignment, is I make all the arguments about why it's constitutionally required and why the court rules require it—why it's good efficient management and so forth. But, then I also talk about two things. One is, if you have lawyers at arraignment and first appearance, there's a good chance you're going to get more people out of jail. In Baltimore they did a study of that. Professor Calder wrote at least one article about how in fact they saved a lot of money by getting people out of jail by having lawyers at the first appearance.

But the other thing I say is, look at the cases you have in your court. And if you go to almost any misdemeanor court in this country, you're going to find suspended driver's license, minor possession of alcohol, possession of marijuana, obstructing the police and criminal trespass. That's going to be the bulk of the cases. There's also DUI and domestic violence, but the great bulk of it is all those other things. They don't need to be there.

And if you go to juvenile court, you're going to find all kinds of dumb cases there that can be diverted out of the system, that when many of us were growing up, nobody went to court for those things. Now they do and they get criminal records for it. And there is no reason for that. In some situations there are felonies that can be diverted as well, particularly low-level property offenses. So, it's possible to talk about all of those ways to reduce the expenditures, and then shift some of that money into public defense.

One of the things we did in our county was, our office and the prosecutor's office got together, talked to the other defenders, talked to the judges, talked to the county counsel, and eventually put together a re-licensing program to get the suspended driver's license cases out. You can go

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to the website of the King County District Court<sup>42</sup> and read all about how the prosecutor offers pre-filing diversions, so the cases never get filed if people to go to a re-licensing program. The first year we saved \$300,000 in public defender cost.

We also put together a program with Anne Daly from SCRAP, one of the other offices that's here. We put together a program where, in contempt of court cases for parental support, we set up a two-track system. I don't know if it's still functioning very well, but the idea was that we would agree that people would not have counsel at the first hearing if the only thing that happened there was an effort to change administratively what their payments were. And that the prosecutor's office would promise not to use anything they learned in that ever again—later against the defendant. In that program, I think we saved \$300,000 in the first year. So, that was a situation where defenders and prosecutors got together, came up with ideas on how to save money, make it more efficient, and help the clients in the process. Parents who want to make their payments but have lost their job or they have been downsized in their job or they've got health issues or whatever, they shouldn't be going to jail for not making their payments. Their payments should be altered, and they should figure out another way to do it. So, there's ways of putting all these things together, so that maybe you can find extra money. Maybe you can free up money from changing the prosecution plans. But ultimately, it is a right. If you're going to prosecute, you have to defend. And I think that the fairness of that can resonate with a lot of people. So, all those things are possible. And, of course, you can also find grants and things that kind of bridge you through until you can make changes.

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<sup>42</sup> King County District Court, Relicensing Program, <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx> (last visited July 26, 2010).

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AVIS BUCHANAN: Can I follow up on that grant comment? I don't want to sit here being a salesperson for the DOJ, but there is one person who claims to care about the Sixth Amendment<sup>43</sup> and that's Eric Holder. He is making efforts to try to change some of the culture of the justice department. He has said he wants to make public defense part of the DNA of the justice department. And the public defender community has communicated to him that one of the barriers to more effective work in the public defender community is that the public defenders don't have the same kind of access to Bureau of Justice Assistance Grants that prosecutors and law enforcement do. So, I think that this is potentially an opportunity to show that, or to take advantage of this increased access to money. He said that—and you may hear about more of this from Laurie Robinson—has said that they have listened to that, that they want to put public defender representation on some of these grant award committees to have a more receptive audience for grant applications. So, in the next year or two years or three years or however long he or this program—or Larry Tribe is in place to focus on public defender issues—this may be a chance, if not to actually get the money, but to show why the program is either effective or that it's not effective. That we've made the effort to get the access to the funds that he says he wants to make available. So that's another option.

And I didn't say one thing about juvenile caseloads at PDS. They may sound very low, but we insist that the juvenile attorneys do their own investigation, and these cases turnover fast. So there's a context for that number.

NORMAN LEFSTEIN: Our featured speaker at dinner tonight is Laurie Robinson, the Assistant Attorney General in charge of the Office of Justice Programs, which includes

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<sup>43</sup> U.S. CONST. amend. VI.

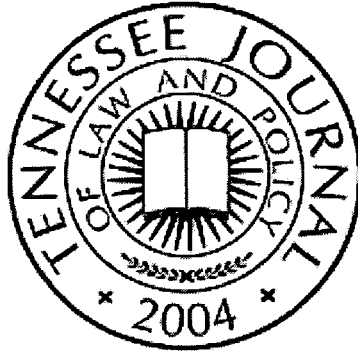
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the Bureau of Justice Assistance to which—

AVIS BUCHANAN: Avis.

NORMAN LEFSTEIN: —Avis was referring. I've known Avis for years so, but every once in a while there's an unexpected mental lapse. Listen, you've been a terrific audience here this afternoon, and it's been delightful to spend the afternoon with you. Please join me in giving a round of applause to our panel.

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**NATIONAL PUBLIC DEFENSE SYMPOSIUM**

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:  
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**“DEALING WITH EXCESSIVE CASELOADS WITH  
LITIGATION”**

**PANEL TWO**

**FRIDAY, MAY 21, 2010  
MORNING SESSION**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW**

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**INTRODUCTION OF DEAN:**

NORMAN LEFSTEIN,  
Professor of Law and Dean Emeritus  
Indiana University School of Law - Indianapolis

DEAN DOUGLAS A. BLAZE,  
University of Tennessee College of Law

**PANEL TWO SPEAKERS:**

MODERATOR: MARK E. STEPHENS,  
District Public Defender  
Knoxville, Tennessee

RORY STEIN,  
Executive Assistant Public Defender and General  
Counsel, Dade County (Miami), Florida

MAX BAHNER,  
Chambliss, Bahner & Stophel, PC  
Chattanooga, Tennessee

PROFESSOR CARA H. DRINAN,  
Columbus School of Law, Catholic University of America  
Washington, D.C.

PROFESSOR ADELE BERNHARD,  
Pace Law School  
White Plains, New York



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NORMAN LEFSTEIN: I know we're going to be joined by a few folks in just a minute. When we began the program yesterday afternoon, the Dean of the College of Law, Doug Blaze, was unable to be with us because he was visiting with alumni and raising large amounts of money for the College of Law, which is what Deans do. He's taking a break from fundraising this morning, and I'm very pleased to welcome Dean Doug Blaze to his own law school to greet all of you this morning. Thank you.

DEAN BLAZE: Thanks, Norm. We are really excited to have you all here. I am sorry that I wasn't here yesterday. I heard that it was an excellent day—very productive—and that you got a chance to see the Baker Center. I was out meeting with alumni. And just to digress for a second, I was in Nashville. I just have to say, and there may be some folks from Nashville here today, it is remarkable how that city and the surrounding community has responded to what has been a devastating two-and-a-half weeks. That community has pulled together. I know as a Tennessean, I'm extremely proud of what they've done over there to deal with some incredibly difficult issues and pull together. I think the whole country can be proud of how disasters like the one experienced in Nashville have been handled in that particular locality.

Again, we are very, very proud. I think it's incredibly appropriate that this conference is being held here. Hopefully, as you walk in and out of our doors, you see that it says "Equal Justice Under Law" at one side and "To Have the Assistance of Counsel" at the other side. We are very, very proud of the law school, of our long tradition of connection with the profession and involvement in the very issues that you all are talking about.

As you may know, we have the oldest, continuously operating legal clinic program in the country. We're headed on sixty-three years right now. And we have been

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heavily involved in criminal defense, Sixth Amendment<sup>1</sup> issues for a long time and increasingly so lately. Our clinical program, in fact, was a public defender for quite a while before we had a full-time public defender program in the state of Tennessee. It was also the legal services provider for a four-county area up until 1981. So it has had a long and rich history of that.

More recently, though, I'm very proud of something we've done. We now have an Innocence Project Clinic at the law school, and thanks to the hard work of Penny White, Steve Bright will be working in that program this fall. We're really excited about that occurring. We also have some amazing faculty. Dwight Aarons has done a lot of work for the ABA Death Penalty Moratorium Implementation Project, particularly focusing on Tennessee. Hopefully, you all have met Jerry Black, who is finishing up as president of TACDL, Tennessee Association of Criminal Defense Lawyers. He also just received an award, the Law & Liberty Award, from the Knoxville Bar Association for his long-time commitment to representing citizens accused of crime.

And then there's the incomparable Penny White and everything she's done to help put this together. You know, Harvard asks her to write law review articles, she puts together conferences, she makes sure that there are flowers spread around our law school, she writes a death penalty manual for handling cases in Tennessee. She's just remarkable.

Obviously, I'm very, very proud of our program, our association. It is wonderful that you all are here. If there is anything anybody in this building can do to make your visit more enjoyable and more productive, just let us know. So welcome and thank you.

NORMAN LEFSTEIN: Thank you very much, Dean Blaze. I should have also mentioned that the Dean comes

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<sup>1</sup> U.S. CONST. amend. VI.

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from a clinical law background and has worked in legal services and in public defense. And there aren't too many Deans around the country who can make that claim. It's my pleasure now to turn the program over to Mark Stephens.

MARK STEPHENS: Well, good morning. I'm delighted to be here and to have the opportunity to serve as moderator of this panel; I look forward to their remarks. But before we get started, I do want to take just a couple of minutes. I'm kind of a child of the 1960s, and I am from time to time reminded of Max Yasgur standing on the stage screaming, "I'm a farmer," and then addressing the half a million or so people that were there at Woodstock.

I was thinking yesterday that I am a public defender. That's who I am—that's who I want to be. I'm so lucky to have the job that I want to have. I don't want to do anything else but this work. And yesterday, as I looked around this room, I was just energized by the wonderful, talented, and dedicated people who are here.

You know, this work that we do—not that I would know—but I hear that people that run marathons say that at some point you kind of hit this wall and you feel like you can't go forward. And any of us who have done this work for any length of time, we know there's those points where you kind of hit a wall, and you think, I just don't know if I'm going to be able to bring this home. And then you come to a group like this, and you see giants in our field, and you guys really are giants in the field. Norm Lefstein knows more about this topic than probably anybody I know. And as I was looking around I saw Bob Boruchowitz. I see that Avis—Avis Buchanan—is here, the head of PDS. PDS, the mother ship of public defender offices is here for God's sake. And then there is Ed Burnette. I don't know if you know Ed's background, but you should talk to Ed about what happened to him in

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Chicago. And let me tell you, if there's anybody in this room that has a bigger backbone than Ed Burnette, I want to—I want to meet you because that guy's got something.

And so I just want to start off the day by saying that I am proud to be in this room. I am proud to learn from the folks that are here, the people who have dedicated their lives and who are truly experts in this field. Before I go any further, I would like to ask my staff who is here to stand up. I would please ask the audience to recognize them for the wonderful work that they do.

Now it's time to get started. We've got a panel here of real experts. Max Bahner is going to kick things off. I'm going to introduce Max here in a minute. Max is with the firm of Chambliss, Bahner & Stophel, a law firm in Chattanooga, who agreed to take my caseload litigation. And then I'm going to speak a little bit about the effort in Knoxville of caseload litigation. Rory Stein is here. Rory is the Executive Assistant Public Defender and General Counsel of the Miami Public Defender's Office. And for those of us who have been in this business for any length of time, we all know Bennett Brummer and what a leader in this business Bennett has been. Carlos Martinez was Bennett's right-hand man forever. Now Carlos has assumed responsibility for running that office and has designated Rory as his right-hand person. And so Rory must be an outstanding individual, and I look forward to his remarks. Rory is going to talk a little bit about the Miami experience, which is similar to the Knox County experience, although Rory has had chapters that are different from what we've experienced, and I'm interested to hear what he has to say about that.

Professor Cara Drinan is going to talk to us as well. She is currently a professor at Catholic University in Washington, D.C. She's been teaching since 2004; she's done research that has focused on the death penalty and the public defense reform. I recommend to you an article, *The*

*Third Generation of Indigent Defense Litigation*,<sup>2</sup> a 2009 article that Jerry Black gave me about eight or nine months ago. It's a great read. I also understand that there will be an article coming out this summer called *The National Right to Counsel Act, A Congressional Solution to the Indigent Defense Crisis*.<sup>3</sup> And I recommend that to you when it comes out. Cara is going to be talking a little bit about her research in the area of public defender litigation generally. She's going to give us a little more insight into what's going on in Michigan and New York.

And then we're going to move to Adele Bernhard. I didn't realize until last night that I actually know Adele. I've been in her office.

ADELE BERNHARD: That's how old we all are.

MARK STEPHENS: Actually, I was in her husband's, Peter Neufeld's, office and that other guy that he works with. I can't remember what his name is. I was with Bob Spangenberg in New York, and we were doing a site study focusing on private lawyers who are appointed to do this kind of work and performance standards and appointment and all that process. Adele has been very involved in those sorts of things. She worked with and ultimately chaired the Indigent Defense Organizational Oversight Committee, which monitored and evaluated the provision of indigent defense services by organized providers in the Bronx and in Manhattan.

What she is going to do is give us her thoughts on the difficulties and practicality of litigation as a strategy to control caseloads in the public defender's office. She's also

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<sup>2</sup> Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009).

<sup>3</sup> Cara H. Drinan, *The National Right to Counsel Act, A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARVARD J. ON LEGIS. 487 (2010).

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going to talk a little bit about whether there are other strategies that we should be thinking about. And then any other things that Adele wants to talk about I'm sure will benefit us.

Let's get started. To kick off the program I'm going to talk to you a little bit about Max Bahner. For those of you who don't know the history, in 1987 Tennessee decided that we needed to look seriously at the possibility of a statewide public defender system. We were providing counsel just through local appointments to private counsel. Tennessee started a pilot program in 1987, and I don't know the exact number—Gerald might know—that there were eight, nine or ten, something like that, pilot programs. After a couple of years, they decided that it was a cost-effective way to provide services. In 1989, we went to a statewide system.

People in Knoxville, being smarter than everybody else in the rest of the state, decided that we didn't want to participate in that program. So we really had a statewide system except for Knox County. We had the law school, and judges didn't have problems finding lawyers to handle these cases, so Knox County opted out. A year later, we decided we wanted to opt in and the Knox County Public Defender's Office was born in 1990.

I don't know if this is true or not, but I think the legislature was mad at us, because it staffed us with seven lawyers in an office. While we're not the same size as Nashville—Nashville had about thirty public defenders—we had seven. Memphis, which is considerably larger than Knoxville—maybe four or five times larger—had an office of seventy lawyers. So from the very beginning, we've been chasing caseload issues; from the day we were born, so to speak. In fact, I was elected, I think, on August 2nd or 3rd of 1990, and the very next day in court a judge appointed me to a death penalty case. I wasn't even sworn in until September 1st. I didn't have an office. I didn't have

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a phone, and I didn't have a staff. He thought it was funny.

And so, eighteen months in we found ourselves in a terrible predicament, and we filed a petition to suspend appointments. I asked for a ninety-day reprieve. That was going to solve my problem, and I got it. I walked out of that courtroom thinking my problems were over—my caseload issues were over—and I won't have to address this again. But that didn't prove to be the case. And by 2006 I was in big trouble. I was seeking counsel from some people that I respect, particularly a gentleman named Bill Redick, who's a lawyer in Nashville. Bill told me, "What you need to do is to get a lawyer, and you need to let them be the lawyer. Don't get you a lawyer and then tell the lawyer how this lawsuit is going to be handled." And I said, "Well, that sounds good. Do you have anybody in mind?" And he said, "Yeah, I'll tell you exactly who you need to get. You need to get Max Bahner." I said, "Well, who the hell is Max Bahner?" I didn't know who Max Bahner was.

I started talking to Bill a little bit about who Max was, and I wound up getting Max Bahner. Everything Bill said about him is true. I would like to read just briefly an e-mail that Bill sent to me the other day when I told Bill I had an opportunity to introduce Max. There is also a death penalty twist to this, because Max Bahner did some incredible work in the case of Michael McCormick, a man who was convicted of murder in Tennessee and who was given the death penalty. Max Bahner and his firm then represented McCormick on post-conviction and won a new trial for him. Then Mary Ann Green represented McCormick back at his re-trial and he was acquitted. The man is innocent, and—thanks to Max Bahner—is no longer on death row. Bill Redick sent me this e-mail about Max, and he said,

Because Max was on the Board of Directors of the Capital Case Resource Center, and a senior partner in a

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major Tennessee firm, he was one of the first that we looked at in our attempts to recruit major Tennessee firms to take capital cases in Tennessee. Max responded to the request as enthusiastically and appropriately as anyone we recruited. He committed staff and firm resources to the case as needed and worked on the case as it should be worked. He had to deal with the fact that McCormick had already been convicted and sentenced to death in an innocence case that had never been investigated. And since the case had never been investigated, Max had no persuasive reason to know that McCormick was innocent. Yet he and his staff rolled up their sleeves. They started from scratch and they did the work. I had several conversations with him and his staff as they worked the case and approached this evidentiary hearing. On one occasion, as they worked the case in anticipation of the evidentiary hearing. Paul Morrell and I went to Chattanooga and met with Max and his paralegal. I'm sorry I can't remember her name but she did incredible work. She was extremely talented. They approached the case with a quote, "leave no stone unturned," attitude. If they had not approached the case this way, Michael McCormick would still be on death row. In my experience, I can't think of a more classic example of a case in collateral litigation in which the attorneys turned around a conviction and death sentence of an innocent person.

Max Bahner, Jerry, I'll quit this in just a minute. I don't want to take all of Max's time but—

MAX BAHNER: Take it.

MARK STEPHENS: Jerry Black tells a story—Jerry Black has the ability to articulate what I felt all my career—I don't know how he does this—but he tells a story about how important the process is to people, to poor people who are in our courts. It is extremely important that they believe



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that they're being represented by a quality lawyer who is really fighting for them and who has their best interest at heart, and that the judge is giving them a fair hearing. The process is important. If they believe that the process is fair, then they'll buy into the result. Whether they like it or not, they'll buy it if they believe they were treated fairly.

Well, I have the privilege of experiencing that because when I walk into court I know I have got a great lawyer. I know that he's prepared, and I know that he's going to fight like hell. I hope we win. So far we're okay. We're still breathing. We don't have an order that I can walk away with, but I know that the process is being handled the way a professional lawyer is supposed to handle this process. So I'm able to experience in a very real way some of the concerns that we have about our clients. So, I've already taken too much time, but it's my great privilege to introduce to you Max Bahner, and I look forward to his remarks. Max?

MAX BAHNER: Within the world of the law there are several worlds, and the world of public defenders is a world of which I was never acquainted really until I learned from Mark Stephens and from Norm Lefstein, with whom I have had the great privilege of spending a lot of time. I feel like I am a pigmy among giants. Because the more I have gotten to know what you public defenders go through, the loads that you carry, the walls you climb, the fierce winds which are in your face constantly, the more I admire what you do. I salute you because in what you do. You do something for me and for every other citizen of this great country of ours because you stand for what constitutional rights have to be enforced,—case by case in the small corners of time—and I really do admire you.

My perspective is very different from yours, and I hope that what I have to say in these few minutes will spark some interest. I think you will probably disagree severely

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with some of the things I say, but I hope you will think about them after we are through here. I've practiced now for a little over fifty years and am just beginning to learn. People keep asking me when I'm going to retire and I say, "Well, when I get it all right." And I have not ever gotten it all right. I hope that sometime, if I reach the age of my senior partner who is ninety-nine—will be 100 in October—and still comes to the office five days a week—although he's in the hospital right now and I'm very worried about that—but he has stood for what is right. Jack Chambliss has preached since I have known him, that we are all priests at the bar of justice. We have a calling far beyond what we articulate when we take the oath of office to become a licensed lawyer.

One of the things that we have emphasized in our firm, as long as I have been there, is that we represent clients and the cases on which we work. I am trial lawyer. The case is not my case. It is never my case. It is always the client's case. I must never forget that, and we don't let people in the office forget that. If somebody comes back from court and says, "I won," one of us is going to be in his face and say, "No, you didn't win. You were a part of a team that won." You may have tried it by yourself, but you had an assistant, and you had other people in the office you could call on for help. It is the client's case, and each client has to be treated differently.

One of the things that shocked me when I began to learn about the operation of Mark's office is that if you take the sheer numbers and divide the numbers by the number of lawyers he has, each lawyer has roughly thirty minutes to take care of the interview, the investigation, the thinking, the studying of the case, and the trial, if a trial is necessary, for each of those persons assigned to her. That's impossible. We couldn't do that. We would never do that. We would be guilty of malpractice if we tried to do that in our firm.

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In Mark's case, we got some outstanding criminal defense lawyers to come and testify as witnesses, in addition to Jerry Black, who is outstanding for many reasons. But they said they would never take on such a caseload. And how you all do it is something beyond my imagining. My perspective on excessive caseloads is influenced by my experience as a young lawyer in my first twenty years of practice. Indigent defendants were assigned to lawyers on a rotating basis, and I kept doing this until about 1979 or 1980 when I went to the court and asked to be taken off the list for various reasons. But in each of those cases, I learned that I had to go to the jail, interview the person, and investigate the facts, because sometimes my client knew exactly what she or he was talking about. Most of them were men because they were in the jail there, and then I had to do some research—because I didn't know criminal law, although I had a great teacher in law school. Then I had to go try the case or bargain.

One of the things that I learned was that people I thought were guilty, if put to trial were not always found guilty whether or not they were guilty. Juries do interesting things. But if you challenge the prosecution's case, frequently you can find that there are weaknesses in it which result in a defendant's verdict. And those people walk. I have seen people I represented who walked who I was as sure as I am standing here today were guilty. I've also had some people who I was appointed to defend who said they weren't guilty, and I thought they were. But as I investigated the case, I learned that they were not guilty, in my mind. And we tried the cases, and *mirabile dictu*, in a lot of those cases there was a defendant's verdict. Juries are pretty savvy, if you get to the jury. If you have done your homework and try the case well, then those people get to walk. I think that is very, very important for the system. Now how you all do it with the caseloads that you have to

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deal with is beyond me. But the point I am trying to make is that we have got to change the system, as I understand it, because we're talking about people's lives. When a person pleads to a felony—or any crime when they're not guilty—just because they want to get out of jail and want to go home, they don't realize the implications of what they're doing and how that is going to hang like a very heavy necklace around their lives as long as they live. I don't think we can do that to people. I think that we have to treat each person as a person. We have to get them to participate in the cases in which we are representing them, because it's their case. It's not our case no matter what our caseload is.

One of my doctors was talking to me about some surgery that he thought I ought to have. And I was grilling him, he was grilling me back, and we were having one of those rough exchanges you have sometimes when a doctor is telling you something that you don't want to hear. And he said, as we concluded our conversation, that he was glad I had challenged him. So many times, my doctor said in fact, most of his patients would say to him, “Whatever you say, doc, whatever you think.” And he said that's not the way it's supposed to be. He said it's your body and your life. I think in the case of each of these people we're appointed to represent, it's their lives and we have to bring them into the process.

One of my perspectives on excessive caseloads is influenced by my having been fortunate to be a member of the ABA Ethics Committee which wrote the opinion with which you are all familiar. I pulled out—in preparing these remarks today—some of the correspondence I got from the public defender in Los Angeles and some other large cities. Norm and Mark have seen some of that correspondence. There were several pages devoted to why in the world we should not do this, but we did. I think, as things have played out, that every one of us on the ethics committee was proud of that opinion, and thought it might make a

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difference. But I have decided that the heads of public defender offices decided that they were going to ignore that opinion until they were forced to acknowledge what is said in that opinion. I would like to encourage some of you to do what Mark has done and take this on. I realize that there are limited resources. The world is made up of limited resources. We're learning that even air quality and water quality are limited resources. There is a tension between funding and not funding the defense of indigent criminals and for the whole judicial system. But I think that we have to learn to do things differently, and we may need to go back to involving more of the private bar in defending indigent criminals even without paying them.

The place I went to law school had inscribed over the door a phrase which is indelibly a part of my soul, "That those alone may be servants of the law who labor with learning, courage and devotion to preserve liberty and promote justice." I think all lawyers, public defenders, prosecutors, and private practitioners have that duty. I think you will find—if you look—that there are resources yet to be tapped to help deal with the situation. As a lawyer—except when I have those lights going on in front of me, a yellow light and an orange light and a red light—sometimes I talk too long, and I'm going to skip a lot of what I would otherwise have said.

In closing, I want to say something that I hope may be helpful to you, in which I read for the first time just two or three weeks ago—some remarks Robert Kennedy made when he was talking to a law school class in Cape Town, South Africa. These are his words, "Each time a man stands for an ideal or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, these ripples build a current which can sweep down the mightiest walls of oppression and resistance." That is what I think all of you are involved

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in, and my hat is off to you. Thank you.

MARK STEPHENS: Thank you, Max. I want to start off now telling you just a little bit about the Knoxville experience, and then we'll move to Rory who will take it from there with the Miami experience. In 2006, we had caseloads that were completely out of control in my office. And I decided, at that point, that I was going to approach the judges and tell them that I couldn't continue to take appointments. I started gathering data, because I knew that the judges were going to be asking questions, and I needed to be able to provide them with the material. I discovered in June 2006 that our data were not in the shape that they needed to be in. There is a state statute that defines what a case is in Tennessee. Our data processing capability didn't match the State's definition of a case. I don't count by their definition the work that we have in the office. That's because, in my view, I think that the statute is structured in such a way as to save the State the most amount of money when it comes to paying private lawyers. For instance, if a client walks into a Wal-Mart parking lot and breaks into cars and is charged with fifty different offenses—that's one case as far as the Supreme Court is concerned. As we know, in terms of workload, that's a heck of a lot more work than one case. Traditionally, what we had always done is that we would count charges instead of cases, and so I knew that there would be a problem there. So we had to start reassessing our ability to count our cases.

Unfortunately, I wound up spending almost a full calendar year converting our data into something that I felt was reliable, and I thought would be able to answer all the questions that they had. Then I went through the process of listening to Bill Redick and going to Max Bahner. I still remember that first day I walked into Max's office, and he came into the conference room. I introduced myself to him, and told him that I needed a lawyer to represent me in

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caseload litigation that I want to file—and that I don't have any money. I thought that would be the end of the meeting. Two and a half hours later—I think Max was on his twenty-fifth page of notes that he was taking—and he said, “There are some associates that I want to talk to and get their counsel and we'll probably be calling you back for another session because I'm sure there are things that I've missed.” And that happened. I later met Hugh Moore and Aaron Love, two of his lawyers that work with him. And then a month later he called me and said that he had taken this matter before his partners and they had agreed to represent us. We were off and running.

One of the first things we did was to contact the judges and ask them if they would sit down and talk with us. I think that was important. I think it's important to begin the process with a dialogue with the judges. But I think there are some things you need to know, and you probably already do know. That is that the judges—well, hope I don't offend too many people—but judges don't care about anything other than if you don't do the work who is, and who the hell is going to pay them, and how much trouble am I going to get in when I give you the relief that you ask for and I start authorizing private lawyers to handle these cases, and the AOC has to pay the bill. I don't think it is true that what the courts are really concerned about is the quality of representation we afford our clients. I'm not taking pot shots at them. If they were sitting in this room I would tell them this, and I probably already have told them this a time or two. I just don't think what matters to them matters to us. And I think that in some of these discussions we had with the judges I was just off because I assumed they had a context that was similar to mine about the discussion that they don't have.

Now, one of the things I've heard judges say at one point is if one lawyer has ten then that can be handled a lot quicker than ten lawyers handling ten cases. When I start

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talking about how I can't do this work and we need to get private lawyers involved, their concerns are how much extra time is it going to mean that I'm going to have to sit on the bench and who is going pay for all of this. And so, the conversations that we had didn't go exactly how I had hoped they would go. Then, in the course of that conversation, they play so many games with you. They say, "Mark, you're a really good lawyer. In your office, you've got a great staff, and they are doing fantastic work. The results that they're getting are"—I don't necessarily believe that they think it's true, but that's a tactic that they start to use with you to try to get you to back off. They give you this false sense that you are providing quality representation. The other thing that I think is important to understand is judges don't know what quality representation is. At least in our jurisdiction, if you're not a prosecutor, you're not a judge. They've never been defense lawyers before; they don't understand what you do or what you believe you have to do or why you would have to do it for that matter. It's just not something that they comprehend or appreciate. They think that defense lawyers do the same things that prosecutors do. So, as hopeful as I was that we would be able to have a meaningful discussion about delivering quality services to clients just didn't happen.

I still would recommend to you that you have that discussion. If nothing else, it's an educational process that you could go through. In those discussions, the attorney general asked to participate, because there were grave financial consequences to what I was proposing, and so he wanted to come in as counsel for the Administrative Office of the Courts, or AOC. It is the arm of the judiciary that winds up handling a fairly large indigent defense fund that pays private lawyers to do this work. If I were given the relief that I asked for, private lawyers would be appointed, and it would cost the AOC more money. And so, the attorney general decided that gave him standing to appear



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and take an adversarial position to what it is we were trying to do.

If you do this, you need to consider what your position is going to be relative to the attorney general, because I guarantee you, they're going to want to get involved. Ed is here and maybe he can correct me if I'm wrong. I think in Kentucky they decided to let the attorney general in. I think in Miami you guys decided to let the attorney general in, I think. Initially, we were able to dodge that bullet, Max. Our sessions court judges decided that this was not an adversarial proceeding, and so there was no question as to whether the attorney general was going to be deemed a party or not. And then the court really helped us. I guarantee you that it was accidental. They hadn't thought about actually helping us. What they told the attorney general is that you can do whatever you want to do. You can participate in the hearing, offer proof, cross-examine witnesses, argue, and do whatever you want but not as a party. If you have information that you want the court to know about, we want to hear it, but I'm not going to deem that you're a party. The attorney general was uncomfortable with that position, because he/she didn't know that if they got an unfavorable ruling what he/she would be able to do in terms of appealing an unfavorable ruling. When the meetings with the judges got us absolutely nowhere, we decided to go ahead, file our petition, and move forward with the hearing.

Some things that I think you'll have to do if you have a hearing is you're going to have to have good data. I mean, you have to be able to answer every single question they might present to you in terms of what your lawyers' caseloads are and how you're counting things. Each jurisdiction, I suspect, is going to have its own little unique things.

Here in Knox County, Tennessee, we have something called general sessions courts, which hear both

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felony and misdemeanor cases. The judges only have misdemeanor jurisdiction, but the felony cases go through there as well. It's a little complicated. But every single case that starts by the issuance of an arrest warrant goes through sessions court. A good bit of things get filtered out of sessions court and only a small percentage of the cases actually go to criminal court. But because of our staffing we practiced horizontal representation. I had lawyers assigned to the felony division of sessions court. And when that case passed through and went to criminal court, I had new lawyers picking it upstairs—because we didn't have enough staff to do vertical representation—which is obviously the preferred method. There was a question about how I was counting my case. Was I counting a case in felony sessions court as one and then when that case went to criminal court was I counting it again? Was I double-dipping so to speak, in the counting process? So you have to be ready to handle that. There were issues about conflict cases. When I “conflicted off” a case did I count that as a case or did I discount it? There's going to be those things that you're going to have to think about in the process of assembling your data, so that you can make sure that you are able to answer all the questions that they'll have for you.

I think the other thing you have to do on these cases is to talk about the national caseload standards. I don't disagree with Norm when he says they don't mean anything, but judges don't know what you're talking about when you talk about caseload standards. You have to provide some context. If you think that the context is going to all be subjective, I just think you're making a mistake. The judge is not going to let me define for them what a public defender is in my office—they're just not going to do that. What is a reasonable caseload and what's not? I cannot give them any sort of external support for where I came up with these numbers. Consequently, I just don't

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think you can avoid a conversation about national caseload standards. I agree that these standards don't mean anything to me. They don't mean anything to the judges. However it was helpful to hear that the national standards say you can handle X and my lawyers are handling four times X. That was helpful.

