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Dealing with Excessive Caseloads Without Litigation

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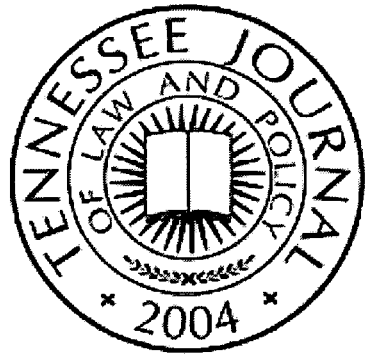

NATIONAL PUBLIC DEFENSE SYMPOSIUM

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:

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Faculty Advisor, Tennessee Journal of Law & Policy

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Chief, State Appellate Defender Office
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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."[1] 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

[1] U.S. CONST. amend. VI.

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.[2] 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

[2] *Id.*

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

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*

Workloads[3] and *ABA Ten Principles of a Public Defense Delivery System*,[4] 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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[3] 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.

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

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

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

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.

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

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*[5]—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

[5] 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/.

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 a 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

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.

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

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.[6]

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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[6] ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

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

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.[7] 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."[8] 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

[7] D.C. CODE § 2-1605 (2001).
[8] MASS. GEN. LAWS ch. 211D § 9(c) (2005).

assignment to private lawyers.[9] 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[10] and Colorado,[11] 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.[12] 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.[13] 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

[9] IOWA CODE ANN. § 13B.9(4) (West 2005 & Supp. 2010).
[10] FLA. STAT. ANN. § 27.5303(1)(d) (West 2009).
[11] COLO. REV. STAT. § 21-2-103(1.5)(c) (2009).
[12] TENN. S. CT. R. 13 (2010).
[13] U.S. CONST. amend. VI.

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.[14] 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

[14] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS - COURTS, CHAPTER 13, THE DEFENSE (1973).

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

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

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

lawyer. It is much like a "three-legged stool."[15] But, as a practical matter, there is no real defense lawyer doing what is required by the Sixth Amendment[16] 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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[15] U.S. v. Goodwin, 272 F.3d 659, 679 (4th Cir. 2001) (citation omitted).

[16] U.S. CONST. amend. VI.

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

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

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

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.

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

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

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

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.[17] 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

[17] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

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

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.[18] 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[19] 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, Harring, H-a-r-r-i-n-g.[20] *Padilla*, I talked about. This is language that even reverses *Strickland*.[21] The defendant is entitled to effective assistance of competent counsel, 1.1.[22]

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

[18] Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
[19] State v. A.N.J., 225 P.3d 956 (Wash. 2010).
[20] Hurrell-Herring v. State, 15 N.Y.3d 8 (N.Y. 2010).
[21] Strickland v. Washington, 466 U.S. 668 (1984).
[22] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

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*,[23] 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,[24] 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

[23] Argersinger v. Hamlin, 407 U.S. 25 (1972).
[24] WASH. REV. CODE § 10.101.030 (2008).

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*,[25] 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*[26] was held liable in a 1983 action.[27] 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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[25] City of Mount Vernon v. Weston, 844 P.2d 438 (Wash. Ct. App. 1992).
[26] Miranda v. Clark Co., Nevada 319 F.3d 465 (9th Cir. 2002).
[27] 42 U.S.C. 1983 (2006).

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[28] 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*,[29] 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

[28] State v. Lopez, No. CR 2007-1544, (Ariz. Super. Ct. 2007) *available at* http://www.mohavecourts.com/news/motion%20to%20withdraw.pdf.

[29] State v. Jury, 576 P.2d 1302 (Wash. Ct. App. 1978).

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."[30] This was in 1970 pre-*Argersinge,r* 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

[30] William Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal,* 28 THE LEGALAID BRIEFCASE 151, 155 (April 1970).

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.

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

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

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

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

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

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

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

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

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

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-

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.

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

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

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? Secondarily, 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

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

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

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

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

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?

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

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*[31] 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

[31] State v. Peart, 621 So.2d 780 (La. 1993).

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[32] 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

[32] ABA EIGHT GUIDELINES, *supra* note 3.

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.[33] 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.

[33] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

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

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,

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

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

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[34]—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.[35] Bob Boruchowitz mentioned the most prominent 1983 action involving public defense, which is *Miranda v. Clark County*.[36] 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

[34] U.S. CONST. amend. VI.
[35] 42 U.S.C. 1983 (2006).
[36] Miranda v. Clark Co., Nevada 319 F.3d 465 (9th Cir. 2002).

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

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.

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[37], 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

[37] U.S. CONST. amend. VI.

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

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*[38] 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

[38] Strickland v. Washington, 466 U.S. 668, 687 (1984).

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

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

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*.[39] 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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[39] Public Defender Revolution, http://pdrevolution.blogspot.com/.

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

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

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.

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[40]. 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.[41] 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

[40] U.S. CONST. amend. VI.
[41] *Id.*

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

to the website of the King County District Court[42] 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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[42] King County District Court, Relicensing Program, http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx (last visited July 26, 2010).

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[43] 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

[43] U.S. CONST. amend. VI.

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.