I think if you're going to do this, you have to have complete buy-in from your staff. I think sort of like a borderline personality disorder will do. Judges want to divide and conquer. So they'll be in the back halls grabbing their favorite public defender and trying to get them to admit that we really don't have the problem that Stephens says we're having, or he's trying to create some office that we don't really need to create. They're going to try to do that, so I think you need to make sure that your entire staff is on board with what it is you're doing. I don't mean just telling everybody that they're on board. I mean, you've to do a good bit of educating, I think, to make sure that they understand why you're doing it, and they have to buy in.

Then, when you get ready to file the pleadings, I think you have to offer individual concrete examples of what your lawyers can't do. Don't assume that the judges understand any of it. In our hearing, we painstakingly had to explain to them what a defense lawyer does and what they don't do in my office because of the caseload problems that are imposed on them. And so I think it's very important in my case. By the way, [pdknox.org](http://pdknox.org)<sup>4</sup> is a website that will allow you to go and see all of our pleadings. We attached affidavits to our pleadings from every lawyer in our office that explained what their situation is.

I think you have to rely on national experts. Norm came in, and I still have a judge who every time he sees me kids me about Norm's credentials. They were so blown away when we went through all of things that Norm had

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<sup>4</sup> Public Defender 6th Judicial District, [Http://pdknox.org](http://pdknox.org).

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accomplished in his career and his expertise that they still kid me about “why don't you get your expert to go do” because he can do everything else. They still give me that little smart-ass remark of theirs. Then I think what was most important is that we went to the private bar, and Jerry was our expert from the law school. And I think it's really important to get that sort of—those two made a great pair in terms of the experts that we had. Then, finally, we had private lawyers to go and look at our caseload. We picked five of the more prominent lawyers here in Knoxville who reviewed our pleadings, reviewed the affidavits of the lawyers, and then gave their opinion about whether or not they could provide effective assistance of counsel with our caseload.

We had an absolutely fantastic hearing, and we waited about six years, it seems like, and received a three-page order. Actually, it's two and a half pages. It is so poorly written and thought out that I wanted to share with you just a couple of the highlights of this opinion. This opinion actually says, “The public defender constitutes professional standards require that attorneys representing those accused of crimes to meet certain performance measures.” That's one of their great lines. And then they said, “We find that attorneys in the public defender's office carry caseloads that exceed national criminal justice standards and goals. The Court does not conclude, however, that the caseload is such a level as to violate the accused the right to have competent counsel under either the United States Constitution or the Constitution of the State of Tennessee.” And here's why, “Because the courts—the actual caseload of the public defender's office—has been declining for the last two years, and the public defender has sought and received relief in the form of the suspension of appointments in two other courts.” And then they say, “But now they're taking those cases again,” so they don't explain why that is still a basis for

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finding that we don't have a problem. And then they conclude their opinion with, "It is incumbent upon those of us in the criminal justice system to strive to reach the goals and standards wherever possible." I really think that's funny that they would say that. And then they say this, "It is the mission of this Court to continue to monitor caseload numbers and review them on a systemic calendar quarter to see that caseloads are manageable and that effective representation of all defendants is achieved." You lose. And so our three-year effort concluded with this piece of crap.

Then they took it a step further and a step beyond that. So let me pass it to Rory.

RORY STEIN: Well, I think Florida judges look amazingly brilliant compared to those judges. Just by way of background, obviously everyone knows that Gideon came from Florida. And as a response to the Gideon case, Florida actually created one of the first statewide public defender systems. It now has twenty elected public defenders, and they are all constitutional officers. However, proper funding of the public defender's office has been an issue since the creation of the system. I think one of the first workload related cases is thirty-two years old. So that gives you an idea about how long this battle has been going on in Florida.

During the four years leading up to 2008, we found that our caseload had increased about twenty-nine percent. And in the two years leading up to 2008, our budget was cut by 14 percent. Those two trends created a significant crisis in our office. Since 96 percent of our budget goes to salaries, we realized that the only way we were going to keep pace, at least from a budgetary perspective, was not to replace the people who were leaving the office. That just made the caseloads even worse.

For the six months leading up to June 2008, we did

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what Mark had done. We got together with the judges and asked them for help. We realized that there were limited things that they could do. We spoke with our prosecutor and talked with them a lot about the things that Bob Boruchowitz mentioned yesterday about perhaps not prosecuting cases concerning driving with a suspended license and things of that nature. None of that worked. I mean the judges offered to conduct plea blitzes, which I don't know how that would be helpful to the clients we represented. It would just essentially give away the courthouse and have everyone plead guilty. So we knew we had a problem on our hands. That's when we approached the lawyers at Hogan & Hartson. I think this came up yesterday. We realized that while we probably knew more about our workload than anyone else did—and that we felt comfortable with our ability to advocate in court—we also realized that if we went in, there might be some people who would brand this as just more public defender whining.

So we approached Hogan & Hartson and Parker Thompson, who is the senior partner down in Miami. When you think of liberty's last champion or the defenders of liberty, these people have been amazing. We couldn't be where we are—which is still right now without any relief—without them. I just want to mention them quickly. Parker Thompson, Julie Nivens, Al Lindsey, and Matt Bray have given us hundreds and hundreds of hours of labor. In fact, we had a lengthy conference call last night talking more strategy.

In June of 2008, we went ahead and filed a motion to decline appointments in noncapital cases. We had the chief judge consolidate these cases. At the time, we were concerned about a Florida statute, which Norm mentioned yesterday, that the legislature has enacted that essentially says that excessive workload can never be a basis for a conflict. There we were saying that our workload was too

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high, but the statute provides terms under which you can't withdraw from a case. We figured that the statute didn't apply to us, because we were not withdrawing from anything. We were keeping the cases we had. We just wanted to decline future appointments in those cases.

We had the hearing, and we actually won. The judge ruled in our favor, finding that our caseloads violated any standard that was known. Unfortunately, that order was stayed immediately, and it went up to the 3rd District Court of Appeals.<sup>5</sup> I know that a lot of people in this room have read that opinion. Essentially, it paved some new ground in a number of different areas. The first thing was that, at the time of the hearing, the judge had ruled that the state was not a party, meaning that the state attorney's office was not a party to this litigation. However, the judge allowed the state attorney to participate as a kind of friend of the court, and the participation really was on the same level as a party. We were all cross-examined. There was lots of discovery in the case. They were allowed to submit all the papers they wanted. The 3rd District essentially confirmed that the state attorney did actually have standing to litigate these workload issues, which I think presents an interesting question as to whether the prosecutor should have a hand in deciding the lawyer for the person that they're prosecuting. Nevertheless, the 3rd District ruled that they did have standing.

The 3rd District said that bar rules apply only to individual attorneys and not to the office as a whole. Even though we had litigated, the ABA opinion—which said that Bennett Brummer, who was the public defender at that time, had an obligation to do what he was doing—the 3rd District didn't say a word about it. They also said that there was no difference between withdrawal and declining appointments. I thought that was kind of interesting. It

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<sup>5</sup> State v. Pub. Defender, Eleventh Judicial District, 12 So.3d 798 (Fla. 3d Dist. Ct. App. 2009).

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made me think that it's pretty tough to get divorced without ever getting married first, but they didn't see that distinction.

Lastly, the court said that there really was no magic number above which lawyers could not be effective and below which they could be effective. They said essentially that if you were going to utilize numbers, you certainly couldn't utilize them in the aggregate. At the time that we filed the motion, we basically divided all of our noncapital felony cases by all the lawyers who ever actually touched or looked at the case, and the caseloads were somewhere between 400 and 500. By a couple of months after the litigation, it hit 500 and went over 500. The court basically said you can't do it as an office. You have to do it on an individual case-by-case basis, which frankly was of significant concern to us. One of the things that we realized going into this litigation—and it continues to this day—is that the amount of work that's necessary to put on workload litigation—particularly when the state attorney is a party in the case—is absolutely enormous. Since we had so many lawyers who had excessive caseloads handling these kinds of cases, we knew right then that when the 3rd District decided that there was just no way that we would have the ability to prosecute all of those workload litigation cases on a case-by-case basis.

So what we did was to pick one. We essentially found a felony lawyer who had one of the worst caseloads in the office, and I chose him because he was a lawyer with thirty-seven years of experience. I thought that if a lawyer of thirty-seven years couldn't handle this caseload, then nobody could. So, we went ahead and did a thorough analysis of his caseload. We found out a couple of things that were actually pretty startling. He was assigned to 778 new felony cases that year. He had 590 felonies and 180 new probation violation cases. So when those cases were coupled with the cases he had going into the year, he was



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required to handle about 970 felony cases. These felony cases did have penalties that were as high as life imprisonment. I thought Bob's presentation yesterday was pretty helpful and significant when you think about what that work actually means.

When you're talking about the number of days people actually work, subtract weekends, holidays and things like that, that meant that he was responsible for four felony cases every day. He had 164 pending cases at the time we filed the motion. So what we did was to file the motion to withdraw in about fifty cases. The judge asked us if we would just proceed on one case, because he knew that if we had to demonstrate a prejudice—and we were planning on demonstrating prejudice—that this would be a very lengthy hearing if we had to do it in fifty cases. So he asked us to do it in one case. The state attorney again participated.

One of the things that became quite apparent was all of the negative connotations and experiences that come out of having a high caseload. In our justice system, it is completely common for judges to make plea offers at the time of arraignment. They do that, because the caseload is so high, and it's their caseload control mechanism. We found out that the lawyer involved pled 210 cases at arraignment, which was particularly dismaying for us. We have an office policy that says that you shouldn't plead cases at arraignment, but we have an ethical obligation to convey the plea to the client. At the time that those pleas are conveyed, the only thing that the lawyer knows about that case is an arrest warrant. And we all know that no one has ever seen an arrest warrant that says that I illegally searched the defendant and got some drugs, or here are all the witnesses who say that the defendant didn't do it. And so 210 cases were pled without any investigation being done whatsoever and without any ability by this lawyer to actually counsel this client.

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Florida is rare also in that we have criminal depositions. We're one of the few states in the country that have criminal depositions, although they restrict the number of witnesses that you can depose. The lawyer involved deposed more than 400 witnesses during the year—which was a lot of depositions—but he was not able to depose almost 1,500 witnesses because of the caseload that he had.

The bottom line is that we focused in on the three ethical requirements that we thought were obviously key: competence, diligence, and communication. And in the case that we were dealing with—which was the sale of drugs within 1,000 feet of a school which bears a penalty of life imprisonment in Florida, or thirty years I should say—the record reflected that the lawyer was able to do essentially nothing for that client. He had not been able to talk to any of the witnesses or to interview the client. He filed no pre-trial motions. There was a confidential informant involved. He wasn't able to move to disclose the confidential informant. There was essentially nothing that he could do.

One of the battles in the hearing—which had occurred in the first case also—was exactly what level of prejudice did we have to prove. The state had taken the position—even though they don't nominally call it that—they didn't say they were saying that the *Strickland*<sup>6</sup> prejudice was required—but that's all they argued was that *Strickland* prejudice was required—in order to demonstrate that a conflict should be granted. We took the position that, because *Strickland's* prejudice stand is there to protect the finality of convictions, it was something less: a substantial risk of future harm.

The long and short of it is that we actually won again. The judge granted our motion and decided that because of this particular lawyer's workload, he was not

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<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

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able to provide competent assistance to this particular client. The judge found that the statute—the one that said that excessive workload could not be the basis for a conflict—was constitutional, because he said that it could be a factor but not the sole reason. We had demonstrated prejudice, because the workload was such that he could not adequately represent that client. Now that case is up on appeal, too.

I think I mentioned yesterday, the first case—after it was sitting in the Supreme Court for ten months—the Supreme Court yesterday granted certiorari in the case. So we'll be litigating some of the issues that were in the first case. Going forward, I think there are a few things that are absolutely important to know if you're considering workload litigation.

I agree with Mark. Data integrity is probably the most important thing going forward. If you don't have a computer system that can help you analyze a person's caseload when you're thinking about whether the workload is excessive, you can't win these cases. We have our own database. We did a comparison of our database with the court's database in terms of the accuracy of the statistics. We found that there were hundreds of cases in the court's database which reflected that there was no counsel or record when in fact we were the lawyer on the case. Through this litigation, we established that our database was more accurate, and that helped us win.

The second thing is if you have a liberal public records law in your state, you are going to get lots of public records requests if you're going to be talking about workload. That takes a lot of time to respond to. In our case, we had to provide the state attorney's office with more than a million records in response to their public records request. It takes a lot of time; you've got to respond to it. There are going to be questions about your management. In Florida, there are some great cases that say that it's not

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the job of the courts to interfere with the management of a public defender's office, yet Bennett in the first case and Carlos Martinez had to answer questions about how we use our resources. For example, why do we have lawyers in a particular place? Why do we have lawyers doing training instead of handling a larger caseload?

You're going to run across some resistance from staff. The lawyers who are working in your offices are underpaid, altruistic, public-spirited, motivated people who are trying to do the best they can for their clients. To suggest to them that despite all of those good efforts, they're not really doing what the Sixth Amendment<sup>7</sup> talks about is a pretty tough sell. We had some issues with a lawyer that we were going forward with. He was completely cooperative with us, but he had been a lawyer for thirty-seven years, and he had a lot of success in the courts and people respected him. For him to say that notwithstanding his best efforts he wasn't able to do the job that the Sixth Amendment<sup>8</sup> anticipates is a pretty tough thing for a lawyer to accept.

You also get some staff indifference, and it's very difficult to get them to buy in. We have been at this for two years, and we haven't had a drop of relief yet. Both orders were stayed by the appellate court. The lawyers in your office tend to think that this isn't about them; it's about the administration. And they may think that you're just grandstanding. The truth is, it reminds me of when I was in undergraduate school, and they raised our activity fee because they were going to build some building that wasn't going to be finished until after I graduated. Okay? And this is pretty much the same thing it's turning out. That you may not actually help the clients that the motions are directed at—or the lawyers who are representing those clients—but at some point in time you're working towards

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<sup>7</sup> U.S. CONST. amend. VI.

<sup>8</sup> *Id.*

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the creation of more livable standards for the lawyers and the clients.

Finally, depending upon what your system is, you can expect some payback, and I mean in a negative way. We just went through the legislative session in Florida. It finished at the end of April. There was a proposal up there that was never actually introduced, but it came about probably as a direct consequence of the litigation. It said that because you can't handle these third-degree felony cases, a private firm attempted—through a political connection there—to introduce a provision for a low-bid/no-bid contract, which would have allowed them to handle these third-degree felony cases at about five times the cost of what the state was paying us. They insisted that the money come from our budget as opposed to a private source. It would have devastated the office. We would have had to lay off two-thirds of our employees. Fortunately, that provision did not pass. But this is not an issue that's going to go away anytime soon, and we expect next year we're going to have to fight the same battle.

Even though some of these things sound a little bit grim, I can tell you that most of the team in the office are pretty darn proud of the fact that we have stood up to fight for what we think is the most important thing—a client-centered practice, their Sixth Amendment<sup>9</sup> rights, and an effort to assure that our lawyers are able to meet their constitutional, ethical, and professional obligations. Thank you.

CARA DRINAN: Good morning. My name is Cara Drinan. I've had the pleasure of meeting many of you. But for those of you who I have not met, I'm a law professor at Catholic University in Washington, D.C. I'm really delighted to be here and to learn from so many folks who are in practice and others in the academy. Thank you to

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<sup>9</sup> U.S. CONST. amend. VI.

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Norm for including me. I have to say that the dialogue at this conference has been a little bit freer—shall we say, than most of the conferences that I attend—so that's been a refreshing change of pace.

I research and write primarily in the field of public defense reform. My task today is to talk about the use of systemic litigation to address excessive workloads. So what I want to do toward that end is three things. First, I'll talk a little bit about systemic litigation to address public defense reform generally—just to provide some context. Second, I'll give an assessment of this type of litigation. If we're thinking about using it to address excessive workloads, how effective is it? And I'll do that by talking about the pending suits in Michigan and New York. Third, I'll conclude with the notion that excessive workloads are a necessary but not sufficient condition for a successful systemic suit. So I'll come back to that idea at the end.

Before I jump into the substance of my topic, I just want to mention a caveat. In the interest of time today, I'll be abbreviating some issues that I think are really important including, for example, the history and trajectory of this type of litigation—some of the detailed issues that I'll allude to. Georgia has kindly made available on the flash drive the law review article that Mark mentioned. So, for those of you who are contemplating a systemic suit, that's available and, of course, I'm happy to talk about this endlessly with those who are interested.

So with that said, let me turn to providing some general information about public defense systemic litigation. One scholar has defined this type of litigation as a sustained pattern of cases against large power structures invoking the power of the courts to oversee detailed injunctive relief. Sometimes you hear it called institutional or public law litigation. As you know, impact attorneys have relied upon this litigation to address a number of social concerns: prison conditions, school segregation, and

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employment discrimination. It's been effective in that regard. But historically, systemic challenges to public defense systems have not been common. A 2000 Harvard Law Review article estimated that there had been no more than ten of these suits between 1980 and 2000.<sup>10</sup> I actually think that number is too high if one thinks about what they truly call systemic litigation—something that's proactive, that seeks more than individualized relief. So there haven't been a lot of these suits. That's the first point.

In my scholarship, I talk about these suits. I divide them into what I call first- and second-generation suits. What are first-generation suits? Well, they came up essentially in the context of one suit, one individual defendant. Either the defendant or defense counsel sought individual relief on the basis of systemic flaws. For the most part, these first-generation suits were few in number, and they were not very effective at generating lasting reform. As I said, I talk about this in my scholarship. In the interest of time today, I'm going to focus on what I call second-generation suits. So what do I call second-generation suits?

In the last ten to fifteen years, impact attorneys, defender organizations, private counsel acting in a pro bono capacity, and many of the organizations that are represented here today have brought suits challenging state and county public defense systems across the country. What do these suits look like? Well, for the most part, they're state court class actions challenging objective criteria such as excessive caseloads, a lack of hiring and training criteria, rates of compensation, and particular administrative structures. The legal theory of these cases is that because of these systemic flaws—these structural factors—the public defense system regularly violates the

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<sup>10</sup> Note: *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2074, n. 93 (2000).

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constitutional rights of its clients. That's the theory. They are not aggregated ineffective assistance of counsel claims, despite what defendants in these suits said.

The most recent suits of this kind, Michigan and New York included, have argued that the states have abdicated their constitutional responsibility by delegating the defense function and its funding, in many instances, to the counties. So we've seen successful suits of this kind now in Connecticut, Pennsylvania, Montana, Massachusetts, Washington, and as I said today, the suits are ongoing in Michigan and New York. As you know now, as Jim mentioned yesterday, both of these suits have recently survived motions to dismiss. I'll say more about those two suits later in my talk.

These more successful second-generation suits, if you will, share some common attributes that we can learn from, and there are five in particular. As I said, I don't have time today to talk about all five of these attributes, but I do want to mention them and say a few words about at least one or two of them.

The first common attribute that is now I think a familiar theme is the idea that litigation is a last resort. Right? So successful second-generation suits were brought in jurisdictions where other efforts had already been made and litigation truly was a last resort. In *Duncan v. State*,<sup>11</sup> for example, the plaintiffs complaint demonstrated/alleged that no less than five commissions and task forces since 1978 had examined and condemned public defense services across the state, and that defendants in that case knew of those reports and basically ignored them.

There are two reasons why the litigation as a last resort dynamic is important. The first one is obvious. Michigan and New York just survived motions to dismiss, and they're three years into the litigation process. So these

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<sup>11</sup> Complaint, *Duncan v. State*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham County, Feb. 22, 2007).



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suits are time-consuming and expensive. It obviously behooves litigants to explore options before bringing a systemic claim in court. There's a second reason why litigation as a last resort is important and that is that it's much easier to ask a court that might be inclined to think of public defense reform as inherently a legislative task. It's easier to ask that court for relief if the litigants can show that the legislature has known about and basically ignored the public defense problem for a long time. So that's the first common attribute to these more successful suits. Litigation is a last resort.

The second common attribute—I won't say much about because others have alluded to it already—is that these suits are marked by system wide proof of actual harm to clients. As Rory was just saying, what you need is to be able to point to a client whose case actually would have or might have come out differently had that client had adequate representation. That sounds basic, but suits of this kind in Minnesota and Mississippi were rejected for exactly this reason because of their failure to empirically demonstrate systemic flaws as opposed to what a court might be tempted to view as idiosyncratic harms. There's a lot more we can say about this dynamic of the fact that proof is key. But I would just mention that one of the things that we know is that collaboration between the attorneys who are on the ground handling these cases and outside organizations who can put together these empirical data is really vital. So it's the second element idea that these suits share—this idea of systemic proof.

The third is the notion of strategic procedural decisions. Again, this could be a talk in its own right, so I'll be brief. Successful second-generation suits share the fact that they reflect strategic procedural decisions. What could I mean by that? Well, for example, they have carefully and thoughtfully selected the named plaintiffs. There was mention yesterday of the *New York Times*

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article<sup>12</sup> on the *Hurrell-Harring*<sup>13</sup> named plaintiffs. The article was great, but, more importantly, the plaintiffs were great. They were run-of-the-mill people who were relatable to the average individual on the street, and it was obvious that if they had a lawyer they wouldn't have gone to jail for the crimes that they had committed or not committed. So careful selection of named plaintiffs is important. The trend is toward naming the state itself as a defendant for both symbolic and practical reasons. This involves a whole host of other procedural complications that need to be anticipated and thought about in advance. Most of these cases have faced issues of assertions of governmental immunity, separation of powers concerns and just a whole host of justiciability issues, and standing, ripeness, etc. That's the third attribute—sort of a savvy approach to handling procedural hurdles.

The fourth attribute is reference to accepted professional standards. Again, I don't need to say much about this to this audience, because you know what those accepted professional standards are. One of the reasons these more recent suits have been able to gain some traction is that the ABA and the Eight Principles and Ten Principles, the Standards of Criminal Justice, NLADA, and the defense community has begun to flesh out substantively what that Sixth Amendment<sup>14</sup> right looks like, and it makes it easier for litigants to argue this in court. The second-generation suits rely upon those standards to measure the shortcomings of the system and to craft the remedies they seek.

The last attribute these suits share is the notion of

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<sup>12</sup> William Glaberson, *The Right to Counsel: Woman Becomes a Test Case*, N.Y. TIMES, Mar. 19, 2010 available at [http://www.nytimes.com/2010/03/21/nyregion/21lawyer.html?\\_r=1&ref=legal\\_aid\\_for\\_the\\_poor](http://www.nytimes.com/2010/03/21/nyregion/21lawyer.html?_r=1&ref=legal_aid_for_the_poor).

<sup>13</sup> Class Action Complaint, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Nov. 8, 2007).

<sup>14</sup> U.S. CONST. amend. VI.

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alliances, and there has been some mention of this yesterday. Bob talked about finding allies in potentially unlikely places or just finding one person who can be an advocate for change in the jurisdiction. It's clear in these more recent successful suits that extensive networks of allies and alliances are critical to the success of these suits. Having said a little bit about what public defense reform and systemic litigation looks like in general, let me just turn to the question of where we are now.

As we think about how to use this litigation to address workloads, I want to focus on the Michigan and New York suits.<sup>15</sup> I should mention as an aside that I'll expand my discussion of New York and Michigan in the article that I'm submitting for the publication of these proceedings. So if folks are particularly interested in those suits, I'll say more on paper than I can in person. Both suits were filed in 2007. As I said, both made the claim that the states had abdicated their constitutional responsibility under *Gideon*<sup>16</sup> by delegating the public defense function to the counties.

They have both survived motions to dismiss and the cases before their respective state high courts presented slightly different questions. At bottom, the issues were the same—whether the systemic suits presented justiciable questions. Defendants made a whole host of arguments to support the dismissal of these suits, but chief among the arguments were two claims. The first was really a ripeness argument. That is to say that habeas or *Strickland*<sup>17</sup> was the exclusive avenue for relief. That's a familiar challenge. The second was a separation of powers argument: That it's a legislative function to reform public defense and the courts should stay out of this. As of May 6th both high

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<sup>15</sup> Complaint, *Duncan v. State*, *supra* note 11; Class Action Complaint, *supra* note 13.

<sup>16</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>17</sup> *Strickland*, 466 U.S. at 668.

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courts have allowed these cases to move forward. The Michigan order didn't say much so we don't have a lot to take from that, but it's still a big win.<sup>18</sup>

In the New York suit, there was actually a very useful opinion that came down saying that "The complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*."<sup>19</sup> So clearly, the New York Court of Appeals recognized that this is not a *Strickland* question. It's an absence of counsel altogether. The court went further, finding that the allegations of systemic harm were justiciable. I'm quoting here, "The allegations . . . cumulatively may be understood to raise the distinct possibility that merely nominal attorney-client pairings occur in subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing of indigent defense providers."<sup>20</sup>

Plaintiffs in these cases have a long road ahead of them, obviously, given that they're three years in and they just survived a motion to dismiss. The fact that these state high courts have allowed these cases to move forward rather than just sending these parties back to a historically apathetic legislature is in itself a mark of progress. That's

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<sup>18</sup> At the time of the Symposium, the Michigan Supreme Court had recently allowed the systemic suit to move forward. Less than three months later, the same Court reversed itself and put an end to the systemic suit. *Compare* *Duncan v. State*, Nos. 139345, 139346, 139347 (Mich. April 30, 2010), *available at* [http://coa.courts.mi.gov/documents/sct/public/orders/20100430\\_s139345\\_106\\_139345\\_2010-04-30\\_or.pdf](http://coa.courts.mi.gov/documents/sct/public/orders/20100430_s139345_106_139345_2010-04-30_or.pdf), *with* *Duncan v. State*, Nos. 139345, 139346, 139347 (Mich. July 16, 2010), *available at* <http://www.courts.michigan.gov/supremecourt/Clerk/04-10/139345/139345-7-Order.pdf>. Professor Drinan discusses this turn of events in a separate article published in this volume. *See* Cara H. Drinan, *Systemic Indigent Defense Litigation: A 2010 Update*, 7 TENN. J. L. & POL'Y (Special Edition) 8 (2010).

<sup>19</sup> *Hurrell-Harring v. State*, 15 N.Y.3d 8, 23 (N.Y. 2010).

<sup>20</sup> *Id.*

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the good news that we can take from these suits. The bad news, if you will, is obvious. They're very time-consuming and expensive. Further, we know, from a case like *Quitman County v. Mississippi*<sup>21</sup> that there are no guarantees with systemic litigation. Even where experienced, committed attorneys are involved, failure is a possibility. Sorry.

So, I think in sum what we can say is that this kind of litigation, systemic public defense reform litigation, enjoys increasingly good prospects, but they're an expensive long-term endeavor. That brings me to my concluding point that I started with, which is—based on what I said already—you won't be surprised to hear me say that the answer to the question of whether systemic public defense reform litigation is an effective tool to deal with excessive workloads is maybe. Excessive workloads are clearly part of what you need to bring a successful systemic suit, but it's really only a small part of the picture. So I think I'm out of time, and I will end there. Thank you again for your time.

ADELE BERNHARD: Well, I took notes on what people said on my little computer so we'll see whether I can move it over here and read those notes. I can't tell you how pleased I am to try to pull together some of the themes from these wonderful presentations. I really feel that we should give these guys another round of applause. You guys were terrific. I learned so much.

My name is Adele Bernhard, and I have a mixed background. I started off as a public defender in the Bronx, so I handled all kinds of cases from felonies to misdemeanors. I, therefore, have some grounding in what it's like to be a public defender—what it's like to do this work and what the conditions are like in a big city criminal courthouse. After doing that for a while, I also had the

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<sup>21</sup> *Quitman County v. Mississippi*, 910 So.2d 1032 (Miss. 2005).

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opportunity to work for an assigned counsel plan in New York where private firm lawyers are assigned to cases. I had an opportunity to think about how we could manage an assigned counsel plan more effectively, how we could train lawyers, and how we could supervise lawyers who weren't in a public defender organization. Additionally, I had the opportunity to work for a court committee whose mission it was to evaluate public defender offices. In New York in 1994, the Legal Aid Society was the primary public defender in New York. In 1994, there was a strike. The lawyers went on strike over working conditions and caseload grievances.

The City of New York at that time decided that we don't like the lawyers being able to go on strike. It was a union office, and it was slowing the courts down. We don't like to be held hostage to what these public defenders want to do and what they want to say, so the city decided that it would create some alternate providers. The next time people had caseload complaints, they could send some of the cases someplace else. So the private bar, who is concerned with criminal issues in New York, was very worried about this plan. The city put out what they called a request for proposals. People put in proposals and said, "We'll take part of that money and set up our own shop."

Now, it turned out that for the most part those new shops—small boutique offices—have been very successful, and they've done a very good job. But we didn't know that's how the story would turn out at the time that the city was considering contracting for these alternative providers. So, the private bar said, "What can we do to make sure that the Legal Aid Society, the primary defender, wasn't undercut by these new offices?" What we ended up doing was suggesting to the appellate division, our intermediate court, that they create some rules which would authorize the creation of a committee that would take a look at all the providers. It was a way of monitoring and recording the

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quality of representation provided by the Legal Aid Society and the new providers. It gave us an opportunity to start looking at what people are doing and how people are doing it.

I had the opportunity to think about how offices ensure that their lawyers have a chance to do a good job. What do offices do to make sure that their lawyers have training, supervision, and evaluation so that they can be all that they can be? How do offices make sure that the caseload numbers are kept at a manageable level, so that their lawyers can do what they've been hired to do? So that's my background in the field.

Then I went into teaching where I've been a clinical teacher for fifteen years. During that time, of course, I started thinking about teaching new lawyers, and what I could bring from my history of working in the public defender field. I started thinking about systemic litigation. I also have done some writing about when systemic litigation would be appropriate, what would make it appropriate, what would make it work, and how we can win these cases if we're going to bring them. I don't think that the article that I wrote on the subject is in the material, but I know that Cara does cite to it, so if you look and read her article you can find the cite to mine which is entitled, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*.<sup>22</sup> I wrote it really as an advocacy piece.

I wrote it to give the courts a sense of what they could do, because I took a look at the history of systemic litigation in different areas. The courts got into the prison systems. The prison systems were, and they still are, a mess. A federal court said that this is something we can do.

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<sup>22</sup>. Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002).

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There are violations here of the Thirteenth Amendment<sup>23</sup> and the Eighth Amendment.<sup>24</sup> These prisons are cruel; the conditions are inhumane. This is unconstitutional; we can do something about that. So I thought why don't the courts see indigent criminal defense services in quite the same way? Why don't they grab the bull by the horns as it were and kind of wrestle it to the ground? Why haven't we been able to be as successful in this endeavor as people were in the past with school litigation, desegregation, and prison litigation?

Well, of course, there are lots of reasons why. The times are different. The judges are different. The feeling in the country is different. There are lots of major differences, but some of the reasons I think we can deal with and use to make this litigation more successful. So here is what I take from some of the themes that I have heard the panelists talking about concerning individual caseload litigation and what Cara was talking about in terms of systemic prospective litigation.

We're all here in this room, not just the panelists, but all of us are here because we care about these issues and we want to make a difference. We understand the real importance of providing decent legal services to people who are accused of a crime. We understand what a good lawyer does. I'd like to comment on when Max was talking about: getting into cases, investigating, finding out that somebody he thought was guilty wasn't guilty—and he only knew that because he had the time to interview them—to go out and talk to the witnesses, and to undercut the evidence. We all know that that's what's important to do. We want to do it, and we want to help our young public defenders who, frankly, are the young idealistic future of this country who have taken these jobs because they wanted to. They have choices. We owe it to them to

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<sup>23</sup> U.S. CONST. amend. XIII.

<sup>24</sup> U.S. CONST. amend. VIII.



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provide them with a better environment in which to practice law, not just because of the people they're representing today but because of the people they will be representing in the future and the difference they will make for all of us. What do I take from that?

We all know what to do and how to do it, but providing these services is difficult. Salaries aren't the greatest. There's not a lot of gratitude from clients, from judges or from the public who don't understand the significance of this job. How do we make these cases work? How do we make the caseload litigation work? How do we make the systemic litigation work? Well, I see two major things. We need to make people want to make a change. So we need to make the courts want to make a difference. We need to motivate them, and we need to show them that it's not so hard. They're worried about these kinds of cases, and they're worried about making a decision. It's going to make more work for them. It's going to cost more money, and they don't want to tell the legislature what to do. Right? They don't want to get involved in this. This is something new. There isn't precedent out there that they can rely on. They're out on their own, and they're going to get into trouble somehow. This isn't going to be popular—they might not get re-elected or re-appointed. So we have to motivate people and show them that this isn't so hard. This is within a legal framework. It's no different from other kinds of cases that they have decided or their colleagues have decided across the country. So, of course, one reason to write a law review article is to provide a little support for the judges. So how to make them want to do it.

Another theme that I have heard from today's speakers is that we tell stories. We talk about the plaintiffs and why cases are important to decide. Here is what's really happening to individual people who are not being adequately represented. They're losing their jobs. They're

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losing their kids. They're losing their licenses. There are collateral consequences that they didn't understand when they entered the plea. Let's make it real. How do we tell those stories? We tell them in court by choosing the clients, by choosing the lawyers, by being very careful about which plaintiffs we select to front the litigation. But we also have to do more.

We have got to build a foundation for these stories. There are going to be newspaper articles and studies about what the system is like, e.g., how many people are being arrested. We have to create the foundation of stories so that these issues are familiar and motivating to the court and to the people who care about them. Then the other thing I think we have to do in terms of helping people understand that these decisions are not outliers, and that the framework for deciding these cases is to refer to standards. That's why standards are so important. If you don't have standards in your jurisdiction that you can refer to and that the courts can rely on in rendering these decisions, then they're out there on their own. What's effective? What's ineffective? We can't just say that these people had a bad outcome and that's because the lawyers are ineffective. We've got to be able to refer to standards that say here's what lawyers are supposed to do in cases. We've got ABA Standards. We've enacted them here in Tennessee, in Florida, and in New York. We use these standards. Our office has standards. Here's what our office says that lawyers are supposed to do. In each and every case, they're supposed to communicate, to counsel, to interview, to investigate, and to file motions. If they haven't done that then they're not in compliance with the standards. As a result, there's ineffective assistance of counsel. Ineffective can't just be defined in relation to the post-conviction *Strickland*<sup>25</sup> standard. We have to be able to move away from that analysis into a front-loaded way of looking at cases. The only way we can

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<sup>25</sup> *Strickland*, 466 U.S. at 668.

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do that is by having standards that we refer to. They can be caseload standards, of course, as well as performance standards. That gives the court some mechanism for deciding whether something has gone wrong. Therefore, this kind of representation is unconstitutional. Those are the sort of themes I've heard.

Let's make it real. Let's talk about the people. Let's talk about why it's important. Let's talk about what a difference your decision could make to all these lives out there, and let's give the court a framework for making those decisions. The New York court, which decided this clarified what was a justiciable issue. We were all worried that they were going to say that the courts have no business telling defenders how to run their offices and telling the states how much money they have to give to the counties—that we're going to just throw this back to the legislature. The New York court didn't do that and decided it was a justiciable issue, that it was within their purview and that it was something that they cared about. They did not really use standards in the way that I thought they might, because what they really said is that there was no representation. The quality of lawyering given to these plaintiffs in the upstate counties in New York was so poor that it was really like having no lawyer at all. There was no conversation, no investigation. It was like what you were discussing about your lawyer. He had to plead people guilty at arraignments just to limit the number of cases so that he could work on some of them. As a result, it was almost like having no lawyer at all. But I think having standards out there that state what lawyers are supposed to do, allowed the court of appeals to say that they had fallen so far from the standards that it was like having no lawyer. So I still think—even though they didn't refer to ABA standards or NLADA standards to say that there was ineffective assistance of counsel—that having those things in place and being able to show how far the deviation was from those standards

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helped them render that decision.

So I think in order to make change through litigation, we've got to have standards. We've got to have stories. Obviously, we have to have support—support from the private bar, from your own lawyers, and from the public. I had thought that getting support from the public was almost really impossible, but there are people in this audience who have been able to achieve that.

We look at the campaign in Michigan, and Laura Sager over here has been instrumental in organizing the public to really care in her state about these issues. They go out and talk to community groups and make the case as to why having a public defender and being able to represent people at the best of your ability makes a difference to all of us. This isn't something that you can just isolate and say, “Oh, it's over there in criminal court. It has nothing to do with me. My kid is not getting arrested; I'm not getting arrested. That's not my issue.” Well, that's not true. It's all of our issues, and we have to make that case to people so they understand why that is significant. Those are the things that I heard. Of course, those are the things that I think about, so maybe that's part of the reason why I heard that. Let's now open this up for questions and comments from our wonderful panelists.

**BARBARA HURST:** I have a procedural question. If you decide to bring this on a one-example basis—a one-client basis— isn't the first question really a public relations issue? I mean if you spend 100 or 200 or 400 hours preparing this litigation, and then the court or somebody says that you could have effectively represented 40 clients in that period with systemic litigation you couldn't have represented 700 clients in that period. Isn't that a PR issue at least?

**ADELE BERNHARD:** Does somebody want to take that question?

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RORY STEIN: It definitely is. That's one of the reasons why we were willing to go along with the judge's suggestion that just one case would be handled by individual lawyers, because that was the first thing the prosecutor said. You mean to tell me that you couldn't take a deposition in this case and couldn't go interview? The one case was really, I think, symbolic of a larger problem that this lawyer had. So that's one reason why I think it's helpful to be insulated in having lawyers represent you. And that you're not representing yourself or bringing this motion yourself. Because, at least, you can say that they're doing the work. We support the people running the computers that generate this information—and the public defender and the executive assistant who aren't assigned to this court, and aren't doing this work on these cases, but are handling these kinds of things. But it is an issue that you have to deal with, and I think it's kind of ironic when the 3rd District told us we had to do it on a case-by-case basis. We're up there saying we don't have adequate resources to handle the whole felony division, and now they're telling us to expend more resources to try to prove this case.

BARBARA HURST: You have to have a buy-in at least in this—on the court's part that is essentially a mimicking of systemic litigation. That it is symbolic—that it's system wide. You have to essentially set that premise.

RORY STEIN: Well, I know that in our situation, the chief judge initially asked us to consolidate the systemic cases into one case, and the administrative judge for the criminal division actually heard the case. When the 3rd District decided the case, saying we had to do it on a case-by-case basis, we got a call immediately from the chief judge saying you're going to be doing this in all twenty-one courts. It wasn't our goal to wreak havoc in the criminal

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justice system and take the system down. We wanted to do it in an orderly fashion where the courts could handle it, and we could handle it and even the prosecutor who was involved could handle it. And so we went to one judge. Of course, we had to deal with the fact that we were judge shopping. But it just so happened that this particular judge had this lawyer who had one of the worst caseloads in the system.

DENNIS KEEFE: There is one governmental entity that seems to know how to run a good public defender system—i.e., keeping the caseloads under control, adequately staffing and providing funding, and providing all of the resources that are needed. That one governmental entity is the federal government. I was just wondering if in any of the litigation, anybody has turned to the administrative office that operates the federal public defender's office to bring in the expertise and ask why do you limit your caseload, provide research attorneys, and adequately compensate. I'm just wondering.

ADELE BERNHARD: I think that's a great question, and I think Norman wants to respond to it.

NORMAN LEFSTEIN: In none of the litigation has an effort been made to pull in what the administrative office and the U.S. courts do as far as the federal courts are concerned. Let me just give you a figure, which I discussed with the folks who run the Criminal Justice Act and federal defenders during a DOJ conference in February in Washington D.C. I indicated, I think, in a talk in D.C. that the amount of money—as best as we can determine—being spent in U.S. state and local courts on indigent defense is somewhere around \$4.2 billion. In the federal courts, they're spending about \$1 billion. That's a staggering way of putting this whole thing in perspective. I

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have those numbers roughly correct I think. Because they don't have anything in the federal courts that compares to the state and local governments.

I mentioned these figures to Steve Aison, who is the deputy in Washington D.C. involved with the federal public defenders all over the country, and some of you may know Steve. Steve was absolutely blown away by those numbers. He's always known that there's a seat change between the state and federal courts, but that does really put it in some perspective. The State of California, I believe, is up around \$800 million, and many of the counties in the State of California, but not all, are spending large amounts of money on public defense. So if you take out California from the \$4.2 billion nationwide, then you reduce that number substantially and split it for the rest of the forty-nine states.

The other comment I would make as I think about your question, Barbara, does raise the issue about public relations when you litigate these kinds of cases. I think Rory Stein from Dade County is correct. There is a PR issue—significantly many data when you have pro bono counsel. Even though I know the management of Dade County, and in Mark's office they have spent enormous amounts of time preparing these kinds of cases that the presence of both pro bono counsel—I thought gave you some support for the proposition—but the burden was really on pro bono counsel and much less so on the office. But it really comes back to something I talked about yesterday. That is, I think it could be done with far less preparation. Individual lawyers, if not every lawyer in an office, some group of lawyers in an office should have large numbers of cases, filing fairly simple motions and asking for a hearing. And if necessary, if that evidence is granted, the hearing is granted, putting on a fairly simple presentation of what it is they are unable to do on behalf of their pending clients. As I think I mentioned yesterday, I

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saw it done very effectively in New Orleans. They developed a terrific record—not to say that terrific records weren't developed in Dade County and in Mark's case. In fact, in both of those cases, their records were terrific, and abated the order of the general sessions court that Mark read from: a marvelous literary piece. I'm really curious to see whether or not the journal proceedings of this conference are edited after what you had to say about that. But let me just stop at there.

None of you commented on the notion, by the way, of some lawyers filing individual motions, and I'm going lay it out in the book I'm writing as to what I think ought to go into that motion. And I don't think it would take an enormous amount of work to do it.

ADELE BERNARD: Well, there are some more questions in the back if you want to pass the mic back to Jim. I do think that there needs to be preparation even for those cases, in the sense that you want people to be receptive to them, and you want to make the most out of those motions. So you really need to get people ready to listen to them.

NORMAN LEFSTEIN: Well, that's what I meant yesterday when I talked about changing the culture.

ADELE BERNARD: Exactly. Jim?

JAMES NEUHARD: In my day job, I'm a public defender. I will make the case here for protecting the record of each case. That's what you're seeing develop here when you have lawyers who cannot prepare and are meet and greeting and pleading with their clients. They're not doing what a growing body of federal case law is suggesting is absolutely required pretrial. I have a list of the issues where they're now finding the use of stand-in counsel who are not prepared to cover the workload, investigation, discovery, and research, and fail to timely file motions and



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make an early appearance. These are structural denials of counsel, who do not have a lawyer. The federal courts are beginning to grant writs of habeas corpus on this. We're all thinking systemic, but if you start building in methodically and professionally, I cannot do these things. I have not done these and yet I'm prepared to plead for my client. It's a frightening thing to think that they're running a caseload through—cases that literally go to federal court and get a writ granted—that quickly. There's no need to show prejudice. It is structural denial of counsel; it's absolute and irreversible.

So all I'm saying is that everybody who is in this situation should start having their lawyers protect the record. I mean this is a plea from a public lawyer.

ADELE BERNHARD: Right. To the extent that the judge will accept a plea when you're putting on the record that you're taking the plea although you haven't done these things though.

JAMES NEUHARD: I mean, if you're in that situation—

ADELE BERNHARD: Right.

JAMES NEUHARD: It's the same as a group of lawyers walking in and filing a motion to withdraw. When that motion is denied you say, "Well, Your Honor, this is the next step. My office, structurally, cannot do these things. I could not do the investigation. I could not have a private conversation with my client, and on it goes. That's how I'm here. Let's go forward." The judge orders you go forward and then—

ADELE BERNHARD: Maybe in the context of forcing you to trial when you're not ready to make that record. Right.

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JAMES NEUHARD: Which is protect the record is all I'm saying.

ADELE BERNHARD: Yeah.

JAMES NEUHARD: Whatever the reality is, indefinite flow into federal court—

ADELE BERNHARD: And then that's going to be something that the office as a whole has to discuss, and everybody has to be on board. We can't be expecting individual people to be outliers, by themselves, making those records. We need that to be something that people agree to do across the boards.

JAMES NEUHARD: Of course, it would be ideal to be permanently prayed for—

ADELE BERNHARD: Right.

JAMES NEUHARD: But as Norm said, each lawyer who feels this way and finds themselves in that situation for whatever reason—could be because of an illness—has a duty to protect the record of what they've done in a particular case.

ADELE BERNHARD: Right. Right. I think that's right.

CARA DRINAN: Can I just add, Adele?

ADELE BERNHARD: Sure.

CARA DRINAN: On that point, I think it's important to not view individual motions that you're talking about and the systemic litigation option as mutually exclusive.

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NORMAN LEFSTEIN: I don't.

CARA DRINAN: In fact, I mean, it goes to the point of litigation as the last resort. If you're building that record, that's great. Not just because you have a duty to do so in that case, for your client, but because even if you think you're headed toward systemic litigation, that's precisely what you need.

ADELE BERNHARD: Exactly. So these things are mutually beneficial and work towards the same end. Bob?

ROBERT BORUCHOWITZ: I want to make three comments. One is I don't know that I've heard the full answer to Dennis's question from Norm. I really think it's a tremendous idea to use the federal defender model when we're talking about what's wrong with the state practice. Secondly, I have all the respect in the world for the people that are bringing these motions, but it's difficult from the outside to offer opinions. I wonder what would happen in Miami or Knoxville if every public defender in every single case who felt unprepared were to make the kind of record that Jim was saying, whether they're moving for a continuance or simply saying, "Judge, I'm not prepared and can't go forward with this plea. I can't go forward with this trial." Obviously, there's the individual immediate client whose needs are at risk, but it may be that in many out-of-custody cases it would be less of an issue. One way to get the most action would be for every out-of-custody client to ask for a continuance—for every out-of-custody client to say I can't go forward, and I have to have a continuance. In the *State v. Jury*<sup>26</sup> case that I mentioned, in Washington, is I think some precedent for that.

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<sup>26</sup> *State v. Jury*, 576 P.2d 1302 (Wash. Ct. App. 1978).

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The other benefit of that is that it gets the attention of the court if you make the kind of record that Jim is talking about. Certainly, if a lawyer is pleading for 200 people at arraignment without seeing a police report, that's just not acceptable. And so, the lawyer says, "Your Honor, my client wants to plead guilty to get out of jail today. And the prosecutor is making an offer, but I have no idea whether it's a good offer. I have no idea whether my client even committed this crime. I have no idea whether they even got the right guy in jail. I have no idea whether anything the police did is legal. I have no information at all. But here I am, and I have 900 cases. And that's all I can do, and so here it is, judge." If the judge doesn't want to take the plea then that will put pressure on the system,—which is going to be backed up—and they're going to want to help. You talk about motivating the court; that's one way to motivate the court.

ADELE BERNHARD: I agree. I think there's lots of ways to motivate the court, and I also think there's lots of ways to tell those stories. I mean, we were introduced to a public defender who runs a blog and gets some of those stories out there. Oh, great, she's got her hand up so good transition.

CARA DRINAN: I'm sorry.

ADELE BERNHARD: Oh.

CARA DRINAN: I didn't want to cut you off, but I think that Bob is right that we haven't really addressed Dennis's question.

ADELE BERNHARD: Yes, that's true.

CARA DRINAN: Can I say something on that point?

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ADELE BERNHARD: Well, hold that thought back there and let's go back to the contrast.

CARA DRINAN: Yeah.

ADELE BERNHARD: The contrast.

CARA DRINAN: I agree with Norm. I haven't seen use of that federal model in reference to the caseloads control, etc. I think it's a great idea that certainly merits exploration. Off the top of my head, I can think of two reasons why the suits may not have done that. One is that the use of expert witnesses—or just putting someone on and say this is how it's done elsewhere and therefore should be done in this jurisdiction has been less successful. For example, in *Quitman County*<sup>27</sup>—in the Mississippi litigation—where the county sued the state basically saying that we can't provide public defense and it's your job under *Gideon*.<sup>28</sup> There was the use of expert witnesses. That was not as effective as putting on the faces of clients of the system. Not to say that those two things are mutually exclusive, but that may be one reason.

The other, and I think the more pressing issue is there seems—in my conversations with attorneys who are litigating these kinds of systemic suits—to be a real sense that because the court said nothing in *Gideon* about the method of delivering public defender services. States have a sense of, well, it's our right to figure out what we think is the best method for the delivery of public defense services. While we may agree that that's simply pretext for not delivering public defense services, I do think that there's a sense that, well, the federal government may do it that way, but that's the beauty of federalism. Right? We can each pick our own method and—

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<sup>27</sup> *Quitman County v. Mississippi*, 910 So.2d 1032 (Miss. 2005).

<sup>28</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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DENNIS KEEFE: Well, we can pick our own method, but the federal government has the federal public defender's office. And they have panel attorneys that are supervised by the public defenders in many instances. I mean they don't have anything that the states don't have.

CARA DRINAN: Right.

NORMAN LEFSTEIN: Yeah, but different caseloads.

CARA DRINAN: Yeah.

ADELE BERNHARD: Right, and his point. And I think Rory wants to speak to it as well—that we have an example.

CARA DRINAN: Yeah.

ADELE BERNHARD: If we feel like spending more money on it, we have an example of somebody who does it right, and there's nobody complaining in the federal system of their caseloads, or their salaries for that matter or the quality of representation provided to the clients. Of course, they get to limit the cases that they pick to prosecute, and the states would say, "We are not in a position to do that." That would at least open up the discussion about why we don't all talk together about how many people are prosecuted and what categories or crimes are going to the prosecutors. There are ways to solve these problems. You don't have to haul everybody into criminal court, overloading our lawyers. That's what the feds do. They decide which are the most important cases and why, and they go from there.

I'm sorry, Rory. You wanted to speak.

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RORY STEIN: Yeah, actually, I guess two things. One of the things I can tell you, since we're a state-funded agency, we've gone to the legislature numerous times and addressed with them certain ideas about a more careful control of workload and looking at funding models. We got nowhere. That's why we thought it was kind of interesting in the first case when one of the prosecutors was actually a lobbyist for the legislature and said, "Well, why don't you just go with the legislature and talk to us about this problem." I mean, we've been talking for thirty years. We wouldn't have filed a motion if we were able to get anywhere with that.

The second thing is—I think Bob's point raises an interesting question which we've discussed for a day and a half now about culture. We filed notices for uncounseled plea in every one of those pleas at arraignment—every single one. Some judges won't accept the pleas, if we file the notice.

ADELE BERNHARD: Right.

RORY STEIN: Unfortunately, what happens is you've got a guy sitting in the box who's saying, "I'm offered credit for time served."

ADELE BERNHARD: And you're not going to—

RORY STEIN: You're not going to stand in the way of me getting out of jail.

ADELE BERNHARD: Right.

RORY STEIN: Frequently, those judges find a way to get around that. The more interesting cultural thing that we found was, we asked our lawyers. Actually we didn't ask them. We told our lawyers that they needed to file a notice

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of inadequate resources in the court, because they needed to get the clients advised that they weren't going to be able to handle their cases in the same diligent fashion that we were able to do in the past. There was some blow back from our lawyers—"You're setting me up for bar complaints." That's what we heard. "You're putting out there that I'm not doing my job." We thought it was appropriate to let the clients know that they weren't going to get the same service that they typically got from the public defender's office, because we didn't have the ability to do that.

Of course, one of the things that the state did in the litigation was that we invited the clients to ask the judge for another lawyer, because I don't want wait that long. I think one or two clients did that. That's what the state did with us. How many bar complaints have you guys received as an example that you're actually really doing a very good job? Of course, our clients don't know what we're not doing for them. In fact, the state doesn't know what we're not doing for them. That's one of the reasons why we had this hearing, to explore all of those things that have been mentioned already—that we are doing them. We're cognizant of it, and we litigated it in the motion saying this is what a real lawyer does, and this is what we're able to do with the resources that you gave us. They're frequently two different things.

ADELE BERNHARD: Yes?

UNIDENTIFIED SPEAKER: There's a gentleman with a hand up here.

ADELE BERNHARD: Okay. Thank you for alerting me. I'm sorry. I've forgotten your name already.

CAROL HUNEKE: Carol Huneke.



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ADELE BERNHARD: Carol, right.

CAROL HUNEKE: I first wanted to comment on Dennis's comment about the federal system because—

ADELE BERNHARD: Does she need to speak up? Closer to the microphone.

CAROL HUNEKE: I'm sorry. I'm married to the federal defender in my district, and so it's been interesting to be able to see some of the ways that the federal defenders do things while I'm in state practice. I noticed that some of my friends that work in the office have different cases like illegal re-entry, but there are also cases that are very similar, like drug and gun cases. I noticed that some of the things that they were able to do on their drug cases, for example, that I had not been able to do or not thought of, and I thought I want to do that, too. I also know through seeing things that my husband has done—they do have timekeeper records on those cases, and there is some review by the office of the courts. Whatever you call it, there are in control of their cases and they can take into account what type of cases. So I think there are some statistics that could be usable for state courts. Not every statistic is useful, but the ones on cases that are similar I think could be used to our advantage.

ADELE BERNHARD: I think that's a great idea.

CAROL HUNEKE: The other—

ADELE BERNHARD: And we have to keep the records too, then, in order to be able to show that what we do on our cases and how many fewer hours we have in the state courts. I mean, because they do the hours and they can back it up.

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NORMAN LEFSTEIN: Very sketchy data.

ADELE BERNHARD: Okay.

CAROL HUNEKE: I admire you, Mr. Stein and Mr. Stephens, so much for challenging the caseloads in court. I get messages from public defenders all over the country, though, and it seems that not every defender works in an office where the director has that courage. I don't know what all the causes are, but what my question is, what can individual lawyers who are overburdened in the system do as to a systemic challenge, if anything? Are there any resources that the ABA or another organization can offer to support that?

ADELE BERNHARD: I'm sure that Norman wants to respond to that, because really that's been the motivation for a lot of his work over the last few years in writing this book on excessive caseloads. What can the individual lawyer who finds him or herself in this situation do? But before he gets the microphone again, I know there was another question over here somewhere.

UNIDENTIFIED SPEAKER: This almost follows up in respect to that last question. It's directed to Rory Stein and Mark Stephens. I heard both of you talk about both the importance and difficulty of getting buy-in from the members of your office, both the attorneys and the staff. I know as a post-conviction attorney I often bring claims of ineffective assistance of counsel and have noticed—much to my dismay over the years—how defense lawyers don't often have the concept of what it means to effectively represent a client. I remember having a conversation with the public defender in Davidson County, Tennessee, who said that a lot of lawyers in this office don't realize the full

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situation. It's like a frog in a pot when the water temperature is gradually raised, and they don't realize that it's gotten too hot.

I'd like to ask you how do you deal with that issue? I think it is a question of culture within your office and within the defense bar. But how in your litigation did you deal with it, and what suggestions do you have to offer on how to deal with that position there?

MARK STEPHENS: We've spent a lot of time in our office talking about caseloads and what we were going to do about it. I do think part of the problem—particularly in an office where the caseloads are just out of control—is that lawyers, in order to survive, get so focused on the individual clients and the pressures that they're having to respond to that it's difficult for them to even start to give any consideration to the bigger picture. So when the manager comes and says, “What I'd really like for you to slow down a minute and come spend some time with me to talk about your caseloads and what's going on,” then that's the last thing in the world the lawyer can afford to do at that moment. The lawyer needs to ratchet up his or her commitments to their client. And so, there's real tension. What you are saying to the lawyer is you're not doing a good job. I don't care how you phrase it or how many times you qualify it. What you're essentially telling a lawyer is that you're not fighting a very good fight. Here's all the things that you're not doing, or here's all the things that you should be doing. The mentality of a public defender lawyer—that's going to get you hit in lots of discussions. And so, it's a very difficult thing. You just need to meet with them on a regular basis through staff meetings and try to hold those staff meetings to the smallest possible amount of time to explain to them why you're doing it and how important it is, and why it's important and why they need to buy in. I don't have 100 percent buy-in in

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my office on this issue. I think I have some lawyers who tolerate it, but I don't know that they're really committed to it. So it's a hard thing to do.

ADELE BERNHARD: Max?

MAX BAHNER: I think one of things, from my standpoint looking in, that you're not able to do in a public defender office is something we do routinely in our practice, and that is we have critiques all through the process. The lawyers know before they try a case, or before they do a contract, how we think they're doing, and they know afterwards how we thought they had done. We all learn from this. Apparently, I don't wonder why you can't do that in a public defender office, but I think that if that were done, this problem would not be so significant.

ADELE BERNHARD: So we've got a couple of ideas on the table. One is how can management motivate their lawyers to do a good job, some of which could be done by talking about cases, critiquing, training, supervision, and evaluation. If that's all part of the office, it will help motivate the lawyers. We also have the question of the motivated lawyer and the less-than-motivated management. How does the lawyer handle that? There's a question there I think.

UNIDENTIFIED SPEAKER: Yeah, I'm curious to hear about the situation in which—

ADELE BERNHARD: Speak into that mic.

UNIDENTIFIED SPEAKER: —the situation in which you have the lawyers, and you have management aligned. We've heard over the past two days about motions to withdraw, motions to recuse, and systemic litigation. And

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for those of you who are either providers or litigators on behalf of providers, if you were at time zero in deciding how to litigate this case—just about excessive caseloads—what would you do?

ADELE BERNHARD: Why don't you give two seconds about who you are and where you come into this whole thing.

UNIDENTIFIED SPEAKER: I work for Davis, Polk & Waldwell, which is a law firm based in New York City, and over time we have been representing the Legal Aid Society, who has been struggling with excessive caseloads and has in the past year had successful legislation. They've been helped in that way, but we're in a situation where their funding is being pulled out by the city and (inaudible response from audience) how to move forward.

ADELE BERNHARD: Does somebody want to take that before Norman makes us stop?

CARA DRINAN: Can I just ask for a clarification? Are you asking if they had it to do over again what would they have done differently?

UNIDENTIFIED SPEAKER: Yes.

CARA DRINAN: What you were asking?

UNIDENTIFIED SPEAKER: Essentially lessons learned. So we've seen, for instance, where individuals have moved to withdraw, where individuals have or the office has moved to refuse cases, wholesale, or where strategic systemic litigation has been employed. And presumably certain things out there that appear to be more difficult to others, and just—I wonder which way would you have

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chosen if you had that—the actual ability to go back in time and start at time zero?

RORY STEIN: Well, I think it's a mixed bag, because it's easier to prove one lawyer's caseload problems for prejudice purposes. But generally speaking that problem recurs all across your office, so that's not going to solve the problem. I don't really know too many public defenders' offices that have the resources, time, or ability to litigate it everywhere—particularly if you're in a large urban jurisdiction like we are. So it almost forces you—if you're going to try to get the relief that your office really needs—to do it in an office-wide systemic way. I think that is one of the big issues that is going to be resolved by the Supreme Court in the first case.

ADELE BERNHARD: Well, Norm has pulled the clock on me and said that we've got to keep on schedule. I said we're doing great here. Everybody's involved in conversation, so let's keep talking. Barbara, we'll get talking.

BARBARA HURST: Just to put something else out to you.

ADELE BERNHARD: Okay.

BARBARA HURST: Rory has been the only one really that's talked about client perception.

ADELE BERNHARD: Un-huh (affirmative).

BARBARA HURST: I'm really going to be stuck on this individual motion versus systemic issue. I'm just picturing the clients in the next courtroom. Somebody is putting on the record what they can't do in that case, and the next

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lawyer has got to plead that client. May be the only answer is what Jim was talking about. Some other people have said you have to do it in every case, because what in the world do you say to those other forty-two clients who are about to plead that day, who know their situations are no different from the lawyer on whose behalf you are bringing this example motion. How do you deal with the perception? You want to—

ADELE BERNHARD: All right. So we'll keep talking about those things, and we'll keep talking about your book and caseload issues, but hold on. Ed, did you have an announcement that you wanted to make?

EDWIN BURNETTE: Yeah, I just got off the phone about half an hour ago with Dan Swanson from Senator Durbin's office, and they're expecting that the solicitation for John R. Justice is going to come by the end of next week. There could be some play in that. They're really expecting that that's going to happen.

ADELE BERNHARD: Do we all know what that means because I don't?

EDWIN BURNETTE: John R. Justice is a loan repayment forgiveness for prosecutors and defense counsel. We—NACDL, NLADA, MDAA, which is the prosecutors, and the ABA—have been in a working group for the last six months or so to try to work with the DOJ for this solicitation. It's a mandated 50/50 split between prosecutors and defense counsel. The fear is that there are only seven states involved. The letters have gone out to the Governor's Reform Agencies to handle these requests through solicitation. Letters went out about a month ago. Up until now only seven states have responded. So if you know anyone in the governor's office or a liaison that you

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can talk to and get them to form these agencies, please do so. The DOJ has stated that it's staying away from the SAAs, because most of them aren't set up to doing this type of thing, which is a positive, because we don't have positive experience from our SAA's in the (inaudible response from audience.) So if you know anyone in your state—and the state having committed to this point—please do what you can to try to get them to form that agency, because this money has to be committed by the end of September. We're a little worried that the longer that it takes to form these agencies, the less chance we will have all this money committed.

ADELE BERNHARD: If you have more questions, please talk to Ed outside.

ED BURNETTE: One other thing, NLADA's director of research, David Carroll, has been publishing over the last several months blurbs that he calls *Gideon Alerts*.<sup>29</sup> Some of you may already receive those. They are blurbs, bites that discuss, highlight reform efforts, concerns and invariably link you to a site that will give you an article or something like that. If you want to receive those, please see me. Give me your business card or sign up, and you can use those however you see fit. You can put them on your blog—whatever you want to do—but if you're interested in that, please see me at the break.

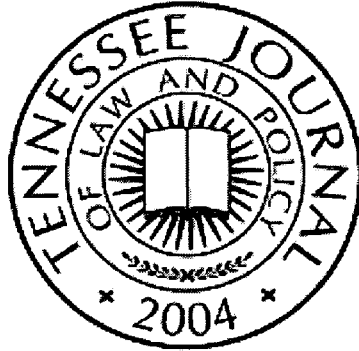
NORMAN LEFSTEIN: Thank you very much, Ed. We're going to take a break till about two minutes after eleven. Before we leave, join me in giving a round of applause to our excellent panel.

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<sup>29</sup> David Carroll, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL DEFENDER LEADERSHIP INSTITUTE, *Gideon Alerts*, <http://www.nlada.net/ndli/view6>.



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**NATIONAL PUBLIC DEFENSE SYMPOSIUM**

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:  
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**REMARKS FROM PROFESSOR JERRY BLACK**

**LUNCHEON ADDRESS**

**THURSDAY, MAY 20, 2010**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW**

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PENNY WHITE: All right. I hope you're enjoying our lunch, and I will tell you that we regret that Professor David Dow from the Houston Law Center was unable to be with us today, but we're delighted to give you the opportunity to have more interaction with one of the College of Law's brightest stars. And you've heard him throughout the last two days as he's spoken up on some of the topics, and that's Professor Jerry Black.

To many of the UT alumnus, including me, Jerry Black is the College of Law. This is because he's been a part of the UT legal community since I think the early 1900's; I'm not quite sure of the date. He was my clinic supervisor in 1980, and he is Jason Bobo's clinic supervisor in 2010. So that tells you something. For me and hundreds of others who had the benefit of his tutelage, the practice of law is defined by the demanding standards set by Jerry Black.

Recently a student who was with us throughout the last two days—I don't see her right at this moment, but she—in an application for the Summers-Wyatt Scholarship, which she received, she wrote this about Jerry Black, "My law school experience has been filled with the opportunity to work with unbelievable lawyers who have devoted themselves to raising the bar of representation for the criminally accused. It is truly a gift that I have been able to get to know and learn from Jerry Black, TACDL's current president, and someone I have personally heard speak from the heart about his commitment to indigent defense. He is a force to be reckoned with in the UT Legal Clinic for decades and daily as he fights the fight when it comes to upholding *Gideon's*<sup>30</sup> promise. It is almost unreal to me that Professor Black taught my father-in-law at the UT clinic, and it makes me smile to see how things come full circle." And those are the words of Sarah McGee.

In 2002, Jerry Black received the Richard Jacobson

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<sup>30</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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Award for excellence in teaching trial advocacy. That's the highest award in the country given for that endeavor. In 2003, he got the TACDL, Tennessee Association of Criminal Defense Lawyers Award for lifetime contribution. And just two weeks ago, he received the Law & Liberty Award, honoring his contributions to the profession of the Knoxville Bar Association.

I also think it's just worth mentioning that twenty years before the Carnegie Foundation and their Educating Lawyers Report said that we needed to re-think the law school curriculum, Jerry Black and our then dean, Richard Wirtz, had presented a comprehensive curriculum for training future advocates that emphasized teaching practical skills to law students and emphasizing the duties of ethics and professionalism. And Jerry's vision is what gave birth to the Center for Advocacy and Dispute Resolution that I now direct and the curriculum that we have in the Advocacy and Dispute Resolution in the college.

And while he is obviously a great teacher, a phenomenal visionary and all-around wonderful person, which he proved last week when he bought an entire flat—if you're from the country you know what a flat is—a flat of strawberries—and shared them with everyone in law school. He is first and foremost a great lawyer.

I asked Doug Blaze for a funny story about Jerry as a trial lawyer, and I tried cases with Jerry so I had tried to think of some funny stories about Jerry as a trial lawyer. Neither of us could remember any at all. When Doug and I talked about it, we realized that there are no funny stories about Jerry as a trial lawyer because Jerry takes the practice of law seriously. He is committed to his clients. He is committed to justice. But Dean Blaze did tell me that he had nicknamed him long ago, "Most Likely to be Held in Contempt." And we all know that that is indeed a badge of honor.

This year when TACDL came knocking Jerry

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Black, a lifelong member, stepped up to the plate and said, “Yes, I will serve as president.” And yesterday, when Professor Dow cancelled, and I came knocking and actually beckoned Jerry to come to my office so I could ask him a favor, he agreed to step up to the plate again today. So thank you, Jerry, very, very much. It is all yours.

JERRY BLACK: I thank you for those kind remarks. As a prior speaker that Penny introduced said, “If my father had heard it he would be proud. My mother would have believed it.” So I would say to you, it’s an honor to be here.

I come to you today as the President of the Tennessee Association of Criminal Defense Lawyers. When I assumed that office in August of 2009, there were three things that I wanted to see the association address. One was the low rate of compensation that court-appointed counsel got in the state, which I think directly affects the quality of representation that we provide to the poor who can’t or don’t otherwise qualify for the public defender.

Secondly, I wanted to address the way counsel is assigned. This is done by our judiciary, and I don’t think that they always have quality representation foremost in their mind. They all too often, I think, appoint their buddies or those who happen to be in court at the time.

And thirdly, I think that it is important that the Association address the case overloads for the public defenders. I don’t really believe that the public defender’s office, for the most part, can do that for themselves. That’s an unfair burden in Tennessee because we have an elected public defender’s office and what are you going to say? I can take fewer cases, I can provide higher quality of representation and, by the way, it will cost you more money so vote for me. I don’t think that works very well.

I was talking to Libby Sykes earlier, who’s the director of the Administrative Office of the Courts, and we

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learned within the last month that I believe there are over 3,000 lawyers who are paid by the Administrative Office of the Courts for taking court-appointed work. The Tennessee Association of Criminal Defense Lawyers does not represent the majority of them.

We represent private lawyers that take criminal indigent defense cases, and we represent public defenders. We have 800 members. The AOC says that it pays about 2,400 different lawyers for court appointed work. This leaves about 1,600 lawyers that are taking court appointments that are not TACDL members. In all likelihood they do not belong to the TBA. They may belong to the county bar association. They are getting many court appointments, and I worry about the quality of representation they provide. What quality checks are in place to see that the defendant gets the promised effective assistance of counsel?

As a part of what we did in this state—at a retreat that the Tennessee Association of Criminal Defense Lawyers had in January—we set a modeling of what they started in Nashville, what they have now in Chattanooga, and what we now have in Knoxville. We ought to have roundtables once a month, and we ought to talk about basic criminal procedure issues. And we invite these lawyers to come for free; you don't have to pay a nickel. It's after work. Ours meets at a bar, upstairs. And if you want to have a drink while you learn some basic criminal procedure, come on. And all the young lawyers out there taking court-appointed cases—with the exception of the public defender's office—almost none of them come. None of them come to this.

I began my career somewhere in the 1900's. But I began as a legal services lawyer actually in 1968. I wanted to be a public interest lawyer, and I believed that *Gideon*<sup>31</sup> meant what it said—and as that citizen or person accused

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<sup>31</sup> *Id.*

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was going to get the effective representation of counsel and that the welfare mother was not. The person being hounded by the loan company was not. And so I wanted to be one of those lawyers that would provide representation to those people.

I came to UT in 1975—contrary to what Penny said—and it was here that I worked with or saw the people in our Criminal Defense Clinic receiving at the time Law Enforcement Assistance Administration money. And we had some really good fat lawyers. And we were sort of the public defender's office for Knox County at that time. But what I saw when I went down to the courthouse with them, was judges who resented appointing lawyers for indigents.

And in fact, if you think about the way we characterize indigency, it seems to me that it's wrong from the word go. When we talk about somebody—and we look at something like poverty guidelines—they may be able to hire the lawyer Mary Ann Green talked about who is going to take the shoplifting case, or the person slightly over the guidelines could hire them. But in a first-degree murder case—where a lawyer in private practice wants a hundred thousand dollars—there are a great number of people who couldn't afford that lawyer. And they may not qualify for the public defender's office. I don't know what they'd do.

I'm reminded of when I started doing this legal services work, there was an article by a woman named Carol Silver talking about our welfare system. And she said, you know, the problem with our welfare system is we have a hundred people who, let's say, need a pair of shoes. And we have ten pairs of shoes. Now, how are we going to divide up those shoes? We can give ten people a pair of shoes and leave ninety out in the cold. We can give twenty people one shoe and leave eighty out in the cold or they could hop or we can divide up the shoes and give a hundred people a piece of a shoe. And that's the way we do our welfare system—or did.

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I'm afraid that all too often that's the way we do our criminal defense system. We give a hundred—we overload the public defender's office, we underpay private counsel, and so what we give them instead of the effective assistance of counsel, is a piece of a lawyer. I was serious yesterday when I said I don't believe we take the Sixth Amendment<sup>32</sup> very seriously. I don't doubt that if we do a survey, people are going to say I believe in fairness.

Well, I sort of have two responses. What are they going to say unless they are a prosecutor or a judge? I think you would expect them to believe in fairness. Well, you just have to look at the *Brady*<sup>33</sup> violations. I mean, why is there a prejudice prong for *Brady*?<sup>34</sup> When the prosecution cheats, when they hide evidence, why do I have to show prejudice? When we're talking about ineffective assistance of counsel, why do I have to show prejudice? I didn't get what you promised me, what the Constitution promised me. Why do I have to show prejudice? If we're really talking about fairness, this system has a problem that is not new. This is the forty-seventh year after *Gideon*.<sup>35</sup> And we're here again trying to figure out what to do to provide and make meaningful the promise of *Gideon*.<sup>36</sup> I'm glad we're talking about litigation. It seems like to me that's where we ought to be focusing our efforts, or something radical. Because in trying to get people to do the right thing, it doesn't seem to me works very well.

The 2009 report<sup>37</sup>, the crisis in indigent defense—I

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<sup>32</sup> U.S. CONST. amend. VI.

<sup>33</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>34</sup> *Id.*

<sup>35</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>36</sup> *Id.*

<sup>37</sup> NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://2009transition.org/justicedenied/>.

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mean—it's not new. And even before then, Francis Allen, author of the report called, *The Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice*,<sup>38</sup> in 1963, before *Gideon*<sup>39</sup> was decided. And what he said was, "It should be understood that governmental obligation to deal effectively with problems of poverty in the administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity." But I think a lot of legislators believe that way. The obligation of government in criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this report is concerned, arise in the process initiated by the government for the achievement of a basic government purpose.

It is moreover a process that has one of its consequences as the imposition of severe disabilities on the persons proceeded against. Duties arise from action. The course of conduct, however legitimate, entails the possibility of serious injury to persons. A duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely to be no less than that of taking reasonable measures to eliminate those factors that are irrelevant to the administration of justice.

The essence of the adversary system is challenged. The survival of our system of criminal justice and the values which it advances depend upon our constant searching and creative questioning of official decisions and assertions of authority at all stages of the process. The prior performance of the defense function is thus as vital to

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<sup>38</sup> *Poverty and the Administration of Federal Criminal Justice*, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963).

<sup>39</sup> *Id.*



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the health of the system as the performance of the prosecuting of adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges. It constitutes a threat to the vitality of the adversary system. And that seems like to me what we're about. There is a threat to the vitality of the adversary system.

Over twenty-five years ago we had a trial college here at the law school, and one of the lawyers was a very fine civil trial lawyer. He was talking with the participants about the difficulty of convincing the jury to award damages for pain and suffering. And what he said—and I remember after all these years—is that the easiest thing for somebody else to endure is somebody else's pain. And I think in the criminal context, the easiest thing for us to surrender is somebody else's Constitutional rights. You see it. You hear it. If they came to me, and I had nothing to hide I would do it. And why is that? And I was thinking about this. Why are we willing to—I mean the Sixth Amendment<sup>40</sup> is pretty clear. *Gideon*<sup>41</sup> is pretty clear. Why are we doing that?

I think that the basic premises underlying the Fifth<sup>42</sup> and Sixth Amendment<sup>43</sup> are contrary to human nature. When we talk about a presumption of innocence, I ask my students to think about their experience. My own personal experience—when I drive by and I see the police pull over somebody else—my first response is I wonder what he did. And if that's my first response, that undercuts the presumption of innocence.

And so I tell them there's nothing wrong with that. That is a human experience. My first experience, actually is, I should stop the car and tell the person, "Don't say

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<sup>40</sup> U.S. CONST. amend. VI.

<sup>41</sup> *Gideon*, 372 U.S. at 335.

<sup>42</sup> U.S. CONST. amend. V.

<sup>43</sup> U.S. CONST. amend. VI.

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anything, and don't let them search your car." But the reason I say that is because I think they probably did something, and they've probably got something in the car. And I'd really like not to have to say, "Why did you consent to the search?" "Well, I didn't want the officer to get mad at me."

So there's nothing wrong with that, but when we come to talk to a jury, and they give us this little nod, "Yeah, I believe in the presumption of innocence." That's not what they really believe. When they come in the courtroom, and they look at your client, they look at your client like, "I wonder what you did." Similarly, the Fifth Amendment right to silence<sup>44</sup>—you know—is that right? Don't we think that the innocent person would step up and say something if they were truly innocent?

And what's the evidentiary rule in civil cases? It constitutes a tacit admission, right? So that's based on human nature. So I wonder if the legislators and the judges and the prosecutors don't operate on that assumption. Why should we really care about this because the person is probably guilty anyway? And if they are probably guilty, why do we want to put resources into that? Wouldn't a piece of the shoe do just as well?

When Mark Stephens talked to you this morning about the case overload in his office—and when he talked to you about what happened when the state sought to intervene—they did not come into court and try to argue that he could handle that number of cases. They did not try to come into court and argue that he didn't have an ethical obligation to provide effective representation to his clients. What they said is, "It costs too much money." Justice costs too much money, and that's what we're about. Instead of providing a hundred pairs of shoes, we've only got ten. And so you're going to have to make due with what you

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<sup>44</sup> U.S. CONST. amend. V.

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have. And the judges that decided that case—particularly in the South and in Tennessee—are probably the same judges who put their left hand on the Bible, raised their right hand, and swore to uphold the Constitutions of the State of Tennessee and of the United States of America—the Sixth Amendment.<sup>45</sup> Those are the same judges. Those of whom we're talking about. The attorney general that argued that case did the same. So, I don't really think that we're terribly interested in—well, I suppose—we say we're interested in fairness, but the real issue is what are you willing to do about it.

I want to spend a few minutes talking with you about the Tennessee scheme for appointing counsel. When the public defender's office under—as Norm talked about yesterday—under Rule 13,<sup>46</sup> you have a person that is deemed to be indigent. Rule 13 mandates that the public defender be appointed, unless there's a conflict, or unless the public defender—in a case-by-case basis presumably—can make a clear and convincing showing that he can't provide the constitutionally entitled representation. Otherwise, they've got to take the case.

If they can't take the case, then we send it up to a court-appointed counsel. And as Mark alluded to, this wasn't new. This was created in roughly 1987-1988—our public defender system. Before that, we paid court-appointed counsel \$20 for out-of-court work and \$30 dollars for in-court work.

Now, the fact that you would pay more for out-of-court work tells you something about our view of out-of-court. It tells you something about our view of what the quality of representation is. I've never talked to a lawyer who didn't say “the work I do out of the office is more important than the work I do in the courtroom, because I have to be ready.” But at any rate, the Tennessee Bar

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<sup>45</sup> U.S. CONST. amend. VI.

<sup>46</sup> TENN. S. CT. R. 13 (2010).

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Association said that this system was deplorable. “Woefully inadequate” were their words.

And as a result, we created the public defender’s system. Then the Bar Association, in coalition with other bar groups like the Tennessee Association of Criminal Defense Lawyers and other legal entities like the Capital Case Resource Center, filed a petition with the Tennessee Supreme Court in 1994 seeking to do something about the appointment representation in indigent cases. And the courts did that. The court created a commission to look at this.

This was their charge: They were charged in 1994 with developing and recommending a comprehensive plan for the delivery of legal services of indigent defendants in the state court system. They were charged with collecting information regarding cases in which an indigent defendant was represented by a public defender or a private attorney. They were charged with determining a reasonable caseload for each public defender. They were charged with creating a statement of standards for criminal defense attorneys appointed to represent indigent defendants, including standards for complex and capital cases. They were charged with developing a schedule of reasonable compensation. And they were charged with developing a system to audit claims for compensation.

So what happened? That was sixteen years ago. Why are we here today? Why are you in Tennessee today? Why is Mark Stephens filing this lawsuit that’s now bogged down for two or three years in the courts? Well, part of the reason is that the public defenders are part of the problem, as opposed to part of the solution. The public defenders resisted having caseload standards, right? The public defenders resisted having anybody providing any oversight for their cases.

I think as an elected public defender they view their constituency as the elector as opposed to their client.

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That's wrong. What did come out of this is that we have raised our princely sum of \$20 and \$30 to \$40 and \$50. I suppose that's a 100 percent increase—at least in the out-of-court work.

There was testimony, though, and proof presented that the overhead for the average criminal defense lawyer in 1994 was \$46.72, as I recall. So for out-of-court work, you're only losing six dollars and seventy-two cents. Now, I could be cynical—and I quite frankly am—and could suggest to you that there's a method to this madness. You don't have many lawyers, many experienced criminal defense lawyers, clamoring to get on the court-appointed list when you're losing \$6.72 for every hour you work.

So the private bar is not there saying, "Wait a minute, you need to be controlling the caseload of the public defenders, so that they only provide—so that they provide effective representation of counsel. You in effect are taking money that we could otherwise have and should have because the Constitution demands that we provide effective assistance of counsel."

And the lawyers that we have, at least in Knoxville, who often take court-appointed work are young inexperienced lawyers for whom \$40 an hour is probably the best they can do. There are lawyers who are on the court-appointed list who would rather turn—as the ad says— "a wreck into a check,"<sup>47</sup> than they would to do criminal defense work, but \$40 is better than no check for the wreck.

We have filed a petition—the Tennessee Association of Criminal Defense Lawyers—to increase the fees with the Tennessee Supreme Court. I have reservations about that. I'm afraid that we might get something. I think that we have to file the petition because, as it was alluded to this morning, you have to use non-

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<sup>47</sup> Ogle, Elrod, & Baril, PLLC,  
<http://www.knoxvilleinjuryquestion.com/>.

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litigation before you can use litigation.

Now, suppose they get a \$20 increase to \$60 an hour, which probably doesn't meet overhead now either. Well, that's a 50 percent increase. That looks good doesn't it? Who wouldn't like a 50 percent increase? Well, if \$40 is inadequate and \$60 is still inadequate, you still don't have lawyers with quality experience providing mentoring and models to the young lawyers coming up. I don't have anything against young lawyers accepting court-appointed work. Everybody's got to get a start somewhere. But we ought to have standards as to what kinds of cases they can handle. And we ought to have standards that require the more complex and difficult cases to be with the appointment and representation by competent, experienced lawyers. Those lawyers in turn provide modeling for the young lawyers. And you could say, "What about the public defender's office?" I heard about the wonderful lawyers that are out there in the public defender's office, who—in Mark's office—who wonder why can't they provide the model. I think the answer is because they're not the gold standard.

Mark requires his lawyers to investigate a case before they accept a plea. And one of the judges told him, "You require your lawyers to do things that the private lawyers don't do, and their cases are handled just fine. So the people that are getting the court-appointed cases are the people that aren't doing the investigation. The court's accepting that, and saying "That's okay, we don't need it." And you're requiring something that some of judges believe the Constitution doesn't require. I don't know where they get that. Well, since they are all former prosecutors—that may be where—but one of them was in your public defender's office before she became a prosecutor, and before she got on the bench. So I don't know. I think they believe, "Well, this person's probably guilty, and so it's okay."

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The other thing that we do is that they try to divert as many cases as they can from the system. And we have what we call, I guess, an arraignment court. There are no public defenders in an arraignment court. The people are brought in, they're booked, and then sent to arraignment court. And the first question they're asked is would you like a lawyer, or would you like to see if you can resolve this case today. And most of them would like not to come back, nor would I want to come back. And they say, "I think I'd like to resolve it today." And based on a conversation with the prosecutor—and some brief colloquy with the court—they plead out many, many cases. I don't remember. What, 60 or 70 percent, did you say?

MARK STEPHENS: Seventy percent.

JERRY BLACK: Seventy percent of the cases that come in are diverted, basically, from any court. This rate of compensation hasn't changed in sixteen years—as I said. But that's only part of the problem. I could make out a case that there is a scheme in Tennessee designed to provide minimum representation and designed to hide ineffective assistance of counsel. Because your question ought to be, "Why aren't ineffective assistance of counsel claims filed in these non-capital cases?"

Well, the first thing is, we have a \$1,000 cap. Now, given the princely sum of \$40 out of court, that would be twenty-five hours. So you're going to spend three days investigating this case—or three eight-hour days. You've got to get the file from the lawyer. You've got to read the file or the transcript of the record, and you've got to get the transcript of the record. You somehow might talk to the client, and then you've got to meet the *Strickland*<sup>48</sup> standard. You've got to provide first a deficient performance, and then, second, you've got to prove

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<sup>48</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

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prejudice.

Well, that wouldn't be so bad, why don't you ask for resources? Why don't you get an investigator? Why don't you get experts? Well,—because as Mary Ann told you—in non-capital cases you don't have any right to resources. You don't have any right to an investigator. They're not going to pay for one. They're not going to pay for an expert. And when you think about it—with the National Academy of Science report—the work in criminal cases is not getting less complex. It's getting more complex. And the science is not getting better, it's getting more suspect.

So without these experts what are you going to do? How are you ever going to meet the prejudice standard? Unless you want to do it out of pocket or, what'd you say? Beg and plead and whatever to get resources? So I could make a case that we're really trying to hide ineffective assistance of counsel.

That's why, obviously, you do not have a Constitutional right to post-conviction counsel. And in Tennessee, not only do you not have a Constitutional right to post-conviction counsel, but there's a statutory right to post-conviction counsel. That lawyer—even though he may be ineffective—can waive a client's rights to a full and fair hearing. I know that because I argued it in the Tennessee Supreme Court in a successor post-conviction petition, *House v. State*.<sup>49</sup> Paul Gregory House was later found by the U.S. Supreme Court to have a viable innocence claim. This was only after they went to federal court and only after they had an evidentiary hearing. His lawyer waived in state court and the evidentiary hearing. And the court said, "That's okay." You only get one bite out of the apple.

My question is in an ineffective assistance claims, how do you ever know you got a bite out of the apple?

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<sup>49</sup> *House v. State*, 911 S.W.2d 705 (Tenn. 1995).



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How do you know you got an apple? The courts will tell you—the Tennessee Supreme Court will tell you the only effective way to raise an ineffective assistance claim is on post-conviction relief. You got to have an evidentiary hearing; you got to put on proof. Oh, but by the way, we aren't giving you a good lawyer to do that. And we assume we had a good apple and a bite out of it.

I realize there are real problems with the capital system, and I'm not here to tell you that in Tennessee it's good. I believe it's deplorable. But nonetheless, I do believe it's probably better than the non-capital system. At least there are some quality standards—some standards, I don't know about quality. There are quantity standards as opposed to quality standards. There are at least two lawyers. There are at least resources on post-convictions. And with the post-conviction defender's office, you've probably got a good lawyer. I promise you, you got a good lawyer.

It seems to me, the bottom line is—at least under the Tennessee scheme—we hid ineffective assistance of counsel. I think that what I come away with is several conclusions, and I'll leave it with you. I believe that we should focus on more radical solutions. I think that the suggestion that we litigate ought to be the focus in this. We ought to be talking about how to do it. We ought to be talking about how to file these motions to withdraw.

The other thing that occurred to me—as I listened to the gentlemen from Michigan and the State of Washington—I think you place a real difficult burden on public defenders to step up and say, “I'm ineffective in this case.” What if you changed the requirements under *Boykin*,<sup>50</sup> and under, I think, Criminal Procedure Rule 11<sup>51</sup> in Tennessee—to require—as Mary Ann said—this five-page plea agreement? And in that you would have to say,

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<sup>50</sup> *Boykin v. Alabama*, 395 U.S. 238 (1969).

<sup>51</sup> TENN. R. CRIM. P. 11.

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“I investigated the case as a part of that. I spoke with the client.” And the lawyer has to certify that in every case where there’s a plea entered. Then that lawyer is not out there on his own. He just has to—that lawyer or he or she—has to at least be honest. But instead of worrying about the affidavit—just that’s part of the plea form. And you can’t get a plea unless you do that. It seems like to me that would be an easy solution to simply say, modify *Boykin*<sup>52</sup> and require that as part of the proceedings.

I think that one of the things TACDL needs to work on—but perhaps with the Tennessee Bar Association my problem is they represent the greatest number of lawyers, an overwhelming majority of which, are civil lawyers who, unlike Max Bahner, may not be terribly interested in criminal defense—is that we should work on standards and try to get the court to adopt standards for indigent defense. That’s what we ought to be focusing on now. We need those standards, so that you’ve got something that they can’t duck or dodge. The Tennessee Supreme Court basically has said that they don’t accept as gospel the revisions for the ABA Guidelines on the provision of counsel in death cases.

If litigation is not the answer, then it seems like to me that we have to force education on the Bar. And I would suggest that we think about dismantling the public defender system and instead go to a straight court-appointed system. And we require all lawyers, every lawyer in the state, to sign up to take court-appointed cases. And that lawyer has to personally do so. He can’t pass it off to an associate or a young lawyer. That’s his or her case. We could mandate three, six hours of criminal CLE in criminal law and criminal procedures, so they get up to speed.

But what Max Bahner told you is that when he did those cases—what he found and what he learned and how it

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<sup>52</sup> *Boykin*, 395 U.S. at 238.

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impacted him—and so now he’s a champion for indigent defense. The majority of the lawyers who do not do this and do not have any court experience look the other way. We don’t take criminal cases. We don’t do that work.

I think that then you have to have some kind of quality control system. I understand that the fear is that these lawyers won’t like their clients. Well, what about the people that are doing it now, and they don’t have time to meet with their client. Seems like to me that we’ve got injustice on one hand and injustice on the other and hopefully we can overcome some of that. We will also have a bigger voice in the legislature and in the courts because somebody will want to do something, so that they get the hell out of doing criminal defense work.

But the other thing is you have to have a quality control system, and you have to have experienced lawyers who do criminal defense that are familiar with the requirements, that are familiar with the standards, and who will enforce the standards. And if lawyers don’t provide quality representation, the penalty is you’re disbarred. Now, if I run the risk of being disbarred because I didn’t really want this case but I got it, I’m probably going to provide you a quality representation.

When Mark talked about his ninety-day hiatus, all lawyers in Knoxville were subject to court appointment. The dean of the law school, who I don’t believe is licensed in Tennessee, was appointed to a case. The Mayor was appointed to a case. And some really good civil lawyers were appointed to a case. And I remember talking to one of them. First-rate trial lawyer—handles complex medical malpractice cases, handles complex products liability cases, and he’s smart enough to figure out criminal defense work too. And he did.

He said, “I’m going down here. I think I’m going to have a preliminary hearing. I’m putting my client on the stand. I believe I can win this attempted first-degree

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murder case.” By God, he did. And they didn’t take it to the criminal court, the grand jury, even though they won the preliminary hearing. It had two effects. One, there were a lot of different things being done by lawyers who weren’t familiar with that’s how we do business. It wouldn’t have been long before we stopped having trial by ambush because these lawyers would have said, “This isn’t how we do civil cases. We have discovery. We know what’s going to happen before we go to trial. This isn’t the right way to have a lawsuit. This isn’t the right way to do something.” They would do something different.

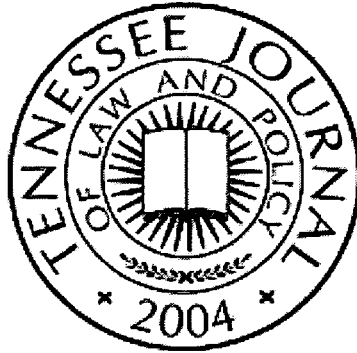
The other people that didn’t like it were the prosecutors. Because they sort of know what we’re going to do. But when these guys came in there, they weren’t sure what they were going to do. It kind of created chaos in the system; this is probably good for the defense.

And as a result, we got more funding. Not enough, but we got more funding. Because all of a sudden the private bar said, one, “We don’t like doing this,” and, two, “The prosecution said we don’t like the way they’re doing this,” and, three, “We need to do something to get them back out of here and where they belong. We need to get back to business as usual.”

I thank you for your time, and I am honored to be a part of it. I hope we all can continue in the struggle to improve indigent defense. Many of you are my heroes. I admire the work you do. Please keep it up.

PENNY WHITE: I forgot to say about Jerry, golly, that he’s been director of our Legal Clinic four times. The man can’t say no. Thank you very much, Jerry. It was better than I even expected, and I expected a lot. So thank you very much.

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**NATIONAL PUBLIC DEFENSE SYMPOSIUM**

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:  
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**“UNIQUE ETHICAL DILEMMAS IN CAPITAL  
REPRESENTATION”**

**PANEL THREE**

**FRIDAY, MAY 21, 2010  
AFTERNOON SESSION**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW**

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**PANEL THREE SPEAKERS:**

**MODERATOR: PROFESSOR PENNY J. WHITE,**  
Director, Center for Advocacy & Dispute Resolution  
Faculty Advisor, Tennessee Journal of Law & Policy

**PROFESSOR SEAN O'BRIEN,**  
University of Missouri-Kansas City School of Law  
Kansas City, Missouri

**BRADLEY A. MACLEAN**  
Office of the Post-Conviction Defender  
Nashville, Tennessee

**MARY ANN GREEN,**  
Assistant Public Defender  
Chattanooga, Tennessee

**ANN SHORT-BOWERS,**  
Attorney, The Bosch Law Firm  
Knoxville, Tennessee

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PENNY WHITE: The previous sessions have focused on the effects of insufficient resources on the Sixth Amendment's<sup>1</sup> promise. This session is somewhat different as it will focus on other impediments to the delivery of effective assistance of counsel, specifically, impediments to counsel in capital cases that raise not only legal issues but ethical issues.

The panel format will also be different. The panel will discuss hypothetical cases that are strikingly similar to cases that happen every day. These hypotheticals will be posed first to a panel of experienced criminal defense and capital lawyers, and then hopefully we'll have time to open it up for discussion.

Each panelist will speak primarily to one hypothetical, which I will introduce to you, and then we'll have some interaction between the panelists before moving on to the next hypothetical. At the end, we will engage in your discussion, comments or questions.

Let me describe the materials for this session. On the flash drive are three articles that our panelists thought would be helpful to you as you look at these issues in greater depth. They include Larry Fox's article in the *Hofstra Law Review* on capital guidelines;<sup>2</sup> Sean O'Brien's article in the same, volume 36, of the *Hofstra Law Review* on supplemental guidelines for the mitigation function;<sup>3</sup> and Brad MacLean, Bill Redick and Shane Truett's article *Pretend Justice* on death penalty representation in Tennessee, which is in volume 38 of the *Memphis Law*

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> Lawrence Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, (2008).

<sup>3</sup> Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693 (2008).

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*Review.*<sup>4</sup>

All three of those articles are on your flash drive. But to make it a little easier to follow along and participate in this particular session, we also have a handout. The handout includes a copy of the hypotheticals, the PowerPoint slides and then some additional resources that are listed on the slides that are pertinent to the individual hypotheticals. So that's what you will have in front of you. Also, we have copied in total some of the most pertinent provisions from the *ABA Guidelines*<sup>5</sup> and two ethics opinions from Tennessee.

So as we begin the discussion, we'll hear a lot of our panelists undoubtedly referring to the *ABA Guidelines*<sup>6</sup> and on the slide, which is in front of you and also in your handout, is the link to those guidelines. The ones that we will be most frequently referring to, 10.5, 10.7, 10.11 and 10.13,<sup>7</sup> are in your handout, either completely or partially, the relevant parts. And as I mentioned, there are two Tennessee ethics opinions that may be helpful to Tennessee lawyers in your handouts.

Let me then begin by introducing our panelists very briefly because you have the bios of three of our panelists in your biographical material. Our panelists will draw upon their own personal experiences, but also upon excellent, excellent resources that they will make you familiar with and that will be on the slides.

First, we are honored to have with us, in alphabetical order, Mary Ann Green, who is Assistant Public Defender from Hamilton County, which for those of

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<sup>4</sup> William P. Redick, Jr., Bradley A. MacLeanm & M. Shane Truett, *Pretend Justice: Defense Representation in Tennessee Death Penalty Cases*, 38 U. MEM. L. REV. 303 (2008).

<sup>5</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (2003).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



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you who aren't Tennesseans, is Chattanooga. Second, Bradley A. MacLean, who is with the Office of the Post-Conviction Defender in Nashville, Tennessee. Then we have Sean O'Brien, who is a Professor of Law at the University of Missouri-Kansas City in Kansas City, Missouri. And I have to give special thanks to Ann Short-Bowers, who is a lawyer in Knoxville with the Bosch Law Firm. She is neither Larry Fox, who had an emergency, nor David Dow who had an emergency, but she has graciously agreed to come on less than 24 hours notice and help us out. So please first join me in thanking our panelists.

Our first hypothetical is about formulating trial strategy. The situation is this: The client is charged with capital murder. You, as counsel, discuss with the client your plan to interview the client's mother. The client says, "Absolutely not, you are not to bother my mother about any of this. She has suffered enough. I am directing you not to contact her under any circumstances." The client is competent and does not change his or her mind even after extensive explanation.

And we pose the question to Professor O'Brien, "How do you proceed?"

SEAN O'BRIEN: Thank you. This is the familiar "don't be talking to my momma" hypothetical. It involves ethical rules pertaining lawyer-client relationships and making weighty decisions about life and death. I had a client on death row tell me this story. It is in bad taste, I'll tell you in advance. That's never stopped me before from telling a story. But there were these two guys on death row in Texas, both scheduled to be executed on the same night, and the warden is giving them their final requests.

And so the warden says to the first guy, "I'll give you one request before we execute you." And he says,

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“You know, I’d like to hear ‘ACHY BREAKY HEART’<sup>8</sup> one more time.” And the warden says, “You got it.” He turns to the second guy and says, “Do you have any last requests?” And the guy says, “Yeah, I want to go first.”

The hypothetical makes me think of the second Star Trek movie, the WRATH OF KAHN,<sup>9</sup> in which you learn that Captain Kirk cheated on the Kobayashi Maru scenario<sup>10</sup> because he doesn’t believe in the no-win scenario. So in order to pass the test, he re-writes the question. And the part of the question here that I would rewrite is the assumption of competence because, in my view, a defendant facing a capital charge is very, very unlikely to be in a position to make a competent decision to forego mitigating evidence or to forego an appeal. So let me talk about that from this point of view.

First of all, we have to talk about theory, right? Because there are so many law professors in the crowd, I feel like we at least need to give some lip service to this. But trust me—those of us who have been doing this for a long time—we’ve got this down in practice. We’ll just never work it out in theory. The standard that the ethical code gives us is that we’re supposed to let the client decide what plea to enter, whether to waive the jury trial, whether to testify, and that sort of thing.

The ethical standards also tell us as lawyers that we have the right to decide what witnesses to call and whether

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<sup>8</sup> BILLY RAY CYRUS, *ACHY BREAKY HEART* (PolyGram/Mercury 1992).

<sup>9</sup> *STAR TREK II: THE WRATH OF KHAN* (Paramount Pictures 1982).

<sup>10</sup> The Kobayashi Maru scenario was a test at Starfleet Academy involving a simulation in which the cadet, acting as a starship captain, was surrounded by hostile ships while responding to a distress call from the Kobayashi Maru, a stranded freighter. There was no way out; the purpose of the exercise was to determine how the cadet would respond to the no-win scenario. James T. Kirk does not believe in the no-win scenario, so he changed the puzzle. The same strategy works here.

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and how to cross-examine those witnesses and what motions to make. All tactical and strategic decisions are the exclusive province of the lawyer after consultation with the client. And so that's the premise from which I begin to work this out in practice.

The other premise though, comes from the Constitution. And the standard in death penalty cases is fully-informed decision making in matters of life and death.<sup>11</sup> And that goes not just for the decision of the judge, the decision of the jury, and the decision of the prosecutor about whether to seek the death penalty, but it's also the client's role to make fully-informed decisions about what evidence to present. How can the client know what evidence you might present in mitigation if we have been barred from talking to his or her mother prior to even getting to this stage? So that's the second point.

The other thing the *ABA Guidelines* give us in *Guideline 10.7*,<sup>12</sup> the commentary is particularly important: That we have an obligation not only under the Constitution but under the ethical guidelines, to conduct a thorough and independent investigation as to both guilt and penalty. And that obligation exists regardless of any statement by the client that evidence bearing on penalty is not to be collected or presented.<sup>13</sup> That's an important provision of the *Ethical Guidelines*.

The other critically important aspect of the *Ethical*

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<sup>11</sup> “[W]here sentencing discretion is granted, it generally has been agreed that the [sentencer’s] ‘possession of the fullest information possible concerning the defendant’s life and characteristics’ is ‘[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.’” *Lockett v. Ohio*, 438 U.S. 586, 602-03 (1977) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)) (alterations in original).

<sup>12</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7 (2003).

<sup>13</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7(A) (2003).

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*Guidelines* is our duty as lawyers to make every appropriate effort to establish a relationship of trust. The client telling you that you're not to talk to his or her mother is a sign of distrust. There's a problem in the attorney-client relationship. There's an absence of rapport and likely even a lack of understanding on the client's part about your need to be communicating with members of the client's family. The Guideline recommends very strongly that you see your client within twenty-four hours of appointment and that you engage in a continuing and interactive dialogue with the client.<sup>14</sup>

This is very important in the context of today's discussion because the defender system is in financial crisis; attorney-client communication is the first casualty of an overloaded public defender's office. You don't see your client as often as you should. You don't talk to your client as often as you should. And when you finally do get there to talk to your client, what do you talk about? Why haven't you been here to talk to me? And that creates a barrier in that relationship. And so this is incredibly important that we keep that thought in mind.

*Ethical Consideration*, 7-8.<sup>15</sup> A lawyer should exert his best efforts to ensure decisions of the client are made only after the client has been informed of relevant considerations. Again, how can you fulfill your ethical obligation to your client if you haven't interviewed the client's entire family?

The other aspect of our obligation as lawyers regarding mitigation and guilt/innocence investigation is that we have to understand, the client is not the only person who has a stake in the outcome. Generally, as a society we have things in place to stop people from committing

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<sup>14</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.5 (2003).

<sup>15</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 7-8 (2003).

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suicide. If you're the guy standing there on the ledge next to the fellow who's thinking about jumping, only in a bad Mel Gibson movie do you say "Go ahead." And if you do, you only do it as a strategy to get him to stop.

The other aspect of this decision has to do with the context of capital litigation. We must understand as capital litigators that these decisions are made in the context of extreme trauma. Not just trauma from the capital crime, the arrest, the incarceration, but also the trauma of the child's past. And quite often when the client tells me that he or she does not want me to talk to certain witnesses or interview momma, that tells me that momma knows something that I need to know. That heightens my desire to go talk to that witness because it is likely that this person is trying to hide trauma from me.<sup>16</sup>

What's one of the classic symptoms of trauma? Avoidance. Avoidance of triggers that cause you to re-experience the trauma.<sup>17</sup> And yet, we all know from death penalty litigation, that it is the trauma that the client has suffered that is most likely to evoke sympathy and understanding on the part of the capital decision-maker that will save his or her life.

So we have to proceed from the understanding that there are barriers between us and the mitigation case. And some of those barriers include the shame and embarrassment and humiliation of having been raised in an impoverished, abusive household. They're not proud of that. And they don't want that paraded in front of the jury or a court, especially not if it's a high publicity, high-

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<sup>16</sup> A competent mitigation investigation will invade dark, shameful family secrets; it "exposes raw nerves, re-traumatizes, scratches at the scars nearest the client's heart." Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan.-Feb. 1999, at 35-36.

<sup>17</sup> For an excellent discussion of trauma issues in capital cases, see Kathy Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2008).

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profile case.<sup>18</sup>

There may be concerns about the consequences. Are my other children going to be taken away from me? Maybe they don't understand why it is you want to know this. They don't understand why this is a critical part of his or her life history. There may be some race and class and social barriers. Most of us in the capital defense community who are doing this are white while many of our clients are people of color. And so we have a lot of other kinds of barriers to get over.

But the most significant barrier I have found in these cases is the desire of the client to one day have a normal relationship with the parent, with the abuser—the idealizing of the abuser. There's a really cruel experiment that they did with monkeys sometime ago where they put needles under the fur of a surrogate mother figure and then an artificial breast from which the baby monkey would seek nourishment. And in spite of the fact that it was physically painful for those baby monkeys to snuggle up to their mother while they were eating, they never stopped trying.<sup>19</sup> And those are our clients. Those are our clients in these cases.

And so we have to proceed with the understanding that the things that we're going to investigate will expose these raw nerves and re-traumatize and as Russ Stetler says, "Scratch at the scars that are nearest to the client's heart."<sup>20</sup> And the answer is not to avoid it and not to cave in to the client's natural tendency to stay away from those things, but to counsel the client through it by this process of

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<sup>18</sup> See John H. Blume & Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 2000, at 63-65.

<sup>19</sup> See The Adoption History Project, *Harry Harlow: Monkey Love Experiments*, <http://www.uoregon.edu/~adoption/studies/HarlowMLE.htm>.

<sup>20</sup> Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Feb. 23, 1999, at 5.

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constant engagement.

This is the American Medical Association's model of suicide prevention and interventions.<sup>21</sup> And you could not do a better job of diagramming the stresses that a death penalty defendant is under when facing a capital charge. You look at suicidal behavior, and there are two things that start it.

The first is stressful life event, and I think being a defendant in capital case qualifies. Does anybody disagree with that? The second is a mood or psychiatric disorder. How many of you have ever had a capital client who didn't have that going on? So in the beginning, you have the formula, and then you get the perfect storm here—the suicidal ideation, the thinking about life or death—and we're forced to engage our clients about that thought process. They're going to try to kill you. Huh, let me think about that.

Then we get to the specific factors that feed into suicidal behavior. Impulsivity. Gee, I've never had an impulsive client, how about you? Hopelessness and/or pessimism. How often do you see that as your client is starting to absorb the weight of the state's case and the massive resources that are being devoted to seek to end his or her life? If that doesn't make a normal person hopeless, I don't know what will.

Access to lethal means. Well, these are your tax dollars at work. The whole idea behind capital litigation is to provide the lethal means. And then imitation. Imitation. Who are they imitating? Governors, senators, congressmen, prosecutors, maybe even other people on death row. And then all of those add up to a suicidal act.

Then you look in the blue section on the right, the

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<sup>21</sup> A graphic depiction of the Suicide Risk Assessment Model discussed here is available online at Mark A. Zamorski, *Report of the Canadian Forces Expert Panel on Suicide Prevention*, <http://www.forces.gc.ca/health-sante/ps/dh-sd/spr-rps-eng.asp>.

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prevention. Interventions and education awareness programs. Do you have any of those in your county jails? Screening individuals for high risk. How good is the county jail at that? Pharmacological therapy, medication. Most of our clients are not getting the medication they need. Psychotherapy. That never happens in jails, not on a meaningful level—follow-up care for suicide attempts. None of the treatments intended to ameliorate suicidal impulses or behaviors exist on a meaningful level in our client's lives.

One thing I learned about investigating suicide is that if there is one suicide attempt in a person's life, one in ten of those people who have had one suicide attempt eventually will succeed in committing suicide. And so how many of our clients have suicide attempts in their past? Virtually all. I reject the basic premise that this is a voluntary, competent decision. This is my definition that I found in the Youth Suicide Prevention Program website: "Suicide is not chosen. It happens when pain exceeds the resources for coping with pain."<sup>22</sup> I think that's a significant factor in dealing with all of these decisions. Pain exceeds the resources for coping with pain. And it is our public defender systems in this context that provide the resources for coping with pain. It is our job as capital defense attorneys to keep the client on board and moving forward.

I actually have John McCain on my side. You know, he's an angry guy, and I have discovered it's not just because he's a Republican. I realized this when I read some comments that he made on the Anti-torture legislation. "Solitary confinement is an awful thing. It crushes your spirit, weakens your resistance, more effectively than any other form of mistreatment." This is a

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<sup>22</sup> Youth Suicide Prevention Program, Resources, YSPP Suicide Prevention Materials, July 26, 2010, <http://www.yspp.org/resources/resources.htm>.



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guy who had an arm broken twice and a broken leg during interrogation, and he says the worst was solitary. And that is all of our clients on death row, all of our clients in pre-trial detention. I don't have to tell you we have more people in jail getting mental health treatment than we do in our hospitals getting mental health treatment right now. I won't dwell on it because of the materials on your thumb drive—but the *Hofstra Law Review* has some amazing articles about this very subject and about the mitigation function.

And finally, this is my argument that I'm right about this. This is Joe Amrine. I have had the “don't talk to my momma” discussion with him. In the last year of his appeals, he had no stay of execution along with ten other guys who are backed up behind a particular legal issue. The first Tuesday of every month he watched an inmate parade by his cell in the company of guards taken off to the death watch cell and executed at midnight that night. And there were ten guys waiting a year for their turn.

And after eight, he called me up and said, “I want to go next.” It had nothing to do with ACHY BREAKY HEART,<sup>23</sup> trust me. But he was so damaged emotionally and so ready to get out of there that he would do anything. We eventually succeeded. Rather than getting an execution warrant, he got a briefing schedule. We proved his innocence and this is the day of his release from prison.<sup>24</sup> So don't assume guilt from the fact that your client wants to volunteer to be executed, or to avoid mitigating evidence in the penalty stage of the capital trial. So this is my Exhibit One, Joe Amrine. Thank you.

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<sup>23</sup> CYRUS, *supra* note 7.

<sup>24</sup> See *Amrine v. Roper*, 102 S.W.2d 541 (Mo. 2003) (en banc) (granting Joe Amrine habeas corpus relief and ordering his release from death row based upon a showing of innocence by clear and convincing evidence).

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PENNY WHITE: All right. Facilitator's prerogative, Sean. We all know that the courts won't agree with our evaluation of our client's competence. So I'm taking you back to the question. There's been a competency determination and your client is declared competent. Your client says, "Don't talk to momma." Is your short answer "talk to momma" and competency?

SEAN O'BRIEN: My short answer is "talk to momma," because competency doesn't resolve it. There's also knowing and voluntary and intelligent decision-making on the part of the client. And you can be competent but not be making a knowing, voluntary, and intelligent decision. So client engagement is my answer to that.

PENNY WHITE: The caption under this next question is one law professor tries to take on another. Your client knowingly, voluntarily and freely says, "Don't talk to momma." Do you tell the public defenders in the audience "talk to momma?"

SEAN O'BRIEN: You know, it's sort of like—[Telephone rings.]

PENNY WHITE: Momma's calling.

SEAN O'BRIEN: There's momma. There's momma.

PENNY WHITE: She called me. I didn't call her.

SEAN O'BRIEN: You know, hopefully, and—and I'm going to sidestep your question again—

PENNY WHITE: I know that.

SEAN O'BRIEN: Because that's my prerogative, right?

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And so, you know, if this happens on day one of your representation, you've got a problem. You've got a barrier to work over, and you'd better work through it with your client. And you're going to have the time to do that. So you've got something to work on.

There is a wonderful book by Xavier Amador called, *I AM NOT SICK*.<sup>25</sup> He advocates engagement with somebody who has mental illness or emotional stressors in his life, and he uses the acronym LEAP, which is Listen, Empathize, Agree and Plan. You have to hear out the client. You have to listen to what's going on. You have to show that you empathize with the client's situation. You have to agree on an approach. And you have to develop a plan. And you have to do that together. Because the reality is this: If the client says I don't want you to talk to my mother, and you say, "Screw you, I'm going to see her tonight," you're going to lose that client.

PENNY WHITE: That's right.

SEAN O'BRIEN: And so, you know, what I'm saying is that I don't lightly disobey the client, but I will continually work on the process of engaging the client and engaging the client's family. So that when that conversation does happen, I might even plausibly be able to say to the client, "Hey, I want you to know that I talked to your mother last night."

PENNY WHITE: So you're going to see fairly quickly that our next two hypotheticals are related but they are somewhat different. I'll ask Brad, Mary Ann, and Ann if they have anything they want to say in response to Sean before we move ahead.

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<sup>25</sup> XAVIER AMADOR, *I AM NOT SICK I DON'T NEED HELP*, (Vida Press 2007).

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BRADLEY MACLEAN: Well, I want to make one comment. I want to follow-up on a lot of what Sean said. But the *ABA Guidelines* are very clear. They impose on defense counsel the absolute obligation to conduct a thorough mitigation investigation whatever the client's wishes may be. So if you are going to comply with the guidelines, you conduct the investigation.

PENNY WHITE: You see on the overhead the *Guideline* that Brad's referring to, 10.7,<sup>26</sup> that speaks to that. Mary Ann?

MARY ANN GREEN: And I would just reinforce Brad's comments. So as a public defender, who has handled capital cases, absolutely, you talk to the mother.

PENNY WHITE: Ann, anything on this one?

ANN SHORT-BOWERS: [Shakes no.]

PENNY WHITE: So let's go turn then to our second scenario, somewhat related but a bit different. Here the client has been convicted of first-degree murder. The State has rested its case on penalty. You are preparing to begin your case. You've done your homework. You've conducted your investigation. But at the point that you are about to begin your case, the client instructs you to call no witnesses and to offer no evidence in mitigation. Mary Ann, how do you proceed? Not that you've been there and done that.

MARY ANN GREEN: No. I even have the t-shirt and scars to show it. Absolutely it is ineffective assistance of

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<sup>26</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7 (2003).

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counsel at that point to simply agree with your client. Period. There is no question and there is no footnote. It is ineffective assistance at that point. What you can do—and what the Tennessee cases hopefully are teaching us to do even though the law in Tennessee is that your client has the right to direct his own destiny and has the right to forego mitigation, that is the law. However, I would offer some guidance hopefully for someone caught in that position as I was and looking around for what do I do now.

First, ask for a continuance. I agree completely with Sean about the competency issue. Whether the client has been deemed competent by the State's experts, your experts, your co-counsel, whoever, there is a competency issue at that point. And you are asking for the continuance to discuss the matter with the client. But what you're actually doing is asking for some time to muster your resources—to muster your experts to figure out how to address this issue.

Number one, why is the client doing this? You have to determine that. You can't determine that unless you've done all the things that Sean was talking about earlier in terms of establishing that relationship with the client. You cannot determine what's driving the train at that point. And the one thing that you want to know is whether it's because he thinks he's going to be embarrassed. Is it because he doesn't want his relatives involved? Is it because he doesn't want embarrassing facts about his past to come out or about his relative's past? You want to know what's driving the train.

Unfortunately, what drives the train for so many of them seems to be so and so, who has experience because he's a death row inmate, and he came back to the county jail on a post-conviction—he told me I had that right and it seemed like a good idea to me. They have actual delusional ideas about the criminal justice system. One of them is, that if they don't let you present mitigating

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evidence then the jury will think that they are more innocent. Or somehow the jury will find that they made a mistake in the first place and they'll go back and take away the guilt finding. That's an actual delusional understanding of the criminal justice system.

Another one is "if I don't let you put on mitigating evidence, then I will automatically get the death penalty. And if I automatically get the death penalty, I'll wind up with the best attorneys. I'll get the best attorneys. I'll get two attorneys instead of one attorney on my appeal and on my post-conviction and on my federal hab. And not only will I get that, but I'll get services." And in Tennessee, that's the law. They will get services on a death penalty post-conviction case. They will not get services on a non-death post-conviction case. But they think somehow that's going to give them a second bite at the apple of actual innocence and of walking out. But they are proceeding with some very warped ideas about the criminal justice system. The only thing that I can suggest in terms of counterbalancing that is again the relationship that you establish with your client.

Listen more than you talk. Listen to what your client is telling you. Listen to what the client's significant others are telling you. Identify very, very early who the significant others are in your client's life. Is it clergy? Is it wife? Husband? Children? Nieces? Nephews? Mothers? Dads? Little old lady next door? Who is the significant other in your client's life? And establish just as close a relationship with that significant other as you do with the client. And again, listen more than you talk. Listen to what these people are trying to tell you.

When you establish a relationship, a new relationship with someone, like a friend, you would hope that you get to know each other. You get to know their characteristics. You get to know the mutual likes and dislikes and then you determine, hey, this person could be a

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friend. I'm not saying you have to be the best buddy of your client, who is accused of a capital offense, but I am saying that if you listen more than you talk, you will get to know your client.

When you get to know you client, there will be an establishment of trust. Trust will be established. And at that point, you can begin to educate your client, educate your client about why certain things need to be done that the client may not have thought of. And if you just went in at the very first meeting and said we're going to be talking to your mother, your daddy, your grandmother, your granddaddy and all your brothers and sisters. And he's going, "Whoa." Well, if you don't establish that relationship, if you don't establish that trust, then you're behind in the game.

The other thing that you want to do is to enlist the help. In this hypothetical, your client's just been found guilty. You're getting ready to start sentencing, and the client says no mitigation. Your experts have evaluated this client on basically an objective basis. They are not there to treat the client. They are there to evaluate the client and to give you assistance in building your case for mitigation.

But your experts are still experts. They're still psychiatrists, psychologists, social workers. They're still experts. Bring in your team. Bring in your team of experts and see if they have ideas about, number one, why he's doing this? Number two, what we can do to combat it? Then ask the court for a competency evaluation. At the very least, it's going to build a record. But don't just go in and say, "Your Honor, my client says he doesn't want mitigation, and he's been sitting there during trial acting like a perfectly nice, good, ordinary citizen. And I'm not sure why he might be not competent, but we need a competency evaluation."

You're not going to get a competency evaluation on that. Go in with your facts and your documents in hand.

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Go in prepared to make an offer of proof if nothing else. Go in prepared with the medical records, the mental health records, the mental health reports, and your social history. One thing that I would suggest is that from your very first meeting with your client, begin a behavioral time line.

On day one, even if it is just a few descriptive words, describe your client's demeanor. Describe his attitude. Describe whether he's getting at that point any assistance from mental health professionals in the jail in terms of treatment, medication. Keep up with his treatment and medication throughout the process. I don't know how it is with your jail. But the jail in Hamilton County—unless we have the HIPAA<sup>27</sup> release and a really good relationship with the jail, our client may be on all kinds of medication, and we wouldn't know it. So you have to ask for these records.

And it's an ongoing process because they don't really recognize that if they change medications, or if the doctor comes in and changes a diagnosis, that they have to let us know if we got the records two months ago. But keep a behavioral time line, so that when you go in front of the judge and you say we need a competency evaluation, you can show the judge with that behavioral time line how your client's behavior has disintegrated over a period of time.

Also make an offer of proof. Try to present lay witnesses and expert witnesses on the issue of your request for a competency hearing. You've got the witnesses there anyway. They're there to start the mitigation part of this case. The lay witnesses who have been visiting him, whether it be clergy or family or friends—visiting him throughout his incarceration—can testify to those things that are in your behavioral time line.

It corroborates exactly what you're time line is

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<sup>27</sup> Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 (2006).



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saying. The expert witnesses can testify as to any underlying mental illness or mental defect that the client has. Recognize that the standard for competency in Tennessee is the *Dusky*<sup>28</sup> Standard as adopted by *Mackey*<sup>29</sup>. Those both say that the defendant must have a rational as well as a factual understanding of the proceedings against him, and that he must be able to understand the nature and object of the proceedings in order to consult with his counsel and to assist in preparing his defense.

Understand also, that when someone is sent for a competency evaluation in Tennessee, the McGarry Instrument is the one most often used. There are thirteen points in the McGarry Instrument. And they were recognized in *State v. Benton*, 759 S.W.2d 427,<sup>30</sup> a 1988 case. And in that case, the McGarry thirteen points were set out: Ability to appraise and apprise legal defenses available; level of unmanageable behavior; quality of relating to attorney; ability to plan strategy—that's a novel idea—; ability to appraise the role of various participants in the courtroom proceedings; understanding of courtroom proceedings; appreciation of the charges; appreciation of the range and nature of possible penalties; ability to judge likely outcomes—well, if his idea of the outcome by not putting on mitigation evidence is that he's going to get better lawyers and he's going to get services and therefore, he's going to get off death row, this is not realistic—; capacity to disclose to attorney available pertinent facts surrounding the defense; capacity to challenge prosecution witnesses realistically; capacity to testify relevantly; and manifestation of self-serving versus self-defeating behaviors. That's something that should be in your behavior time line.

If the client continues in his request, and the court

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<sup>28</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>29</sup> *Mackey v. State*, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975).

<sup>30</sup> *State v. Benton*, 759 S.W.2d 427, 430 (Tenn. Crim. App. 1988).

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allows the sentencing hearing to proceed without the competency evaluation, again, go back and request a more thorough examination, on the record, of the client's knowing, intelligent, and voluntary waiver of his right to present mitigating evidence. Let me repeat that. If the court proceeds without a competency evaluation, then go back and request a more thorough examination, on the record, of his knowing, intelligent, and voluntary waiver.

In the *Kiser*<sup>31</sup> case, which is cited in your material, the colloquy between the judge and the defendant takes up about I think seventeen to eighteen lines.<sup>32</sup> That's what it took for this man to say "I don't want any mitigation. I want to get the death penalty." If you enter a plea of guilty on a shoplifting case in Hamilton County, you have to fill out this form, which is five pages long. You have to read it to your defendant. You have to not only read it to the defendant, the defendant has to be able to knowingly answer the judge's questions during the plea. Ladies and gentlemen, it's ridiculous to allow the courts to proceed with a mitigation waiver that takes seventeen or eighteen lines on a death penalty case, when it takes five pages to enter a plea on a shoplifting case. I'm getting the bad looks, so, I'm sorry.

Finally, the last thing that I would suggest—I'm skipping over some of this—but the last thing that I would suggest is at any rate, submit under seal your entire mitigation case. Submit affidavits of your lay witnesses, reports of your expert witnesses, your exhibits, submit under seal the entire case into the court record. So that hopefully—somewhere down the line—someone will be able to look at it.

The one thing I don't want to leave out with regard to the questions that the judges ask, at the bottom of the plea form—this part is all about what the person is charged

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<sup>31</sup> *State v. Kiser*, 284 S.W.3d 227, 241 (Tenn. 2009).

<sup>32</sup> *Id.* at 240.

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with. “Do you understand that you’re charged with shoplifting, and it carries one day up to eleven months and twenty-nine days?” There should be something like this for the mitigation waiver. The mitigation waiver should say, “Do you understand what the mitigating facts that your attorney would present to the court are—and actually spell out those facts.” Thank you.

PENNY WHITE: So the cases that Mary Ann referred to are *State v. Kiser*<sup>33</sup> and *Zagorski v. State*.<sup>34</sup> Their citations are on the PowerPoint slides. I handed Sean a copy of Formal Ethics Opinion 84-F-73,<sup>35</sup> which quotes *Zagorski* while Mary Ann was speaking. He took one look at me and said, “This is horrible.” But that’s the law in the State of Tennessee. That’s the part you can edit out when the transcript is prepared if you would like.

SEAN O'BRIEN: Okay.

PENNY WHITE: And the guidelines that Mary Ann referred to include 10.7<sup>36</sup> you've already looked at. It is pretty clear. Counsel's duty to investigate and present mitigating evidence is well established regardless of the desires of the client—regardless of counsel’s belief that the investigation will prove futile. And finally, even more specific is guideline 10.11.<sup>37</sup> Counsel at every stage has a continuing duty to investigate the issues bearing upon penalty and to seek information that supports mitigation or

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<sup>33</sup> *Id.*

<sup>34</sup> *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998).

<sup>35</sup> Tenn. Bd. Of Prof.'l Responsibility, Formal Ethics Op. 84-F-73(a) (1999).

<sup>36</sup> ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7 (2003).

<sup>37</sup> ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.11 (2003).

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rebutts the prosecution's case. This includes discussing the procedures with the client—maintaining a consistent theme throughout both phases of the case—in determining whether the client will testify and what evidence will be used in the defense case.

So our next hypothetical, carrying along with this same theme, is post-sentencing strategy. Now we're at the appellate level. The status of this case is the post-conviction appeal of the state death-sentenced inmate. The direct appeals have been completed. Counsel is explaining the next steps with regard to post-conviction appeals to the client. And the client—maybe based on some of these conversations Mary Ann so aptly pointed out—says, “This is just not a life worth living. I don't want to live if I can't be free. No more lawyers. No more appeals. I'm ready to die. Don't file anything. If you do, I'll tell the judge you are doing it against my wishes.” So the hard question is what to do when you are asked to abandon appeals. Brad?

**BRADLEY MACLEAN:** Let me start off by saying that if that is the situation that you're confronted with in post-conviction in Tennessee, you really don't have a serious ethical dilemma because in order to file a post-conviction petition in Tennessee the client has got to sign the petition. It has to be a verified petition. And so the situation that you run up against is a client who refuses to sign the petition.

Once the petition is signed, you do have situations where the client will seek to dismiss or withdraw the petition. And often they do that by simply writing a letter to the judge saying that that's what they want to do. And so once that happens the die is cast, and what you need to do in those circumstances is very clear. It's not an ethical dilemma at all. In those cases, you simply raise the issue of competency and litigate competency. You have no choice but to do that.

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I'm going to talk about the more general issue. All of these scenarios fall under the same general rule. In all of these scenarios, what you have is a volunteer. You have a client who is willing to volunteer for execution. The client may not look at it exactly that way. The client at the trial stage who wants to waive mitigation may not see himself or herself as a volunteer. But, in fact, that's what he or she is.

If you successfully waive mitigation, and as a consequence no mitigation evidence is presented at the trial, then under Tennessee law—and I suspect it's true in most other jurisdictions—the death penalty is mandated as long as the prosecution proves its case and produces a finding of the existence of aggravators that qualify the defendant for the death penalty consideration.

I want to, first of all, raise one issue. Death is different and we hear that a lot. And in this context, I want to focus on two ways in which death is different, which is I think fairly startling when you think about it. In Tennessee, life without parole and the death penalty are the only kinds of cases where the jury makes the sentencing decision. If a defendant is allowed to waive mitigation, it is the only kind of case where the defendant is given the choice—the authority to make the sentencing decision because then the sentencing decision is death, if the prosecution proves its case. There is no Constitutional right—there's no right in the law in any other area of the law—for a defendant to choose his sentence. That's the job of the sentencer, typically the judge. But death is different in this respect.

Secondly, in Tennessee, death is different in particular in the case where the defendant seeks to waive mitigation because in all other serious criminal cases in Tennessee, before a judge can sentence a defendant, the law requires that the judge receive a pre-sentencing report. And if you look at the statute in Tennessee as to what must go into a pre-sentencing report, it's basically the same kind of information that a defense lawyer should present at

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sentencing in a capital case: something about the client's history, the client's mental status and things of that sort. So ironically, in a death case where the defendant waives mitigation and as a consequence no mitigation is presented—unlike any other serious criminal case in Tennessee—for the sentencing decision is made without any information whatsoever of that type. So death is different in those respects.

I want to talk about the fundamental question. I had a student who recently asked these very same kinds of questions. She asked me these questions because she was writing a paper for her law school class, and I had about five minutes to e-mail her an answer. And yet I think that the answer was as concise as I can put it—exactly how I would respond to all of these hypotheticals. The first response is: I will do everything I can to present a mitigation case and in post-conviction to advocate for a life rather than a death sentence. I will do everything that I can in my power.

The second thing that I will always do is: I will ask certain basic questions. And I've listed those questions—and I'm repeating a lot of what has already been said—but here are the questions that I would ask. The first question, which is of paramount importance, is what is the nature of the relationship between the client and the attorney? And when I'm the attorney, I have to ask myself, what is the nature of my relationship with the client because that relationship will govern the outcome in most cases in my view. The second question I would try to ask is what is the nature of the client's understanding of the proceedings and of his rights and of his position? The third question I would ask is what is the nature of the client's capacity to think rationally, to make a rational decision? What are his thought processes like? The next question I would ask is what is motivating the client?

And interestingly, the two prior questions that I

raised—the client’s understanding or his appreciation of his circumstances, of his legal standing and also his capacity to make a rational choice—those are the two tests that have to be satisfied for a client to be competent under *Rees v. Peyton*<sup>38</sup> to waive his post-conviction remedies.

But beyond that, the question of what is motivating a client is not typically a question that the courts ask. But fairly recently, within the last couple of years, the American Bar Association Task Force on Mental Disability and the Death Penalty made a recommendation that an inquiry into the motivation of the client should be an essential element in determining competency in these situations.<sup>39</sup>

And the next question after that, that I would ask—and this requires a lot of probing—what are the client’s beliefs? And by that I mean this: does the client believe that imposition of the death penalty in his case is fair? Does he think he deserves the death penalty? Does he think—does he believe that he was treated fairly in the process? Does the client believe that life is worth living? Does he want to live?

Those are questions that you can never fully answer through a superficial discussion with the client. Those questions can be answered only after you learn about the client and learn about the client’s background. And typically, in many of those cases, those questions can be ascertained only with the help of professionals, mental health professionals. So you have to get a mental health professional involved, at the beginning.

John Blume, who is well-known in the death penalty community as a death penalty litigator and as a

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<sup>38</sup> *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

<sup>39</sup> Paul M. Igasaki et al., *A.B.A. Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 674 (2006).

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scholar has written prolifically in the death penalty area. He wrote an article about volunteers on death row.<sup>40</sup> And he did a survey, and he found, based on his survey, that 88 percent of those inmates who have volunteered for execution and have been executed suffer from mental illness or a drug abuse disorder.<sup>41</sup> Some 78 percent suffer from a mental illness. In my experience, every client that I have represented on death row suffers from a mental illness.

There are two basic characteristics of every inmate on death row. Number one, they're indigent. In Tennessee, there's not a single inmate on death row who is not indigent. Everyone is indigent today. Everyone on death row today was indigent at the time of his trial. The second characteristic which is common among death row inmates with very few exceptions is that they are mentally or psychologically impaired. And that's been my experience.

I want to relate to you a couple of cases that have influenced my thinking in this area. The first case is the case of Ron Harries. In 1984, Ron Harries was scheduled to be executed. He was on death watch. He was scheduled to be the first inmate to be executed in Tennessee post *Furman*.<sup>42</sup> He was a volunteer. He volunteered after his direct appeal before state post-conviction.

Another inmate and a lawyer in Nashville filed a petition in the federal court, a habeas corpus petition, seeking to stop the execution. They were successful, and then litigation ensued concerning his competency. He was found to be both incompetent and to be acting involuntarily. The finding of lack of voluntariness was based upon the inhumane conditions of the prison. The finding of incompetency was based primarily upon his

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<sup>40</sup> John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 962 (2005).

<sup>41</sup> *Id.* at 962.

<sup>42</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).



diagnosis of bipolar.

Bill Redick has been mentioned already earlier today. Bill Redick was a partner of mine. Bill Redick represented Ron Harries at that time. Bill Redick took the position that if this is what Ron Harries wanted to do, this is what he should do. Fortunately, other forces prevailed. The Judge stopped the execution and took Ron Harries off death row. Bill Redick continued to represent Ron Harries, and finally got his death sentence set aside. And then two years ago, settled the case for a life sentence.

In the meantime—over the past many years that this case has been litigated—Ron Harries changed his mind. There were times when he wanted to volunteer, other times when he didn't want to volunteer. I spoke with Bill just the other day about that case. He said he learned a lesson. When he took the position back in 1984—that Ron ought to be allowed to volunteer—he said, “I didn't know about his background. I didn't know about his mental illness. And I would never, ever take that position again.”

What we found—because I had gotten involved in his case later on—and what we found was that Ron Harries did not feel that he was fairly treated at trial. He did not really feel deep in his heart that he wanted—that he deserved to die. Although when he was in a state of depression, he did feel that way. He is very happy today that he's no longer under a sentence of death.

Another case, the Christa Pike case—Christa Pike in post-conviction sought to drop her post-conviction case. She was found to be competent, and having been found competent, the court dismissed her case. It was appealed. In the interim, she was diagnosed with bipolar. She was treated for the first time with the proper medication. Once she was treated, she began to think differently about her case. She did not want to volunteer. And fortunately the Tennessee Supreme Court reversed the lower Court's decision—based upon what had happened in the interim—

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and allowed her to proceed with her post-conviction case.

I am today representing Paul Reid. Paul Reid is floridly psychotic. If you ask him the question of why he wants to volunteer—he's in post-conviction—he would say, "Because I don't want to live like this on death row anymore. Because I think I deserve, you know, that the victims deserve this." But then when you probe more deeply, he thinks he's innocent. And he thinks that everything that goes on in his life is scripted by a force, some kind of delusional force that he refers to as scientific technology. He doesn't really believe these things, but he knows how to say these things. And these cases have formed my view that you should never, ever acquiesce in your client's desire to volunteer.

I want to make one final point that is from a more theoretical point of view. The argument for allowing an inmate or a defendant to waive his or her rights and to volunteer for execution is based upon an argument concerning autonomy and dignity. You see, we have to respect the client's autonomy to make his own decision as long as he's competent.

Now, leaving aside the issue of whether he's competent or not, the point that I focus on is that what makes the death penalty truly unique is that it is the one punishment that completely strips away a client's dignity. That is the purpose of the sentence. A death sentence is not about death. A death sentence is a statement to the defendant by society that the defendant is not worthy of membership in the human race.

Dignity is defined as intrinsic worth. So the death penalty is designed to strip away dignity. It is paradoxical to argue that a person should be allowed to volunteer to a process that is designed to strip him of dignity in the name of dignity. Also correspondingly, the whole idea of mitigation is to demonstrate to the jury, to the sentencer, how a defendant's autonomy, capacity of self-

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governance—which is the meaning of autonomy—has been impaired.

That’s the purpose of mitigation. And to allow a defendant to volunteer for execution in the name of autonomy and thereby take away the opportunity to determine what kind of autonomy the defendant has is contradictory. So as a policy matter, I don’t think we can consistently defend against the death penalty and at any point in time acquiesce in the client’s desire to volunteer. Thank you.

PENNY WHITE: Brad’s words are mirrored in guideline 10.5,<sup>43</sup> saying quite bluntly that it is ineffective assistance of counsel to acquiesce in the client’s wishes to dismiss appeals.

We’re going to change focus. But before we do, Sean, Mary Ann, any closing brief remarks on the issue of foregoing mitigation or abandoning appeals?

SEAN O'BRIEN: I just have one comment. I agree with everything that Brad said. But one thing I would like to see us as a community to get away from is the use of the word “volunteer” because “volunteer” implies voluntary. That’s a decision. And these people pure and simple are suicides. It is suicide. And “volunteer” kind of funnels us down a path of analyzing the decision and maybe trying to talk the client out of the decision and counsel him that way. When you evaluate it as a suicide, and you actually research how do suicide hotlines function and how do suicide counselors function, it is totally unlike what lawyers do. And so I would like us as a community to abandon the word “volunteer” and start looking at what are the effective treatment and prevention methods for suicide and bring

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<sup>43</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.5 (2003).

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those resources and thought processes and strategies to bear on our client decisions.

BRADLEY MACLEAN: I totally agree. I stand corrected. And I will never use that term again.

PENNY WHITE: Our next scenario is one that Jerry Black and I had a little personal experience with. But basically, the hypothetical is posed in this way: You are the post-conviction lawyer for the death-sentence inmate, and your petition will include allegations of ineffective assistance of counsel. So you contact former counsel, trial counsel, to arrange to interview trial counsel, to secure the file, and to do the things that are necessary to prepare the petition or to amend that petition.

Former counsel tells you, “Wait a minute, I’m now an adverse party. I turned my file over to the Attorney General’s Office, and I’m going to do everything I can to rebut your claim that I was ineffective and to clear my good name.” Ann Short, how do you proceed?

ANN SHORT-BOWERS: I encountered that scenario quite a few years ago, and I told Penny when she was giving me the hypothetical, I said my short response internally is how you proceed is to tell the attorney “screw you.”

Now, let me step back and let’s talk on a slightly higher level than that. And let me just get an idea here a minute. How many people in the room have been involved actually in death penalty work at some level? I hope everyone who raised their hand—and for those that didn’t—understand that at any level of death penalty work you may get involved with, you’d better have dang thick skin. What makes it tricky also is that you still cannot for one minute lose your compassion or your ability to identify with your client.

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But don't ever get involved initially in a death penalty case without understanding on the very front end that this is going to be a long haul for you and that at some point in time, unless your client is found not guilty, you are going to be called ineffective—legally, constitutionally ineffective. Not incompetent. I hate attorneys who say you're calling me incompetent. I'm not. I'm calling you constitutionally ineffective. In any work, in any given circumstance, a lawyer can be constitutionally ineffective.

To bring it back a little bit to my experience and where my reference is—many, many years ago my first experience with death penalty work was actually doing a post-conviction on a death penalty case, before I was ever involved many years later in the trial of a case. And back when I was involved in the post-conviction—back before any standards—I mean forget about any reasonable hourly rates, forget about any funds for experts—dignified begging and even undignified begging was the way you had to go about soliciting people to help you in these cases.

And I was naïve to be sure, but I did not realize that my involvement was going to last some thirteen years in that case. A lot of that time was spent in—and I'll emphasize everything that's been said about the attorney-client relationship—a lot of that time was spent getting to know that client and trying to build trust with that client because I was the second attorney that had stepped in. And so, whatever reservations the client had about how his case was handled the first time, I had to overcome some of those communication barriers to be able to work with the client.

You've got to be careful, and you've always got to feed that relationship. And you've always got to nurture that relationship because I'll tell you what happened to me was—at the end of thirteen years—we had a breakdown in our attorney-client relationship. And I ultimately had to move to withdraw in the case, and I did.

In hindsight, that may have been a distinct

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advantage to the client because I was somewhat of an abrasive lightning rod in the case. I wasn't very polite to anyone involved in the court system. And shortly after I got out of the case, the lead assistant prosecutor in the case had gotten very, very sideways with his boss, and he quit. He said, "I'm out of here"—not just off this case—"I am out of this office." And what that left were new faces in that case. And ultimately, I'm happy to say—and it was one of the best days of my life—when I picked up the phone and successor counsel called and said, "We settled this case, and we settled it for a life sentence." And I was absolutely delighted. And in fact the client's name is Kenny Campbell. And as of April of this year, he made parole.

That was also back many, many years ago when the statutory criteria for how long you had to serve before you could make parole was much less than now. But at any rate, as I said, part of the message is, you're going to be in this for the long haul, and you'd better have a thick skin.

And I can tell you because I see a lot of people here from this community, too. I guarantee you—and I know Mark will agree with me also—this community has just finished up the fourth of a series of just horribly gruesome capital defense cases: Channon Christian and Chris Newsom. And I guarantee you, some of the finest attorneys you will find anywhere in this country stepped up to the plate and agreed to represent these people in these cases. And I also guarantee you, every single one of them knows—and they knew going into that case—that at some point along the line, they're going to be sitting in a witness chair. And they're going to be having allegations of ineffective assistance of counsel directed at them. And they all know how they have to respond appropriately under those circumstances.

When I mentioned the "screw you" remark, it was because back when I was working on the case—that I

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mentioned took thirteen years—I got to the point where I had been calling the attorney’s office and kept trying to make an appointment, and the secretary kept blowing me off. And finally, I just said okay, you know, I’ve got to get in the car, go up there, sit in the waiting room if I have to until somebody agrees to talk to me.

I went up there. I don’t know, I guess they kept me cooling my heels for maybe an hour in the waiting room. And of course, no one offered me coffee or anything. That’s okay too. When the attorney finally realized that he didn’t have a back door, he was going to have to come out where I was sitting to actually be able to leave the office. I stood up, and I introduced myself. And I told him who I represented. And I explained, “I need some of your time, please. And if it’s not convenient now, can we please schedule a time to sit down and talk?” And he looked at me and he said, “Lady, it’s just a question of when that guy’s going to fry,” and walked out the door.

And that still is totally imprinted in my long-term memory. That attitude just absolutely blew me away. So when I say “screw you,” that’s exactly what I thought to myself when he walked out the door. And I guarantee you, we made the post-conviction hearing as miserable for him as we could. And let me tell you, there was a reason for that. Not just because of his attitude and getting some visceral fun out of it, but because—please understand under *Strickland*<sup>44</sup>—when you’re dealing with ineffective assistance of counsel, *Strickland*<sup>45</sup> tells you, you have the burden. You’re going to have to try to re-create the circumstances that existed at the time counsel was making certain decisions. You’re going to be confronted with a presumption that what counsel did was reasonable, unless you can show other circumstances.

The more difficult trial counsel makes it for you,

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<sup>44</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>45</sup> *Id.* at 692.

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and the more you have to push back, gives you —and it gave us ultimately—some ammunition to be able to argue, “We were trying our damndest to carry our burden of proof. But look what happened.” I mean these attorneys fought us every single stage tooth and nail. We ultimately had to subpoena the file into court. And of course, they wouldn’t cooperate. “May we see your file now?” “Oh, no.” “Oh, no.” They just sat and held it in their lap.

Okay. Fine. “What’s the first piece of paper in your file? Would you please take it out and identify it for the court?” We are only talking about one little accordion file. I mean, that’s a tip off right there. You know, once we were about a quarter of a way into the file, the judge kind of looked at the attorney and said, “Why don’t we come back tomorrow. And in the meantime let post-conviction counsel just photocopy your file please, and let’s see if we can’t move it along,” which we did.

But the point being, we did have to get into that level of difficulty because obviously the attorney did not appreciate the continuing duty that he owed to that client. Having—and again—we’re going to talk about some of those duties, but let me talk a little bit more practically about what you could do confronted with former counsel with that kind of attitude as an initial way to deal with it.

I would suggest, first of all, look around in cases in your community. Bob Ritchie’s no longer with us. I have asked Bob, and Bob has agreed to do this previously for me—not in a death penalty case. Identify that one attorney in the community that seems to have the greatest amount of respect that you can find. Call that attorney and see if you can enlist them. Say, “Would you call so and so, ask them to go to lunch with you. Just would you talk to them about what’s at stake here? You know, maybe they’ll listen to you. They’re not going to listen to me right now.” And see if you can’t get a network going. You don’t have to share any attorney-client privilege or any confidences of your



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client to try to enlist somebody in that fashion to see if they can soften up that attorney a little bit. That's one suggestion.

Two is to write a letter to the attorney. And just say, "Look, here is what your ethical obligations are. All I'm wanting you to do is within the framework of those obligations. Please meet with me. I have a waiver from the client, so that you can talk to me; so that you can provide your file to me. But here are your ethical obligations." Now, that may help. It may not.

You get blown off again, personally—and at this point in my career—I would probably sit down and write a letter to the Board of Professional Responsibility. Now, is that going to help? Probably not. Is it going to make the situation any worse? At that point in time, I don't think it's going to make it a bit worse. But who knows. You might get the Board involved. You might somewhere along the way make that attorney have a second thought as to what he or she is doing. But if you get that far, then you probably are going to get to a point where you're dealing with having to subpoena the attorney to court—having subpoenaed the files. And get prepared for it and just do it.

If you find yourself in the situation of where your services and your level of representation have been called into question in a death penalty case, what are your obligations? You know, just as if the client dies, the relationship continues. Just because your services may be questioned, it's not free time for saying "okay, I'm no longer bound. I no longer have any obligations to the client. I can do what I want. I can go talk to the state. I can provide all the material." No, that's not the situation.

Now, post-conviction counsel, if he or she is doing the job correctly, should get a release from the client so that that release can be presented to the attorney to say okay, it is all right for you to provide your work product files to post-conviction counsel. It is all right for you to discuss

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my case with post-conviction counsel—attorney-client privileged materials, confidentiality issues, and get that core thing done. That way, the trial attorney should feel that he or she is protected in terms of going forward.

Just because though, that kind of waiver has been obtained, doesn't mean that the client is saying, "Okay, that's fine, you can go talk to anybody you want to." That's not giving you permission to go sit down and talk with the prosecutor that's handling the case. And I would caution, if you are in post-conviction counsel's situation, you need to—when you craft the release for your client—be real careful how you craft it. And you might want to have those caveats in there: "By this I am not consenting that you talk to anyone else. I'm not consenting that you can talk to the state on my behalf." Get those parameters outlined very carefully.

Going into a death penalty case as trial counsel, you have an ethical obligation to keep your files as well documented and as organized as you can. Sometimes I know they get a little messy. I worked for a long time with a gentleman, and that's primarily what I did was clean up his messy work—labeling files and whatnot. But you really should—if you find your files in that situation—take the time. And you know, if you're doing death penalty work, you're not going to get paid for it. Get over it. You weren't compensated fairly the first time. Don't take it out on the client on post-conviction. Spend the time necessary to sit down, organize your files, and find the time to meaningfully discuss the case with post-conviction counsel. And to the extent that the strategy is consistent with what you know the facts to be, you should cooperate with counsel.

What do you do if you get the call from the state, "Hey, we got a post-conviction. We'd like you to come over and talk about it?" I'll tell you personally, in death penalty cases, I say, "You can find out what I've got to say

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when I get on the stand. I'm just like any old witness." You know how we've all had them say, "I don't have to talk to you. Don't want to talk to you. Never going to talk to you." It's kind of how I feel about these things. Why should they be entitled, particularly if my client has given me some pretty good parameters as to what I am, and am not, authorized to say? I'm not going to sit down and talk to the State about the case.

I guess to seriously bring it around and wrap it up: just have thick skin. Don't ever, ever take it personally if you're trial counsel in a death penalty case. Don't ever take it personally. Know that going in on the front end. And if that causes you a problem, don't do the case; just don't do it.

PENNY WHITE: Thank you very much, Annie. Just by way of summary, the *Guidelines*<sup>46</sup> are very specific. There is an obligation to conduct a full examination on the part of post-conviction counsel, an obligation of trial counsel or any member of the defense team to safeguard the interest of the client even after the relationship has ended, and an obligation to cooperate with successor counsel. And the *Guidelines*<sup>47</sup> specifically refer to maintaining the records in a manner that is conducive to use—as Annie referred to—and to providing the files and all information regarding the representation to successor counsel, as well as sharing potential further areas of legal and factual research and cooperating appropriately.

And then finally, the commentary to *Guideline* 10.13,<sup>48</sup>—the last point that Annie made—says that counsel should share not only papers but strategic thinking. All of

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<sup>46</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (2003).

<sup>47</sup> *Id.*

<sup>48</sup> A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.13 (2003).

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this should be routinely and openly presented to the post-conviction counsel. To do otherwise is unethical.

I think—because we have only about twelve minutes left—that rather than do the last hypothetical right now, we will turn to your questions or comments. And then if you don't have many questions or comments, then, we'll talk about the conflict of interest hypothetical. But I'd like to think that there are comments for people who take issue or want to say "Amen, Amen." Again, while they're getting to the first comment, I want to commend our able court reporter from Watts-Boyd who's been working feverishly over here. So bear her in mind and speak loudly when you get the microphone.

BARBARA HURST: I'm very mindful of the fact that you people do this actually on the front lines. I represented three death penalty clients in a direct appeal. The statute was struck down and has never been re-enacted in Rhode Island. So I feel like I'm standing in the position, "easy for me to say."

But I hear a lot of values behind what you're saying that seems to be personal values, about how you view life, how you view life worth living, how you view the relationship between mental health and competent decision-making and maybe some assumptions about certain decisions being the product of a mental illness and not simply a companion to mental illness, as well as the value of life worth living with bipolar diagnosis that cannot always, despite good medication, make for a happy life.

I mean, I wonder the extent to which counsel representing clients in death penalty litigation are inevitably in a conflict of interest position because all of our personal values inform our perspectives about other people's decision-making. I'm not sure it's possible to get away from that. I don't know how you resolve that. But I wonder whether if we were sitting over a drink, my feelings

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about life and suicide as a reasonable solution to a set of problems might simply be very different from yours. And how does that affect how we represent clients?

SEAN O'BRIEN: You were looking at me while you were asking that. And obviously, I have strong feelings about it. But I don't think it started out as ideological or my religious values—my faith. It comes from professional values of my role in the system that is, I think, an oppressive system. I really recommend that you read, Wilbert Rideau's book that recently came out, *IN THE PLACE OF JUSTICE*.<sup>49</sup> Wilbert was the subject of *Rideau v. Louisiana*,<sup>50</sup> the 1963 change of venue—pre-trial publicity case in the U.S. Supreme Court. I'm halfway through it right now—but he's talking about his life in solitary confinement for a period of time, how the system just really, literally abused and raped these prisoners through the death penalty process. If you stop and you look at the overall context of where the client is—what has happened to the client, what is going to happen to the client—there's nothing that says justice about it. I'm all about justice for the client.

You also have to recognize that a client sitting on death row—or sitting in a county jail, pre-trial—has no idea what the quality of life in a general population of a humanely run penitentiary could be compared to where they've been.

Heath Wilkins is my example. Here's a kid, sixteen-years old, allowed to plead guilty, waive mitigation, and sentenced to death. The Supreme Court in 1989 said that doesn't violate the Constitution.<sup>51</sup> And then

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<sup>49</sup> WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* (Knopf Publishing Group 2010).

<sup>50</sup> *Rideau v. Louisiana*, 373 U.S. 723 (1963).

<sup>51</sup> *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (*Wilkins v. Missouri*, 492 U.S. 361 (1989) was the companion case to *Stanford*).

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subsequently, I was appointed on the case, and he's a volunteer from day one. Old habits die hard, don't they? I'm not criticizing Brad at all, but it's a word I want to get away from. He was a suicide from day one. And we are now getting ready for a parole hearing next summer. Now that he's in the general population, he works for a company called Talking Tapes. He reads books onto cassettes tapes for blind people. The quality of life is so much different from what it had been. That's context to me.

PENNY WHITE: Thank you.

BRADLEY MACLEAN: If I could respond to that too? I struggled with that question, and it's through my experience that my attitude has evolved. I've had several clients who have sought to give up their appeals to the point of filing papers with the court on their own. Several clients. I only have one client, though, who has maintained that position. And that client is clearly delusional—totally out to lunch. Every other client has changed.

And I think that there are two factors. One is as they live, they learn that they can live life where they are. That changes their point of view. But I think also what changes their point of view is when they do develop a relationship with a legal team that's willing to fight for them, they begin to see value in living. And I think that's our job. And it is because I've seen that, and I've never seen a client—who is not totally delusional—who hasn't changed his or her mind. Then you know. That has really affected my point of view with the whole thing.

The other response that I would make is that you read in the cases, and you read Tennessee ethical opinions, that say you've got to allow the client to go forward. They're based on the premise that the Eighth Amendment<sup>52</sup> is strictly a personal right. And I don't view the Eighth

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<sup>52</sup> U.S. CONST. amend. VIII.

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Amendment<sup>53</sup> that way. I think the public has an overriding interest in a fair and reliable process where the sentencing decision is made in an appropriate manner. And so, that's from a more philosophical point of view. That's where I come out.

UNIDENTIFIED SPEAKER: I wanted to pose to the panel a dilemma which I actually faced. Number one, the client had had several lawyers—death penalty—had had several lawyers before the case got to me. Those lawyers were excellent, excellent lawyers. Nevertheless, the client broke up with each one of them. I think there were five. Then I was given the case. And I tried to get along with him. And then I wanted to interview his family, especially his father, who he was suspected perhaps of abusing him. But he didn't want to talk about it. He said this, "If you interview my father, we're through. No more cooperation. No helping out. No nothing. It's over. So that's it. I don't want you interviewing my father." Now, I faced the following: five lawyers had, you know, broken up with him—excellent lawyers. And now I was actually getting somewhere, dealing with him, motions filing, and discovery filing. And now he said, "If you do that, it's over and we're through."

BRADLEY MACLEAN: I don't view that as so much of an ethical dilemma as I do a strategic dilemma. You've got a problem in a case like that. How do you proceed in a way that is most effective and that's in your client's interests—and your job—when the client is interfering? And, you know, that to me is not an ethical problem. That to me is a practical problem of how you handle the case. I've got a case now where the client insists on his innocence, and he keeps telling me that you cannot mitigate innocence.

That's his little phrase. And he's saying, "Why are

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<sup>53</sup> *Id.*

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you talking to my family? Because I'm innocent, and you can't mitigate innocence. I don't want to deal with any of those issues." And that has proven to be an obstacle in our representation. No question about that. From an ethical point of view, my view is I do whatever I can. From a practical point of view, I've got to take into considerations what my client may want to do to sabotage his case. Because he can sabotage the case, and I don't want him to do that. So you've got to work through that. It's a problem. No question about it.

SEAN O'BRIEN: Yeah, I agree it's a problem. And the problem sometimes comes with its only solution. It's an opportunity. I look at things like that as an opportunity to ask your client, "What is it? Why? What? Are there certain things that you want me to stay away from with your father? Can you think of things that I could talk about with your father?" I mean, he wants to know about what's happening, and so what am I supposed to do? It's an opportunity to dialogue with your client about that, but you don't argue. You just use it to explore. And eventually, you're going to talk to the father. And eventually, you're going to talk to the father with your client's permission.

UNIDENTIFIED SPEAKER: I dealt with the father. In fact, we put him in a veteran's home, at the client's suggestion. I talked to my client and tried to arrange visits. It was getting into that early background that the client did not want me to do. That's the dilemma.

BOB WEEKS: Thank you. I am Bob Weeks from San Jose, California. In the response to the question, you can't mitigate the innocence argument. One line I had some success with. I hear that from clients as well. You know, under some circumstances, we can put on character evidence to prove your innocence, and there's some



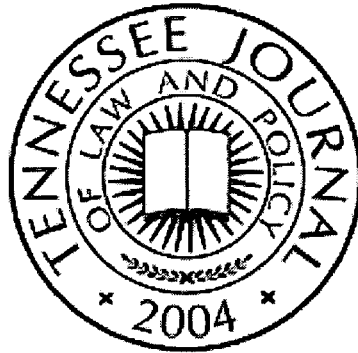
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California law that says good character alone is enough to raise a reasonable doubt. So I tried that line with some success. So I suggest that you put that in your arsenal of arguments to use on your clients.

PENNY WHITE: Thank you, Bob. Well, join me please in thanking this wonderful group of panelists. Thank you very much.

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**NATIONAL PUBLIC DEFENSE SYMPOSIUM**

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:  
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**“FINDING A SILVER LINING IN THE DARKEST CLOUDS:  
HOW TODAY’S ECONOMIC CRISIS CREATES  
OPPORTUNITIES FOR REFORM AND COST SAVINGS IN THE  
ADMINISTRATION OF THE DEATH PENALTY”**

**PANEL FOUR**

**FRIDAY, MAY 21, 2010  
AFTERNOON SESSION**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW**

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**PANEL FOUR SPEAKERS:**

MODERATOR: TONY MAURO  
Supreme Court correspondent for National Law Journal,  
American Lawyer Media, the Blog of Legal Times, and  
law.com

JEAN FARIA,  
Louisiana State Public Defender  
Baton Rouge, Louisiana

PROFESSOR JON B. GOULD,  
Director, Center for Justice, Law & Society  
George Mason University  
Fairfax, Virginia

ELIZABETH (LIBBY) SYKES,  
Director, Administrative Office of the Courts  
Nashville, Tennessee

**RESPONSE TO PRESENTATIONS:**

MALCOLM R. HUNTER,  
Executive Director, Center for Death Penalty Litigation  
Durham, North Carolina

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PENNY WHITE: I'm going to turn it over to our distinguished guest, Tony Mauro, who will be the moderator of this panel. I'll leave the rest to him.

TONY MAURO: My name is Tony Mauro, and I cover the Supreme Court—or I'm a reporter who covers the Supreme Court for the National Law Journal and American Lawyer Media—and it's an honor to be in your midst. I've learned so much in the last day from the excellent panels. It's been tremendous. And, I think I now realize why Robin Maher recruited me to fill in for her. She was supposed to be the moderator, but she had a schedule conflict. And she called me and asked if I would do it. I think I see why she wanted me to. She knows that I cover the Supreme Court, and I've covered it for 30 years. I write about all the decisions they've handed down on the many areas of the law, including EDPA and the effective assistance of counsel. She knows that from that work I get to see the Court's decisions at the level of abstraction that is so far removed from what is happening on the ground, and I've learned that again today. I think that's what Robin was hoping I would learn.

It is amazing to see what the Court does. Of course the Court isn't the only reason for this situation we've been talking about for the last day, but I see now with this sort of steaming costly mess that is indigent defense and how the Court's *Strickland*<sup>1</sup> rulings and others have watered down or betrayed the promise of *Gideon*.<sup>2</sup> It's been sobering and educational for me. But, it's not about me. It's all about you, and I just wanted to say I'm so glad to be here. What we're going to talk about is the economic part of the equation, the entrance of the economic debate, the economic crisis, and the impact it has had on budgets as

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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part of the debate over the death penalty.

As you all know, the economy and the cost of the death penalty have become a debating point in many states from California to New Mexico to Kansas. I have heard a number of stories. For example, in California it's estimated that eliminating the death penalty and going to life without parole would save as much eleven million dollars, but I've also seen articles that say that it's really 110-111 million dollars a year that could be saved. These numbers range all over the place, and I think one of the things we're going to talk about is how do we effectively or accurately assess the cost of the death penalty.

What we are doing to do is find out how this new element of the debate—the economy and the economic cost—is entering into the debate over the death penalty. It's really been quite remarkable to see that legislators, at least in some cases, seem to be more comfortable talking about the death penalty as an economic “dollars and cents” issue rather than a moral issue. And, I hope we can talk about that seeming paradox. Maybe it's just that people are more comfortable with that kind of decision.

Dick Dieter, from the Death Penalty Information Center, was quoted recently and said, that “it is easier for some people to talk about the death penalty in economic terms.” He said, “If it's just on gut and my morality versus your morality the debate gets stuck and it's at a stalemate, but as a pragmatic issue this is a new way of looking at it.”

We have a very good panel to discuss the economic issue from all angles. First up, we have Libby Sykes, who is director of the Administrative Office of the Courts in Tennessee. She's been in that position for five years and in the office for many more years before that. Next, we'll hear from Jean Faria who's been the State Public Defender of Louisiana since June of 2008—and before that she was an Assistant Federal Defender for the Middle and Western Districts of Louisiana. Then we'll hear from Jon Gould,

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who is the Director of the Center for Justice, Law & Society at George Mason University in Virginia. He has done extensive research in this area. Then last but not least, we'll have Malcolm Ty Hunter who will be commenting on the remarks of the three panelists. Ty is the Executive Director of the Center for Death Penalty Litigation, a private nonprofit law firm specializing in the representation of persons accused or convicted of capital crimes. Before that he served as the First Executive Director of the North Carolina Office of Indigent Defense Services.

Before we start, I'll just mention that Libby Sykes, who will speak first, has an important event in a couple hours back near Nashville—a high school graduation that is—she cannot miss and doesn't want to miss, and so I think we'll all forgive her if she has to leave early. She will start first.

ELIZABETH SYKES: I would like to thank my fellow panelists very much for allowing me to go early. Tonight is my great-niece and -nephew's, twins, high school graduation. And, my niece is the valedictorian. She has worked on her speech for weeks, and I sure don't want to miss that tonight. So, again, I do thank you very much for allowing me to go first. Also, I think I've been mentioned here several times since I have gotten here this morning. That way, when I leave, you can talk about me. But anyway, it is my pleasure to be here, and I thank the organizers for inviting us.

As we said earlier, our office, the Administrative Office of the Courts, administers the Indigent Defense Fund. And, of course, our fund and our budget for the fund is in addition to the funds that the public defender's office receives or those county funds. Payments are made pursuant to Supreme Court Rule 13.<sup>3</sup> As Professor Black

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<sup>3</sup> TENN. S. CT. R. 13 (2010).

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said earlier, Supreme Court Rule 13 requires the judge to appoint the district public defender or post-conviction defender, if qualified pursuant to this rule and no conflict of interest exists—unless in the sound discretion the trial judge appointment of private counsel is necessary.

Rule 13 does establish the rates of compensation for attorneys, investigators and experts. Also, as Professor Black said earlier, noncapital rates are set at forty and fifty dollars an hour. Those have been the rates since 1994. We'll talk a little bit later—as I go into my program—what it would cost even to equalize that \$40 to \$50.

Allow me to discuss a little bit about the history of our fund. Here, I sort out some of the claims that we process. You can tell, from looking at this, how we have seen an increase in the number of claims that we pay. During the 2000-2001 fiscal year—which again is twelve months, July to June—we processed 54,000 claims. During fiscal year 2006-2007 we processed 94,000 claims. During fiscal year 2007-2008 we processed 105,221 and during the 2008-2009 fiscal year we processed 115,000 claims.

Here is a little bit about our budget. As I talk about our budget today, we are in the final—probably—week to two weeks of our legislative session. The Indigent Defense Fund is still at risk. I would like to encourage all of you—you don't have to put all this down—that if you're an attorney here, licensed to practice in Tennessee to call your legislator before Monday and Tuesday to talk to them. I truly would. I stood in front and had an opportunity to talk with the House Budget Subcommittee.

One day this week I walked in to see Burney Durham, who happens to be a law school friend of mine from thirty years ago. He is the Chief of Staff for the House, and also the Chief Clerk. I walked in and I said, “Burney, I need your help. They're going to take another million dollars of our Indigent Defense Fund.” He said,



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“Sit there, Libby, and I'll get you in to talk to this group.” I had the opportunity to go in and talk to thirty leaders of our House General Assembly about what that million dollar reduction would mean to us and to the attorneys that we pay. If you haven't made that call, I invite you to do it before we do it next week, because our discussion is not over with yet.

Fiscal year 2000-2001 illustrates that we spent \$12 million, almost \$13 million. As we've gone into fiscal year 2008-2009, you can see the amount increased to almost \$29 million. We do not have recurring money of twenty-nine million dollars. We have probably recurring money of probably \$24-25 million. Over the last several years—since our economy started to plummet—we have supported this fund by the use of recurring supplemental money at the end of the year and nonrecurring money to sort of begin the year.

I must say that the Bredesen Administration has been very, very supportive of our fund. We were running out of money at the end of the year, and they helped us in requesting supplemental money and also some nonrecurring money. But, as I say, it gets harder and harder.

Last year there was an attempt to remove, I think, about \$5 million from the fund. Again, that was unsuccessful. This year, that same legislator filed a bill that would move the services of the Post-Conviction Defenders Office to the Administrative Office of the Courts. I thought that was a wee bit unusual, and I think Mr. McLain would probably agree with us. In the last few days there was another attempt to take about 4 percent, roughly \$978,000, from our office. Although they considered \$978,000 a small amount, to us that is a significant amount of the claims that can be paid.

Also, we have heard some discussions this year about a system that would potentially pay us in quarters.

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Okay. What does that mean? That means that they would give us an allotment for a quarter rather than a full year. We would accumulate our 30,000 claims that we receive during that quarter until the last week or so of that quarter, and then we would determine if the claims exceed the allotment. For example, you are allotted \$5 million. Then, you determine how many claims you have. If they are in excess of that \$5 million, then you cut the claims accordingly to the point that they are equal. So, again, I encourage you to call your legislator before next week.

Capital case expenditures are interesting. You'll see that in 2000-2001 we spent \$2.7 million. This last fiscal year, 2008-2009, that amount was \$1.7 million. For the past several years expenditures have actually looked pretty much flat. I asked some of the staff to look at that in the last few days to see if they could tell us what is happening. And, what they said to me was that between the years 2002 and 2003 we paid 715 claims out of our \$100,000 plus that was considered capital. In the fiscal year 2008-2009, the claims dropped to 428. So, that is a 40 percent reduction in the number of claims that had come into our office that are capital. I assume that is because of the reduction in the number capital cases pending.

I divided the capital case expenditures for 2008-2009 into investigators, attorney fees, and experts. You can see that \$294,000 was paid for investigators, \$883,000 for attorney fees, and another \$554,000 in expert services.

I'm not going to go through all of this, but a little bit of a capital case is defined by Rule 13 as a case in which a defendant has been charged with first degree murder, a notice of intent to seek the death penalty has been filed, and no order withdrawing the notice has been filed. Again, as Professor Black stated earlier, the Rule 13 does require the appointment of two attorneys.

Section 3 of the Rule, establishes the minimum qualifications and compensation of counsel in capital

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cases.<sup>4</sup> And, Section 5 of Supreme Court Rule 13 establishes the procedures for the approval of investigative and expert services and establishes the maximum hourly rates for compensation.<sup>5</sup>

In your materials you should have a copy of all the rules, so I'm not going to go through all of the requirements for lead counsel. But voter, I must say again, that these are our current rates of compensation in capital cases—a little better, Professor Black, than the \$40 and \$50 an hour. The lead counsel when out of court, is paid \$75 and lead counsel when in court is paid \$100. Co-counsel when out of court is paid \$60, and is paid \$80 when in court. Post-conviction counsel is paid \$60 when out of court and \$80 when in court. Rule 13 does not establish a maximum limit for capital cases.

As I said earlier, Rule 13 also establishes an expert and the maximum hourly rates of compensation for our experts and investigators. I'm well aware that most of these experts make a higher hourly rate than the attorneys do. I'm not going to read all of those to you.

What I did on the next one is look at some of the cases that are really at different levels over the last few years as to what we've spent. Some of the trials are still going on, and some of them haven't been tried. I did this by sort of looking at some of those earlier cases in 1994, and the expenses from our fund. The person may have been represented by the public defender's office, but that year we paid for his representation. We had spent \$6,142, and that was the date I believe he was tried. Up to the times of Mr. Cobbins,—listed at the top of the document, as we have spent so far, out of our funds—and he was tried in 2009 for \$346,139. So I think you can look at the document as it clearly shows we are spending much more out of this fund now for capital representation than clearly we did many

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<sup>4</sup> TENN. S. CT. R. 13 (2010).

<sup>5</sup> *Id.*

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years ago.

What if the capital rates were increased by \$25 per hour? What would it cost? At the time I figured this, a year or so ago, it was an additional \$323,000. If the capital rates are increased by \$50 an hour, it would be an additional \$646,000 a year. The one thing that I've really really wanted to do—just a tiny little thing—is to increase the rates—do away with that \$40 and \$50 an hour and to equalize. We would pay a minimum of \$50 an hour, and the cost of that is \$2.5 million. If the noncapital rates are increased to \$75 an hour, that would be an additional \$9.5 million a year.

ADELE BERNHARD: Seems reasonable.

ELIZABETH SYKES: Seems reasonable. You know, no comment on this one. I'd be happy to answer any questions. I won't be here at the end when you take questions, and I would be happy again to take any and answer any questions that you might have. Yes?

MARK STEPHENS: The State's budget is about \$28 million; is that right?

ELIZABETH SYKES: Right.

MARK STEPHENS: And—

ELIZABETH SYKES: Oh, I'd like to say it's probably not \$28 million. We do not have recurring dollars of that amount. We have been success—

MARK STEPHENS: I mean the total State budget?

ELIZABETH SYKES: State budget, you mean billions?

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MARK STEPHENS: Yeah.

ELIZABETH SYKES: Okay. You tell me.

MARK STEPHENS: \$28 billion for a state budget, roughly, \$40 million for the public defender's budget, and roughly \$28 million for the Indigent Defense Fund. That's about \$68 million. I don't know what the post-conviction defender budget is. Do you know?

ELIZABETH SYKES: No. Maybe

MARK STEPHENS: But, we're spending \$70-80 million on indigent defense on a \$28 billion budget. We're spending less than 1 percent of the State money on indigent defense. Contextually is that about right?

ELIZABETH SYKES: If you say so. Our budget overall, the judiciary's budget overall, this \$28 million now represents over a quarter of our budget. In the last two years we have lost 21 percent of our budget discretionary funds. Twenty-one percent. Although, we have made every effort to protect the indigent defense funds that we have. I am not at all defensive about this either. I really don't consider myself or our office sort of the enemy in any of this. I really don't. I mean, some of you may. I really don't. I think we all do very much consider ourselves partners. We have, over the years, as we took a 15 percent cut last year in our office and, again, another 6 percent cut, which has required tremendous lack of—we've closed every law library we have. I've laid off fifty people, but we have protected the Indigent Defense Fund and have made every effort we could to increase that rather than decrease it.

UNIDENTIFIED SPEAKER: Why did the AOC take the

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position—other than practical reasons—that you don't have the money to pay for private attorneys if they've got more appointments than the public defender's office? Why does the AOC become an adverse party in caseload litigation for public defender offices if we're partners? If we're on the same page? That doesn't make any sense to me.

ELIZABETH SYKES: I'm sure in the earlier session you did talk about the ongoing litigation here in Knox County. We took our position because of the impact that it will have on the Indigent Defense Fund. If I am giving \$20-25 million—or whatever it is that we have in any given year—and we run out of money in December, we sit and we'll have to wait six months before we can get any supplemental or additional funds to pay claims. If we do that, it will impact on every court in this state where attorneys are not being paid. My position is you will have fewer and fewer attorneys that will even take the \$40 and \$50 an hour if they know that they're going to have to wait months to get paid. Our fear is what the impact of that would be on the rest of the state.

UNIDENTIFIED SPEAKER: Do you see an answer? This whole symposium is trying to figure out a way to improve the quality of representation as a whole for indigent defendants, whether it be through a public defender's office or through private attorneys. I mean, the ultimate goal for everybody is to fulfill *Gideon's* promise. I understand your office is hamstrung to these as that your budget is as pathetic as the state's budget is. But, if it takes rocking the boat throughout the whole system is that a bad thing? What would the AOC's position be?

ELIZABETH SYKES: I'll leave that up to you on how you might want to rock the boat. What I have noticed in the last several years—and at the General Assembly—is that you

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have fewer and fewer attorneys there. You have fewer people that understand. You have fewer and fewer people that understand why we have to spend \$264,000 and \$832,000 to represent Tony Carruthers. I think that educating them and educating especially the leadership is very important. I also think the process that you have to work with is not only in litigation but also with the people who do the funding, and that's the General Assembly. We have to have the funding, and they have to understand the importance of why this fund has to be appropriately funded. For example, the idea of paying us by quarters—feeling like that their criticism of our office is that we have no control, and we have let this budget get out of control. I don't believe that I have allowed—I've been at this office for much longer than this. I've been the director for the last several years, and I don't believe at all that we've allowed this budget to get out of control. We have paid all of our claims in accordance with Supreme Court Rule 13; it just costs more. There are more people out there that need your services. There are people that could have afforded your services a couple of years ago that can't now. The economy is bringing more and more cases to the courts that need the representation. So, I agree that we all have to be partners, but I believe that much of it. Again, I would invite you to become involved in the legislative process. Ms. Green?

MARY ANN GREEN: Libby, do you have any suggestions for educating the legislature?

ELIZABETH SYKES: Well, you could probably have done a better job than I did. You know, I stood there when I had ten minutes to address that House Budget Subcommittee today. One day this week, I tried to talk about some of the cases that are here in Knox County, and that if we are given a certain amount of money a year the issues that would arise if we have to live within that

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amount. What am I going to tell Judge Baumgartner? He can only try one of those this year and the next one? Say okay we're done for the year, we've spent all our money, but next year we can do the next one and the next one and the next one? I think the legislators understood that. And, I think that they also understand that \$40 and \$50 dollars an hour is surely, surely, surely not enough money, but, I don't know.

UNIDENTIFIED SPEAKER: My take on that is that it sounds an awful lot like what prison administrators used to say until the federal government came in and shut them down and said you have to say no, you just can't keep stockpiling. The prison warden said we have no right to say no. How is it any different? I mean it's unconstitutional.

ELIZABETH SYKES: Yes?

UNIDENTIFIED SPEAKER: I'm from Washington State so I don't know what you do here, but are there qualifications for the appointed counsel that you pay? Is there any review of their qualifications or their work?

ELIZABETH SYKES: No.

UNIDENTIFIED SPEAKER: No?

ELIZABETH SYKES: No, not by our office.

UNIDENTIFIED SPEAKER: Do you have any idea how many cases lawyers have when they submit bills to you?

ELIZABETH SYKES: I don't know that. I could probably tell you. I mean our system has the ability to tell. We key every line an attorney sends us as far as what work they do.



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We know daily how many hours they're billing us for. What we don't know is what other cases they might have. But, I can tell on a given year how many claims that have been submitted by an attorney.

UNIDENTIFIED SPEAKER: Do you know what the most would be?

ELIZABETH SYKES: I don't have any idea.

UNIDENTIFIED SPEAKER: I mean one idea I have in terms of following up on the other question—I know in litigation your office might take the position that it's going to cost a lot of money, but we also know that it should cost more than it does. It might help to alleviate the pressure on the legislature to have a court order that says the caseload has to come down. That would allow you to go to the legislature and say, “Courts have ordered this. You can blame it on them, but we have to have more money to do that.” It could be that if your office did have qualification requirements, for example, like Massachusetts has for appointed counsel, then there would be pressure to get the payment up because you're not going to be able to find qualified people to do it at the prices that you're paying. Also, if you collected data on the number of cases each lawyer is doing and billing you for, then that would also demonstrate the humongous caseloads that people are carrying in order to make a living at the payments that you're making, and that would help support the position of in the legislature. And finally, I have a question. Would be of any benefit to you, your colleagues, everybody here, and on the legislature, for some of us who are from out of town to write an op-ed for local papers based on our being here. I don't know if that would help or hurt. But if it would help, I'll do it.

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ELIZABETH SYKES: I'll let you all decide that after I leave when you talk about me. Yes, sir?

KENT BOOHER: I'm Kent Booher from Loudon County. The problem that you've got—those of us who are accepting appointed cases also have clients who are paying us. The payments that we're receiving on the appointed cases, quite frankly, our other clients are subsidizing them. So, to somehow try and figure out how many cases I have that I'm using to support my firm is really not going to be an accurate number. Because at any given time I may have twenty or thirty appointed cases, but I may also have thirty to forty, or maybe even as high as fifty cases where I have clients who have actually come in to pay me. And we're doing the work for them. The real problem that I have is that my clients who pay me are being indirectly taxed to support the Indigent Defense Fund. Frankly, that's not fair. At some point in time somebody is going to figure that out and who knows, maybe there will be some sort of equal protection lawsuit brought to force that indirect unrepresented taxation on folks who can afford to pay me who are supporting those who can't.

ELIZABETH SYKES: Yes.

ADELE BERNHARD: I'm just wondering, is there an opportunity for you to sit down at some kind of criminal justice roundtable where you can speak with police, and the prosecutor and defenders and say, "Hey, let's take a look at what this is all costing every time you decide, Mr. Police Officer, to do a sweep of the downtown part of town and make another fifty arrests for X, Y and Z as response to citizens complaints." That's going to end up costing us. Then you'll be able to tell them how many millions of dollars are spent. We as a community could decide whether that's the kind of action we actually want to take,

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and whether the results in terms of drug use prevention are worth it in terms of what we're all paying for that—because no one really thinks about it. They see these two separate things as separate pockets. Over here there's safety and then over here there's defense. We don't understand that they're all completely connected to one another. Maybe as citizens we'd rather walk around and talk to the kids than end up paying more tax dollars for this whole system that lurches into place. Is there any opportunity for you to do something like that?

ELIZABETH SYKES: I would love to participate in that, and I think that we could provide some statistics on what those type of things—what they do—cost.

ADELE BERNHARD: Yeah, people don't see it.

ELIZABETH SYKES: People have asked me before whether the whole misdemeanor sentencing is effective. If you'd look to see what we spend for the representation of appointment of misdemeanors, it's many many millions of dollars.

ADELE BERNHARD: Millions.

ELIZABETH SYKES: But, could you just decriminalize that? You know, I'm not here to say I'm in favor of that even though I am a bleeding heart liberal. But, this year there was an opportunity at the General Assembly. There is a bill—and I think it's still moving along, those of you who follow it a little bit closer than I am—that we have this class—it's for aggravated robbery. There are some members of the General Assembly that want to increase that parole eligibility after you serve 85 percent rather than 20 or 30 or whatever, and they're talking about doing away with the initial prison time for 19 D and E felonies to make

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up for that. So at one time I thought, well, that sounds like an opportunity to be able to save a little money and to increase what we pay. Then they went back and they said, well, sometime down the road there is still that possibility, and so you couldn't say that counsel was affected either way. But we would welcome whatever opportunity.

TONY MAURO: Thank you, Libby, and have a good—

ELIZABETH SYKES: Thank you.

TONY MAURO: —celebration.

ELIZABETH SYKES: Again, thank you very much.

JEAN FARIA: Good afternoon, I'm Jean Faria. I'm the State Public Defender from Louisiana, and as my friends at home said to me when I took this job two years ago with worsening economy and having just come off of Rita and Katrina, don't move your head too fast or the rest of your marbles will fall out. It's sort of been like that all along the way. The first summer that I had the job we had Hurricane Gustav, and the Supreme Court Justice Chief called because she couldn't find any public defenders as we hadn't been there long enough to have coups made and put into place or make continuity of operations plans. She called me in and she said, "I can't find any public defenders anywhere. Will you go to the prison and do all the Riverside hearings?" "Sure, chief." "Be glad to do it," I said and often went. It's been that way in terms of funding. Now, of course, we are in real serious problems with what has happened in the Gulf, and what is happening to a one billion dollar industry. We just recently heard on Monday that the \$6.6 million increase that I was given in the Governor's budget may be at risk, so we have a number of strategies, many of which have been talked about today and

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yesterday in this room. That goes to sort of the theme of when I talk about capital work. You have to have a plan.

When I took the position it was in the context of a brand-new state agency being created, which was created because of the crisis in indigent defense and the delivery of services in that state. At the same time that that was going on, we grandfathered in all of the people who had been there for a year before the change in the law. So that created and continues to create some challenges for us. Overall, my budget last year was \$28.9 million when you add in the locally-generated revenue. As many of you may know, most of our financing of our public defender system was historically from a \$35 fee on traffic tickets. So, if you happened to be lucky enough to have an interstate going through your land and your jurisdiction, then you had money. But, if you didn't have an interstate, you didn't have money. Those of you who've traveled through Louisiana know that there are three major interstates. If you're on it, you're rich, and if you're not, then you don't have money. And, if you are in a place like New Orleans, which is still recovering from Katrina and the loss of funding there, that base is also gone.

The other thing that has affected the local revenues has been the use of traffic tickets or traffic cameras at the intersections that catch speeding and running of lights. Well, all the major metropolitan areas have implemented those and guess who wasn't at the table when that little piece of pie was being divided up—which is a critical piece of local funding? The DAs, the sheriffs, and the City and, of course, the company itself were left out. They're the recipients of the money in Louisiana. So, locally-generated revenues are falling.

In calendar year 2009, \$46 million was the total sum of funding to spend on indigent defense, and for the district attorneys there was \$116 million. Of the stimulus money that came into the state, \$20,750,000 went to law

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enforcement and the district attorneys and \$250,000 went to the Supreme Court for a mental pilot program. For the first time ever, \$50,000 went to the public defender, the State Public Defender, to study data systems and the one that we would select. I frequently characterize myself as the little Charles Dickens person with the bowl and cane saying, “May I have some more please, sir”, in the OLIVER TWIST version. So, there are a lot of disparities, and that's not going anywhere.

I am here to say that given all that we have seen—particularly in the capital area, and we'll talk with you just briefly about that in a minute—you can't give up hope and you can't not do anything. When we came in we started to make the changes that we felt were appropriate—we being my fifteen member board who is headed by a very conservative republican who has turned out to be a total champion. I mean the best. We sat down and said, “Okay, what do we think we ought to do. Well, I think we need a media strategy. I think we need to meet two-thirds of the legislators, all of whom are new, and very few of whom are lawyers. We need to have editorial boards. We need to meet the local legislators whenever we travel.” So, we did a road show. We went to the *Times Picayune*. We went to New Orleans. We went to every single little podunk place that had a newspaper, and we sat down and talked about what we're going to and how we're different. Even though all the faces look the same, it really is going to be different. We will be coming to you and talking to you during the legislative session to talk with you about funding issues. Then we started meeting with district attorneys in the hot spots. We don't have the greatest database. We have roughly, on average, 110 open capital cases at any given time. The problem that we have in New Orleans is that we have a new district attorney who is fighting a \$14 million judgment against him, or his office, for a wrongful conviction of a gentleman named John Thompson who is

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one of the seven exonerees off of death row in Louisiana. John Thompson was able to get this and keep this judgment. It went up to the 5th Circuit Court of Appeals.<sup>6</sup> The United States 5th Circuit Court of Appeals said, yeah, you get to keep that judgment and writs have been granted by the Supreme Court. So, that is a very interesting topic for them to be pursuing.

However, we have a lot of mistakes. We have this *Kyles v. Whitley*<sup>7</sup> problem that was a New Orleans case. We just have a history of not having prosecutors who really understand *Brady*<sup>8</sup> and *Giglio*.<sup>9</sup> If that continues on—now with the *Anderson* case wherein there was a taped statement of a witness who said she had slept through the entire event, and she didn't see anything. One of the two prosecutors who did the videotaped statement was one of the prosecutors at trial and didn't say anything when the witness said, “I will never forget that face when I saw him come out underneath that streetlight.” As part of our contractual relations with the Louisiana Crisis Assistance Center, they did the motion for new trial which the prosecutors fought tooth and nail saying that, “Hey, the jury heard both sides of the story, even though the impeachment evidence wasn't available to the defendant, but they didn't believe the defendant's witnesses so what's—no harm, no foul.” It was reversed and LCAC is now going to represent that gentlemen.

We spend about \$8 million a year on capital cases, that's 110 cases out of approximately 280,000 cases a year. So you can see that it eats a great deal of our budget. And, we are not allowed by state law to have defenders as state employees. They are not parish employees. They are not state employees. They are something else, which is yet to

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<sup>6</sup> *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009).

<sup>7</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995).

<sup>8</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>9</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

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be defined. That's another one of my tasks on my list of things to do. The House of Governmental Affairs wants to know who I'm going to contract with and what that contract is going to say. We represent at the trial court, capital appeals, and capital post-conviction level, and that \$8 million represents all stages of the representation. We have post-conviction representation by statute. There is a right to counsel in the capital cases. So, you know that is the area of the greatest concern for the district attorneys. The only thing that they have come to the table to fight me on was the capital guidelines—not the performance standards, not the guidelines we were talking about today, but actually the structure of how we look at and monitor capital cases.

Right now we have panels that are contracted regionally, which is not working very well because the acceptance rate for the Orleans District Attorney is 100 percent. So, 100 percent of the capital cases that come in as first-degree murders move forward as first-degree murders, and that is basically bankrupting us. When we were doing our media strategy, the second component of “have a plan” is, go to the hot spots, when you discover where they are by doing the data research, and meet the District Attorney. So, we did that.

Frank Neuner—my board chair, Mr. Republican—everybody likes to talk to him because he's the stable guy. We go in, and I sort of sit there kind of quietly in the beginning. Frank begins this dialog about we're a reactionary and responsive agency. That's what we are here to do. He said that we have very limited funding and goes through this whole financial discussion. By the end, invariably, you've got this guy across the table going, “yeah, okay.” Yeah, I get that, and it's like I could have said the same thing, but it's not the same coming from a line defender. So it has been very effective. In the really large jurisdictions like Jefferson Parish where we had twenty to thirty cases at any given time, they've taken the



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position that it's too expensive. We can't afford it, and we're not going to do anymore. We will only do it in those cases where we politically cannot survive. You have these conversations that are not ones that you just go in and have one conversation. You have to keep that conversation going.

Every opportunity that we get to go into a district—whether it is to have a district-wide criminal justice discussion by bringing in all the judges, the DA, the parish, the municipal, and the police juries to bring in everybody to the table and talk about them wanting to do all of these capital cases Leon Cannizzaro, Mr. DA of New Orleans, that's what you want to do. Well, there's got to be a trade-off. We can't do 37,000 municipal court misdemeanors. If we're going to be giving over 50 percent of our capital resources and 25 percent of all of our regular resources to this jurisdiction, something has got to give. So, what they decided to do in municipal court was they moved all the first offense marijuana cases, and they moved all the misdemeanors to municipal court. They have reached an agreement that they will not allow any of those to be enhanceable and none of those areailable offenses. So, that was the trade-off that we got in order to be able to do more capital cases.

I mean, you find yourself in these crazy political positions but constantly pushing on the media, pushing on the local legislators, pushing on the DAs that are bringing these cases, and going to the state bar association, passing resolutions to agree to reclassify misdemeanors, to backing legislation for reclassification. It's a constant moving target. It's like three-dimensional chess, but it has to be done over and over and over again. The hard part is keeping the day-to-day hope that we will be able to properly fund the Sixth Amendment right to counsel,<sup>10</sup> whether or not it is a capital case—which where I'm living

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<sup>10</sup> U.S. CONST. amend. VI.

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we're not getting rid of capital cases. That discussion has not happened on a legislative level.

Right now, as we speak, there is a bill going through our house, our legislature, to allow for and speeding up voluntary executions; to help volunteers get there faster. The conversation on a legislative level, within that body, is not happening. That's why becomes imperative that there be smaller conversations with many stakeholders present to discuss the impact.

We have litigation pending in one of our jurisdictions, and one of the reasons they have historically have been in trouble is because the high number of capital cases that they've had. Really excellent representation from LCAC—there are a couple of people here who are affiliated with LCAC. The quality of their representation, the motion for new trial project that we have entered into a contractual agreement with them to do for us, and the advocacy of those panels has made a difference with the funding problem.

Every single courthouse, every single DA is screaming and yelling that they don't have enough money. So, the first thing that we say to them is that these are real expensive cases. It's going to take X amount of dollars, it's going to take X amount of time, and we're going to need X amount of witnesses. We bring that data in that we are now collecting, and we'll be more selective. Okay. Whatever. If that's what I'm going to get is we'll be more selective—and in Jefferson Parish more selective means one case as opposed to continually twenty-four cases. It hasn't made that impact yet in New Orleans. But New Orleans, like everything else in Louisiana, is different because in New Orleans although there is no right to a preliminary examination. The judges and the practice there is for the defenders to have PEs. So, by very aggressive preliminary examination practice they're able to knock a lot of those cases down to seconds and to manslaughters and to put

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them back into the public defender system.

The idea from our perspective is you have to have a strategy, and you have to have a plan. You don't get to sit in your office and just take a look at numbers and crunch numbers and decide, "Well, we're going to put a certain amount of money over here and a certain amount of money over there." It absolutely required my board chair and me to go to every district to see what the practices were in every district. It's very similar to what Dennis Keefe said yesterday when he said, "You know, I don't know if you can really compare jurisdictions across a state. I'm here to tell you, at least in Louisiana, you can't because New Orleans ain't nothing like Shreveport. I mean, it's just not. And, Washataw Parish is not anything like Alexandria. They're very, very different. They're grandfathered in. Those, not just the people but the practices, are grandfathered in." So, you have to look at that.

The reality for us was not only did we have to look at that, but people saw our visits and repeated visits as sort of acknowledgement of those differences and acknowledgement of who they were and a connection that has served us very well. As we've continued these conversations and continued this media strategy, the repeated discussions with the media, and the repeated discussions with the district attorneys—I can't tell you how invaluable standards, all the things I've heard in this room in the last two days, standards are. Understanding what those standards mean, making sure that people perform to those standards, supervision, and adequate funding is essential. All of the things that have been said in here, those things are going to have to be stressed to legislators who are not lawyers and to prosecutors who have never defended. They don't see what we do. That was said earlier today. I couldn't agree with that more. They have no sense of what it is that we do. That our world is not having a case handed to us and what it is that we have to

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do.

The people who tell the story the best, from my perspective, are exonerees off of death row. Those people are the people who, every time that their grace—what people hear when they tell their story, about the years that they spent on death row and how close they came to being executed. How, no, they're really not bitter about any of that. They're just really happy to be free, but they wished that they had had better representation. They wished that they hadn't had to spend those 400 combined years that they were sentenced years to. If they live—I'm sorry—with my noncapital, I have thirty of those. But, these capital people don't resent anybody. It's just astonishing. It's just astonishing. So, yes, you need a strategy, and yes, you need to think about the budget, and yes, you need to think about the media. Yes, you need to think about talking to and convincing DAs that it costs too much money, and it's too much trouble. But you also have to be able to fund the cases that are tried properly, so that they are not too much trouble as they go forward. That's the Louisiana experience. Thank you.

TONY MAURO: Before you turn it over Jon, just one more question. You mentioned, and Libby did too, this trend of fewer and fewer legislators are lawyers now. So how do you have this—I mean, you said—is it some more of these exonerees that make the case or is it the money, it's too expensive, or can you mention *Gideon*?<sup>11</sup>

JEAN FARIA: Well, from my perspective, the exonerees are the best example because what happens if there's inadequate funding, and a person actually is convicted of something that they didn't do. That is the piece that people are willing to listen to.

The piece in Louisiana about—we have a post-

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<sup>11</sup> *Gideon*, 372 U.S. at 335.

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conviction task force that's going on right now. It's doing capital work and noncapital work. The Supreme Court brought in—on one day—the Supreme Court Task Force. On one of the days of the task force the first two people who came in were mothers of two young women who were killed by a serial killer in Baton Rouge. I don't know why, but we always seem to have at least one serial killer. So, that was really very difficult and the level of anger is really very problematic. It's one of my huge complaints about prosecutors, and how they utilize victims. You know, in my capital cases that I have done, they roll them out when they need them for something, and they don't deal with them as people. So these two women were just very raw and very, very angry and hurt. That was what they talked about. The DAs that were on the Post-conviction Task Force were just all, you know, “Yeah, go for it.” The exonerees came in later, in the afternoon. They told the court, and most everybody on there—almost everyone is not a public defender so they didn't know this—that all of the people who get on go forward—of 50 percent of the people in Louisiana who are ever released, are released from parish prisons. They never get to a place where there is a law library and inmate counsel substitute. They're time barred before they ever get to a facility. So, they couldn't ever get post-conviction.

So you can't really go into all of that detail with folks because they look at you and their eyes glaze over. So, they say this is what happens. We've had thirty people we've been able to actually identify who are actually innocent. This is what happens when you have four minutes for every client, and that's what we're trying to do is quantify it. That's what they data is all about. Right? This is the only reason you want people to keep time sheets and do all this stuff. It's not because you don't like them, and you're their boss. It's because you need that to go to the legislature to say here are the thirty people who went to

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prison for something they didn't do, and this is how much time they got from their lawyer. And this is the amount of resources that were available to them, and this is what happens. When you say people don't have respect for the law—all of these criminals and thugs around here—if you have a law and you don't honor it—like the Sixth Amendment right to counsel<sup>12</sup>—you don't adequately fund it. You don't adequately resource it. This is what happens. So that's the level, and it's visceral. It's not really—without the lawyers in the legislature, it's become very difficult.

JON GOULD: In my years of giving these presentations I've learned two things. Number one, try not to be one of the last guys on Friday afternoon keeping the audience from departing and, number two, don't follow Jean Faria. So, you can see how well I've succeeded already. Jean and I were talking before this panel. We were joking that usually I'm the one who's on the optimistic side, and Jean's kind of slapping me around, saying, "Come on, you're being Pollyannish about this." But, I actually think today we are switching roles because even though you hear Jean—I don't know whether she thinks of herself as being half-full or half-empty on this—I very much think that the glass is half-empty when it comes to the question of whether the current economic situation gives us an opportunity for reform or cost savings when it comes to the death penalty.

I recognize that the reduced revenue for states and the federal government has given reformers an opportunity to argue that the administration of the death penalty is too expensive, but actually my research on the cost issue suggests just the opposite. What's happening here is that we are not spending enough money on capital defense—with really tragic consequences. The other problem here is the situation is actually much worse for noncapital cases. I

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<sup>12</sup> U.S. CONST. amend. VI.

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say at the beginning that this is apart from questions of the purpose, if you will, of the death penalty.

If we accept for the moment the public thinks that the death penalty is legitimate, the death penalty as administered isn't very effective. Nationally, just 25 percent of capital defendants who are brought to trial end up being sentenced to death. We know that of the other 75 percent—most of them, the vast majority of them—are not walking out of court that day. So if the question is, “Is the death penalty cost-effective,” I think the answer is no. But that's a different question than the one that I want to focus on today, which is the issue of cost of capital defense.

Here's my concern. You all, I'm sure, are either part of or have read the statements of reformers who are trying to get rid of the death penalty—who talk about how it's too expensive. The death penalty is way too expensive. But, my fear here is that if we are saying that in the context of indigent defense, then the natural implication for policy makers and the public is to think that the cost of noncapital representation is both acceptable and cost-effective. I think all of us in this room know that that is simply not the case, and we can neither glorify or institutionalize that position.

I come at this question from a little bit of different background than most of you. I am what I would like to call a recovering lawyer. I was trained as a lawyer and did practice law for a while. But I'm actually a social scientist, and I head a research institute at George Mason University just outside of Washington, D.C. George Mason University has a number of different people, and our research center brings together people from a several disciplines to do social science research on questions of legal importance. We have the Spangenberg Project<sup>13</sup> now with us at George Mason University. So when I talk about the issue of cost here, this is based on studies that I have done or been part of, both looking at federal capital defense

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<sup>13</sup> The Spangenberg Project, <http://tsp.gmu.edu/>.

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as well as capital defense in this state—and Texas as well.

I have made the mistake of choosing to throw a bunch of numbers at you today without a PowerPoint, and we're going to see whether I can keep your interest and whether I can explain it. But to simplify things, there are four points to walk away with when I'm done here today.

First of all, I'd like us to have a little bit of understanding of what has been done to estimate the cost of the death penalty. Then I'll talk a little bit about why capital cases are more expensive than noncapital cases to litigate. My third point is really this argument that capital defense is not expensive enough. I know that doesn't play politically, but for the moment let's just put politics aside. Capital defense does not offer enough resources, and it comes with tremendous tragic consequences for those involved. Finally, I'm going to finish with an argument for why it's ill-advised for us to keep pushing the cost argument for reform of indigent defense.

For those of you who have done any reading on this, you probably know there have been a number of studies on the cost of the death penalty. Part of the difficulty in trying to understand the cost of the death penalty is that people have used various definitions of what cost means. So, for example, some people have focused on adjudication costs—or I should say litigation costs—but they haven't distinguished between defense or prosecution costs. Others have lumped together all litigation costs—meaning trial, direct appeal, and collateral appeal. Other studies try to throw in the cost of incarceration. And then some of the most—to my mind—interesting and difficult studies are those that look at what they call the opportunity cost of the death penalty. By that, what they're looking at is the social cost of additional crime that is not being prevented or dealt with because money is being spent—as they say—unnecessarily on administration of the death penalty.



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My point here is not that any one of these studies is illegitimate or indeed that any one is better than the other. I think what's important to recognize here is that they're defining costs differently. But even with all of those differences they arrive at a similar conclusion,—which is not going to surprise anyone in this room—which is the cost of litigation and punishment is more expensive for capital matters than noncapital matters. And you're going to look at me and say “Duh. I knew that. What's the value of any of these studies?” And what I will respond back to you—and I know some of you have heard me make this argument before—is that the value of the research here is to quantify what we think we understand to make sure that we truly understand it. Now, some of you will say, “Well you're just quantifying the obvious,” and I will say, “It may be it obvious to you, but it may not be to others.” And more importantly, we may be wrong in what anecdotally we think is going on in the criminal justice system, and that's why these studies are done.

My own research looks at more than the cost of the death penalty. On the indigent defense side, it looks not just at cost but the quality and availability of counsel. And I really would caution us to get away from simply discussing cost, because cost has us forgetting the fact that what we're ultimately after here is quality defense. Because without quality defense, we are not getting the Sixth Amendment standard<sup>14</sup>. I will argue a little bit later that to some extent cost is synonymous with quality in particular situations. But this attachment to cost in this period of declining revenue, while understandable, has us digging a hole that is problematic. The research that I'm going to talk about is true of both pleas and trials and about state and federal court. And my findings are consistent with what other studies have shown, which is that capital defense is more expensive than noncapital defense. And by

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<sup>14</sup> U.S. CONST. amend. VI.

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noncapital defense, we've got to be careful here. It means capital-eligible unauthorized cases. And as we know—or as I should say we might expect—the capital cases are more expensive. This is true, irrespective of jurisdiction and irrespective of whether it's the federal system or the state system.

So the question is, “Why is that so? Why are capital cases more expensive than noncapital cases? My guess is if I asked you for a show of hands, most of you would have the answers immediately. We know that, first of all, structurally the defense of capital cases is different. You generally get more attorneys, you get a higher hourly rate, the courts generally aren't putting caps on your time, and the courts are generally granting you greater deference to bring in experts and other expenses that you might not get elsewhere. But capital cases are also being litigated differently. And they take longer. So let me start off with a few numbers.

In the federal system, if we look at the median length of time that a case takes—so this is from the appointment of counsel to resolution in the trial court, either an acquittal or a sentence being handed down—for capital cases it's 727 days, for capital-eligible unauthorized cases 96 days. 727 to 96. This has been replicated at the state level too. In Kansas, for example, the average number of days that a capital trial takes is 34 days. Compare this to a noncapital murder trial, which takes nine days there. 34 to 9. These things take longer. Why do they take longer? The authorization process takes longer. Jury selection takes longer to get a capital-eligible jury. We have the two stages of trials, and some courts are using three stages. But, also the research suggests—because the stakes are so much higher—that the litigation is more zealous. And we may not want to admit that, but the research is showing that the attorneys are putting in more time. And the investigators are putting in more time. Research shows, for

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example, that both sides are filing more motions in capital cases than they would otherwise.

Another thing to keep in mind is that capital cases are often more complex. They have more defendants and more victims. These things take longer. But even though capital cases cost more, they have shockingly low amounts of time and resources spent on them in a number of jurisdictions—in a number of cases. Indeed I will argue—and you will get tired of me saying this but—I don't think that the problem is that the death penalty is too expensive. Although, of course, I understand that the objection is a worthy one for arguing for the elimination of the death penalty. That's not the problem. The problem is that too many defendants who are facing the prospect of death at the hands of the state are not getting sufficient resources to be able to defend themselves. Let me give you a couple of examples from the research.

If you compare the amount of money that is spent on capital defense in the federal system versus in most state systems, in the federal system defendants are getting roughly ten times more money per representation than they are in the state system. Libby showed you earlier that in the most expensive death case in Tennessee the defense got \$346,000. That is a hundred thousand dollars less than the average death case in the federal system. Indeed, the most expensive death case in the federal system is \$1.4 million more than the most expensive case here in Tennessee. And that's per defendant. One of the most expensive death case in the federal system comes out of the District of Columbia. Three defendants, all getting about \$1.7 million in defense expenses.

Some of the difference in cost is because the hourly rate for federal defense attorneys in capital cases is significantly higher, about a \$175 an hour at present. Many people in other states would very much want that kind of hourly rate. But that's not what's driving a ten times

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difference. There are other things going on in terms of the quality of the attorneys and the effort that is going into the state capital cases. Moreover, there are problems even in the federal system. Over the last couple of days we've heard the admonition—"Go to your federal court. If there's a problem, you need to file suit. You need relief. Go to the federal courts, you'll find the solution there." But, that's not necessarily the case.

If you look at federal capital trials, there is a cut point in defense resources that divides capital defendants in general from those receiving the lowest one-third in attorney time and expert expenses. That one-third of capital defendants has twice the chance of a death sentence at trial than the upper two-thirds. I will give you the cut point, and many of you will say, "Oh, I wish I had that kind of money to defend in state court." It's \$320,000. That's the one-third mark. But if you are receiving less than \$320,000 in defense services at a capital trial in the federal system you have twice the risk of a death sentence than if you are receiving anything over the \$320,000 mark.

Research suggests that there is a link between the cost of capital cases and the quality of the representation being provided, so to me that division between the low cost cases and other capital trials represents a potential Sixth Amendment violation<sup>15</sup>. But I'm also concerned about how this translates to noncapital cases.<sup>16</sup> When people say that money would be saved if the death penalty were eliminated, I'm worried that we're implicitly saying that the resources and quality of litigation in noncapital cases is acceptable. That's what we're going to be to be living with

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<sup>15</sup> U.S. CONST. amend. VI.

<sup>16</sup> A small portion of Professor Gould's remarks delivered at the symposium were excised since they were based on a forthcoming report on which the speaker was working on behalf of the federal courts. Although not yet released, the report is expected to be made public in 2011.

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if the death penalty is ever eliminated, and yet the quality of representation at these dollar levels simply isn't acceptable.

There's been a lot of advocacy lately that capital cases cost sixteen times more than noncapital prosecutions, but that difference is surely not because of the structural differences between death cases and noncapital cases. It's not solely because of the number of attorneys or because you need a death-qualified jury, or because there are the two stages of a trial. More troubling, it's also because the noncapital cases are being litigated even worse than the capital cases. And in this climate where we are trying to get every dollar out of the criminal justice system, what we are really setting ourselves up for is a public that will be satisfied with even a more substandard criminal justice system.

I know I'm out of time, but I cannot close on an absolute downer because it goes against my nature. There potentially is a sign on the horizon that may be a positive—and this would be both for cost and for what happens in capital cases. We are seeing nationwide, and particularly at the federal level, prosecutors bringing fewer capital cases. If you look at the burgeoning data from the Obama Justice Department, and you compare it to what we saw in the Bush II Administration—and in fact in the Clinton Administration—the Obama Administration already is on pace for a record low number of capital authorizations. We are also seeing that in some states. In fact—our lunch speaker who couldn't make it here today—David Dow, was quoted in a newspaper, I think it was in Texas today, talking about how capital authorizations in Texas are down by a large percentage over previous years. While I think this cost argument is dangerous when it comes to the context of indigent defense, what we may see is a twin potential victory in the making as prosecutors bring fewer capital cases. We will be litigating fewer of them and

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saving money in the interim. With that, thank you very much.

TONY MAURO: Actual question. I thought that the total universe of federal and capital cases is still to a low number. Is it? Is it not? Is it? What is it? How many federal capital cases are there?

JON GOULD: Total?

TONY MAURO: Yeah.

JON GOULD: You mean from the beginning of time?

TONY MAURO: No.

JON GOULD: It was—from the reinstatement of the federal death penalty—we're still under 500 cases. This isn't that many, but as we've all talked about the last couple of days, the federal example, to some extent, sets the standard elsewhere. So what's happening at the federal level does have consequences for what's happening at the state level.

MALCOLM HUNTER: A very interesting panel. What was the title? What was supposed to be the title?

VARIOUS AUDIENCE SPEAKERS: Silver lining.

MALCOLM HUNTER: I'm going to provide all the silver, I think, for the panel. I would like to start commenting, just briefly, on my reaction to each of the panelists, which all of them were very different, but very interesting and very illustrative in some ways. And I thought Libby Sykes—God bless her—on her way to her grand-niece's graduation, is the perfect picture of the beleaguered court official who is saddled with a program that is not really their program.

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And they're doing the best they can to explain a program that's not really something they do, or that they understand and to try to and sell that to a legislature. And it's no surprise that that's a very tough job. In North Carolina, ten years ago, we cut loose from the Administrative Office of the Courts. And one of the big worries lots of lawyers had was, "Well, they're the only ones who are protecting us. We'll get nothing if it's not the judges coming in there. You know, we're better off getting the crumbs that fall off the judge's table than in fending for ourselves." And we didn't know the answer to that; we were predicting the answer to that.

But I think the answer was if you've got someone who goes in there who can talk about advocacy, and talk about how important it is, and what the terrible consequences are for poor advocacy, even though they don't have a robe, even though they may be disposed not to necessarily trust that . person, you do better. You do better with the public. You do better with the legislature. And you do better with everybody. And so I felt a lot of sympathy for Ms. Sykes, and it did remind me of where we were before we cut loose.

We're more partners with the AOC now than we were before; well we weren't partners when we were under the AOC. We were the—as one of my friends used to like to say—we were always the red-headed step-child in the family. And now we are more partners. And in fact, we're a competition. We're in this. They're looking for money to line their robes with ermine, and we're looking for money to pay our lawyers. And so we go in there, and we have a discussion about what we're going to do. But I'll just say we cut loose in North Carolina, and we've never regretted it.

My takeaway points from that—and I think Jean's exactly right—is we people need to get the message that we are a completely reactive agency. Our costs are directly a

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result of what these prosecutors decide to do, and nobody is looking at what these prosecutors are doing. And we have had a little fun in North Carolina talking about that. When we first started out in the early 2000's, we were spending about \$10 or \$12 million a year on trial-level capital cases. Then by 2007 we were spending about \$17 million on trial-level capital cases. By Tennessee standards, that means that we're swirling completely out of control on our spending, and so we were getting a little pushback from other people about why we were spinning. So we decided we were going to do a study.

We, right from the beginning, tried to keep very good data. And so we looked at that. And one of the things that we figured out is the reason our spinning had gone up from \$10 million to \$17 million is every year these prosecutors are bringing out more so-called capital cases than they're closing. In fact, the number of capital cases we were carrying was almost 50 percent higher in 2007 than it was in 2002. They obviously had no idea, or they would have never brought up the subject in the first place. But then we didn't stop there, and we started talking about, "Well, what are the things that are driving our expenses?" And I'll just read you a couple of the bullets we had in this report we gave to this legislature. We said, "The two primary factors that drive IDS expenditures in potentially capital cases at the trial level are whether the district attorney decides to prosecute the case as capital or noncapital. And the practice in North Carolina of charging almost every intentional homicide as first-degree murder."

And I don't know if this is true—it's probably true in most places—but in North Carolina if there's anything that can be argued that is an intentional murder, it's first-degree murder. Nobody gets charged with a second-degree, much less voluntarily manslaughter, unless you have a uniform. So we talked about that. We talked about the fact that in North Carolina. We have a very broad first-



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degree murder statute, and we have a very broad capital statute, which means we have 500 new, potential capital cases every year that we have got to figure out lawyers for—spend this extra money on. And so what happens to those cases?

Well, they're charging 85 percent of these cases as first-degree murder. Well what happens to these first-degree murder cases? About 15 percent of them end up as first-degree murder convictions. About another 35 percent of them end up as second-degree murder convictions. Half of them end up either dismissed or voluntary manslaughter or involuntary manslaughter or following too closely or something. But these cases completely wash out. Yet we're spending hundreds of thousands, millions of dollars on getting these cases resolved—which sort of brings me indirectly to Jon's comments, which I really like. It was very stimulating. I thought your take on this whole thing. I tried to think, "Okay, well what do I think about that?" And I said, "I think something cannot cost enough to be good quality and still be a waste of money."

I think what we have to look at is what are we getting, whatever we're spending. Maybe we're not spending enough to do it right. And you know what? I agree with you 100 percent. We're not spending enough to do it right, but it can still be a waste of money. Because what are we getting for it? And part of that is, are you getting capital convictions? And in North Carolina—and I think this is true in a lot of places around the country—the number of capital prosecutions has dipped. You would think that if the prosecutors were being choosier, then their win rate would go up. But it's been just the opposite. In the 1990's in North Carolina we routinely would have fifty or sixty capital trials a year, and about half of those people would get the death penalty. Last year we had eight capital trials in the state. Two people got the death penalty; they were both offered pleas. So nobody is on death row last

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year in North Carolina who the state thought really needed to be on death row. The year before that, there were twelve capital trials. One person got the death penalty. So far this year, there have been five capital trials, and nobody has gotten the death penalty.

So when you're talking about how much you're spending on this—even for people who, quote, “believe in the death penalty,” —at some point you'll have to say, “well the public doesn't believe it anymore.” The public says they support the death penalty if you ask them. But North Carolinians—when you put them in the jury, and they all have to be qualified as people who could give the death penalty in a case—they are saying no. When they hear the whole story—even with imperfect lawyers, and they certainly are, and even in the context of a capital trial, which is not the best way to tell your story necessarily—juries are saying no. And in North Carolina it only takes one juror to cause a case to go to life. And so we went back to look and say, “Well, how many are we having like that?” Almost all of our juries in the last three years have been unanimous. They've almost all been unanimous for life. So there has been a sea change in North Carolina, which doesn't have to do politics, but I think it has to do a lot with exonerations. We've also had a number of very high-profile exonerations. And I think the public has learned that even though some nice-looking young man or young woman from the prosecutor's office comes in and acts like they're entirely convinced this person is a horrible killer, that doesn't make it true. I think for a lot of people that was a shock. And I think the press has been extremely, extremely helpful in that—at least in North Carolina. We've gotten big exoneration stories out of all of our major news networks.

I wanted to tell you one other fun study that we did at IDS. It's not directly related to capital litigation, but has to do with waiting in court. You know how when we have

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a lot of appointed lawyers, they go to court and a lot of their time is spent not litigating, but waiting their turn. While the most important person in the courtroom, the judge, or the prosecutor,—who's the second most important person in the courtroom—are deciding when we're going to hear your little matter. Then you do your little bit of business, and then you get to go home. And what I have been arguing at the legislature and everyone else is, “Yes, the judge is the most important person, and let's just assume that the prosecutor is the second most important person. I don't even want to argue about it, but the most expensive part of that courtroom is indigent defense.” Even if they're getting a lousy \$50 an hour, there's twenty of them out there. We're spending more on indigent defense, and yet we organize this whole courtroom around the convenience of less expensive elements of it.

So just from a matter of spending the state's money, we ought to be disposing of these cases in a way that is more efficient. So we did a waiting in court study for misdemeanors, and we found out that we were spending \$10 million a year in North Carolina on lawyers waiting in court. And the study is at [ncids.org](http://ncids.org),<sup>17</sup> but we have had just a tremendous amount of fun. And then the issue isn't an issue of power, it's an issue of how are we spending the state's money? Why are we organizing things in a way that we're having people lounge around and wait for their turn to get into court? So, it's not about power, it's about efficient spending for the state. I like costs as a different lens to look through. And again, Jon, I'm not disagreeing with anything you said. I thought your remarks were very interesting and stimulating, but I have found that the economic downturn has given us opportunities for reform.

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<sup>17</sup> N.C. OFFICE OF INDIGENT SERVICES, FY05 PRIVATE APPOINTED COUNSEL WAITING-IN-COURT STUDY (Aug. 2005), *available at* <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/fy05%20pac%20wait%20time%20study%20report%20final.pdf>.

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I think when we have economic downturns, the government and the legislatures and courts look for what do they look for when they don't have as much money as they want to spend. They look for government programs, which cost a lot but don't deliver much value. And I would say capital punishment everywhere we have it, in almost all cases, is conducted in a wasteful way even though it's not done well. It's done in a wasteful way and therefore ripe for reform.

And again, I loved what Jean was talking in going to these prosecutors. We have to back the camera up and not just look at what defense lawyers are spending and not just having an argument over whether a defense lawyer is entitled to an investigator or a defense lawyer is entitled to a DNA expert. But back the camera up and look at the way the whole system works and what system reforms we can do because, again, there's nothing we're doing that we're not just trying to respond to the other side.

Another point that somebody made earlier—and I think we have to understand, and I've certainly seen that in my time—is that reform is implied criticism of the status quo. And so when we go in and say, “Boy, the representation is terrible here,” people understand that you're talking about what they've done. And that's hard for people to hear. And judges understand that they're responsible for that court, and they don't want to hear that the justice that's being dispensed in that court is not good. And so there is always going to be pushback and will be pushback. I think it's just human nature. I do think the litigation we're having is helpful and encouraging, even though right now it doesn't seem to have gone very far. But I think we're building toward a tipping point, and I hope it'll be a tipping point where I still have enough of my faculties to appreciate and celebrate when it happens. But I think there are more and more stories coming out. There was a

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great story in *The New Yorker*<sup>18</sup> just several weeks ago about a murder trial in Manhattan of—I don't know if they were from Lithuania—but they were immigrants who came over and got involved in a murder. Janet Malcolm of all people, great writer, wrote a story. Did anybody read that story in *The New Yorker* about the murder trial? Well, I'm in bed with my bride of, it will be thirty-nine years next week, and she's reading the *New Yorker* as is often the case. And then she finishes this story, and she looks at me and she says, “You know, I really admire you for putting up with what you've put up with for all these years—you know, doing criminal defense.” I said, “Boy, thank you very much.” And she had just read this article in *The New Yorker*. She'd never told me that in thirty-eight years.

And so these stories are powerfully important, I think, and are very helpful. So I think that is important. I think stories are important. I think we have to push, and we have to tell the truth. One thing that's only been touched on, but I think is true is our indigent defense problems—and I said this in North Carolina where I think our funding situation is a little bit better than certainly some other places in the South—our big problem is not money. Our big problem is accountability. I think that private lawyers have such a big advantage over public defenders in dealing with their clients. Because one thing a private lawyer has to learn how to do—as a private lawyer they have a completely different relationship with their client. They really understand what a client is. Because with a private lawyer, someone comes into your office, and they're deciding whether they're going to put their hand in their pocket and give you a big stack of money or not. And you have to convince them as a private lawyer “I'm the person

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<sup>18</sup> Janet Malcolm, *Iphigenia in Forrest Hills*, THE NEW YORKER, May 3, 2010, at 34, available at [http://www.newyorker.com/reporting/2010/05/03/100503fa\\_fact\\_malcolm](http://www.newyorker.com/reporting/2010/05/03/100503fa_fact_malcolm).

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for you, I'm going to give you the best job that I can possibly give you. You're going to be in good hands." And if the person is convinced, they give you the money. And they think they've done a good thing, and you think they have confidence in me. And you're off to the races.

Well, needless to say with public defenders or appointed counsel, it's completely different. I mean, for most public defenders you get a new case, you say, "Oh, my God, that's the last thing I need." You're not getting any bag of money with that case. You're just getting another case. You've got to worry about and neglect all of your other cases. And the client has not decided the client likes you, or that you're doing a good job, or that he wants you. And so, I think public defenders have a huge problem in client relations that they don't even understand and that private lawyers don't even have to deal with. Not to say that private lawyers don't have some problems with clients from time to time. They do, but I really think there's something about the way that we assign cases. I would like to have a system where people who are indigent get to pick from a roster who they want to represent them—the way people do that have money get to pick who they want to represent them. I think that would change indigent representation. It wouldn't cost a dime, and I think that would change indigent representation. I'm going to leave some time for comments here, but thank you very much. Thanks to our panelists. And now we'll entertain questions.

TONY MAURO: Well, thank you. We'll all be looking for that *New Yorker* article.

MALCOLM HUNTER: It's not a glowing picture. There was one public defender and one private lawyer.

TONY MAURO: Okay. Before we go to the audience, a couple of comments from—other comments?

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JON GOULD: Malcolm, I really like the statement you made about, “Something cannot cost enough to do it right, but still be a waste of money.” And I agree with you completely. And in fact, there will be a few studies out in the next few months where I think you will find it surprising what judges are saying about the cost effectiveness of the death penalty. So I don't disagree with you at all about whether this is a waste of money or not.

I think potentially I did not make my second point fairly clearly. And it's this: Maybe the way to do this is to ask for a show of hands. How many of you practice in jurisdictions that have the death penalty? Just by a show of hands, so keep them up for second. How many of you believe that if the death penalty were eliminated in your state that your agency or the amount of money you had that's currently spent on indigent defense would remain the same. You would be able to keep it all that you currently you have if the death penalty were taken off the table? Okay. So we have some either optimists or Pollyannish folks, but I think for the most part you've all just proven my second point, which is that if we get rid of the death penalty what we have then is a level of indigent defense as is probably practiced right now—or pretty close to it—without a lot of additional resources being brought to bear. And all the research that I have done and read suggests that the level of defense is better in capital cases than it is in noncapital murder cases. And I want to put the question to you all. Are we then going to be looking at a system where, on average, defendants are getting worse quality representation if we don't have capital representation? That's more of the provocative question I was trying to ask.

MALCOLM HUNTER: Well, you know, if someone told me you can have all the money you want for noncapital and in return we throw somebody into a volcano once a month,

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I would say, “Nuh-uh, I’ll do without the money.” I’m not interested in throwing somebody in a volcano. It doesn’t even depend on whom. But, there are lots of people here from states—Michigan is a place that they’ve never had the death penalty. Congratulations. But they have terrible problems, and it’s not because they don’t have the death penalty. Their problems would be worse if they had the death, but their problems wouldn’t be better. And I think it’s easier to deal with it. I think that the death penalty has had a distorting effect on criminal justice everywhere it is. It is true that it’s pumped some money some places. But I think its impact has been almost entirely—not completely, but almost entirely—predominately negative on the law and on the way people act in court. It’s been quite, quite negative.

JEAN FARIA: How many people are on the row in North Carolina?

MALCOLM HUNTER: 140.

JEAN FARIA: We have eighty-four, but we have the highest incarceration rate per capita of anyplace in the world. 37,000 people are incarcerated. And we have a population of about 4 million.

NORMAN LEFSTEIN: Well, you’ve only been a public defender for two years, so—

JEAN FARIA: Well I’m working on it.

MALCOLM HUNTER: Give her another two years.

TONY MAURO: Any questions? Over there.

CARA DRINAN: I’d like to follow up on Jon on your



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point, and I think maybe I actually like the cost arguments. Like when I first heard you say that you thought that argument was ill-advised, my ears perked up. And I like it because I think it's an argument—can money talk? It's an argument they (inaudible) jurisdictions where, as Jean was saying a moral discussion abolishing the death penalty is just off the table. But I wonder if a way to harmonize our positions—your concern that it's ill-advised and my thinking, “well, it's a great idea,” —is push the practical money argument—is just to refine the argument, right? So if you're posturing that we take away capital punishment, and we are left with the same amount of money that noncapital cases still have, to me that doesn't have to be a natural consequence, right? If we frame discussion as, “Abolish the death penalty,” in response to funding organizations saying where does the money come from—that's, to me, when the abolition argument comes up. Where does the money come from? It comes from not spending millions on capital cases and funneling those into the noncapital cases. Would you accept that refinement?

JON GOULD: Well, I'm being a little provocative here. We all know that to some extent the cost argument works. I come from the State of Virginia. They're only two arguments that ever work in Virginia: reducing cost to the tax payers and reducing crime. Everything else in terms of the Fourth Amendment,<sup>19</sup> Sixth Amendment<sup>20</sup>—

MALCOLM HUNTER: Just noise.

JON GOULD: Exactly. We don't care about that. We care about whether it's going to come out of someone's pocketbook, or whether you're going to get hit over the head by somebody else. So, yes, in terms of the death

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<sup>19</sup> U.S. CONST. amend. IV.

<sup>20</sup> U.S. CONST. amend. VI.

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penalty, as Malcolm says, right now what works is the cost-effectiveness argument. What I'm saying—what worries me here—is that cost argument has—the natural implication of the cost argument is that we then have a system of defense in murder cases where you all are putting in significantly fewer hours and using significantly fewer experts in a noncapital murder case than a capital murder case. And for those defendants who are not being charged capitally, I'm posturing that they are getting a worse defense than those who are being charged capitally. And that's what concerns me.

MARY ANN GREEN: This is primarily to Jon and to Jean. I'm sorry Libby has gone because on her list of cases and the amounts were spent on them. Conspicuously missing was the one case in Tennessee that has resulted in exoneration. Have there been any studies about the costs of cases that go all the way to an acquittal or exoneration as opposed to those cases that do not?

JON GOULD: To my—do you know the answer to this off the top of your head?

JEAN FARIA: No. To my knowledge, no.

JON GOULD: Yeah, I don't know of any either.

MARY ANN GREEN: You were talking about your exonerees, and I just wondered if that were an argument that could be presented?

JEAN FARIA: Well, one of the things that we are now trying to do—the Innocence Project in New Orleans—we actually give them funding because from my board's perspective. The work of a lot of people leads to these horrible situations, and so we feel duty-bound to assist in

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funding the noncapital post-conviction. So it's part of a strategy, a media strategy that we're developing. They just hired a new person for media. I have on my staff of sixteen people for a statewide program—I have a special projects advisor. She's a non-lawyer, and that's one of the media pieces—one of the things that she's doing. And we're going to be looking at that data because it's not been collected—at least in the noncapital post-conviction area. It's not been collected by us. I mean, we could have some estimates, but as is true in most new cases, we have this tremendous reluctance to do time sheets, which we're working on because the culture is—

MARY ANN GREEN: But what I'm thinking of is what is a life worth?

JEAN FARIA: Well, yeah, that's a complicated question. But, yes, I think that is something that needs to be captured. And I think that is going to be very helpful in getting to some idea of the cost of this.

JON GOULD: The other piece is that the vast majority of exonerations so far have not been capital cases. And so there just haven't been that many to work through. Now you can kind of go get the cost by going in from the back end, and it is possible to make these estimates. But I'm not sure. I guess the argument does work. That this is a sum of money the taxpayers had to cover that they should not have had to cover otherwise. And they're not inconsequential amounts of money per case. What you want to do is be able to sum them up to some larger figure either statewide or nationally.

TONY MAURO: Any others? Okay. Before we adjourn, two things. I want to thank the panels for a very good—

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(Audience applause).

TONY MAURO: So I'm going to give Norm the final word, as he should have. And are you planning something else?

NORMAN LEFSTEIN: Well, you folks are the real true believers committed to a late hour at four o'clock. I want to make an announcement. I also want to give a chance to Stephanie Baucus from the Department of Justice to say something about a handout that she has available. I want to remind you that if you have evaluation forms and have not handed them in, that you leave them on the table just outside the door. Let me turn it over to Stephanie, just very briefly, and then I want to make one last comment. Stephanie?

STEPHANIE BAUCUS: Yes. Thank you, Norm. I will be brief. You know, this is great to be back here in East Tennessee because this is pretty much where I grew up. But I am now working with the Obama Administration at the US Department of Justice, so I'm really happy to be with you guys. I've met a good number of you but not everyone, so what I'm going to do is stand out in the back. The reason I was very late—and I apologize today—is that I had some copies made—and by made I made myself—and it took a really long time. And in any event, I have enough cards for every single person, and I have enough copies of an indigent defense speech that I wrote for every person. And I have been assigned to be your liaison in several different ways, because I'm the ADA liaison for the leadership at the department. So that's for the attorney general and the deputy associate attorney generals as well—attorneys general. And we work with a variety of different groups. And I'm also the defense liaison, defender liaison, so I'm very interested in these issues for a variety of

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reasons—and passionate about this. And I've done a lot of work, as you might see by the desk. I have a bunch of other PowerPoints here on these issues that I work on with state legislators and counties, and I'm very interested in a lot of the things I just heard and some fascinating ideas that people have. I work with Laurie Robinson and her staff and other components at DOJ, and I'm very interested in working with all of you. And I hope that you will take my card and call me and give me your complaints and your ideas. Thanks very much, and turn it over to—

GEORGIA VAGENAS: Stephanie, you mentioned that one of the power—this PowerPoint—the handouts have to do with grants. And you mentioned something about the new grants coming up. I don't know if there were some deadlines that you wanted to mention to people.

STEPHANIE BAUCUS: Yes. Yes, I'm sorry. I had twenty minutes of sleep the night before last and two, three hours last night, so I'm kind of sleep deprived. One of the handouts that I do have is the Program Plan. And some of the excerpts from our—what we call our Program Plan, which is a weird name—for grants that are available right now. If you wanted to consider applying, some of the deadlines are in fact coming up soon. And as I think we all know in this room, there aren't enough grants for public defense. There are more this year than there were last year, and there will be more next year. And another handout that I have that deals with that is next year's budget request. And one thing that's important in that—if you look at it now and you say, “Gosh, you know. I wonder how they're going to write that. I wonder how they're going to actually turn that into a grant solicitation.” Then let's talk about it. Let me hear your concerns. Let's hear what you want to go into that. Let's think about it now, because now is the time to hear your ideas before Congress actually appropriates the

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money—those grant solicitations get written. So that's why I brought all of this stuff, because I'm all about being practical. And this is your government, so let's make it accessible to you. So I have presentation copies for you, cards with contact information, and the grant information for both this year and next year. And I'm here to help, so, from the federal government. Thank you.

ADELE BERNHARD: Great.

NORMAN LEFSTEIN: Thanks very much, Stephanie. We appreciate it. Well, lastly, my thanks to our concluding panel. Always enjoyable to hear from all of you, and I especially appreciate Tony Mauro filling in at the last minute as our moderator of this last panel. I want once again to thank the College of Law, Professor Penny White, and her colleagues for serving as our hostess and host for this conference. They've been absolutely splendid to work with. Our goals in planning this conference were to make it enjoyable, to make it educational, stimulating, and we hope we've succeeded in all of those goals. We appreciate all of you being with us and wish you safe travels home. Thanks very much.

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