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CASE REFUSAL: A DUTY FOR A PUBLIC DEFENDER AND A REMEDY FOR ALL OF A PUBLIC DEFENDER'S CLIENTS

INTRODUCTION

In a recent law review article,¹ Professor John P. Gross argues that a public defender's decision to maintain an excessive caseload can be motivated by a public defender's concern for the welfare of that public defender's prospective clients.² That is so, Professor Gross argues, because of "[1] [t]he possibility that case refusal will result in prospective clients receiving no representation[;] [2] the poor quality of alternative counsel [;] [3] and the lack of any meaningful remedy for defendants who are denied representation."³ Under those circumstances, he argues that representation by a public defender with an excessive caseload may be the defendant's "best option."⁴

Professor Gross then analyzes the various reasons why so few public defenders have filed case refusal motions when the vast majority of them have grossly excessive caseloads.⁵ Examples include: lack of independence, fear of retaliation from the judiciary, the legislature, and the governor or their own organization; organizational culture opposed to case refusal; ethical blindness to failure to perform their ethical duties; and heroic ideals (the struggle against an unjust system).⁶

Professor Gross posits that there may be a better explanation for why public defenders do not seek to refuse cases when they have excessive caseloads.⁷ He *60 argues that "[i]f refusing to represent a defendant will prejudice the defendant more than if the public defender represented that defendant, even while managing an excessive caseload, then it is in the defendant's best interests to be represented by the public defender."⁸

Professor Gross is on his strongest ground when he argues that the courts in Missouri, Florida, and Louisiana,⁹ (and all other courts to address the problem, for that matter), while appearing to give lip service to the problem, have largely failed to confront the legislatures in those states.¹⁰ This failure is shown by the courts' failure to insist that public defender funding be sufficient to provide reasonably effective assistance of counsel pursuant to prevailing professional norms for every client represented by the state's public defender (the *Strickland* performance standard).¹¹

However, I strongly disagree with Professor Gross' conclusion that representation by a public defender with an excessive caseload may be an indigent criminal defendant's best option. On the contrary, it is a terrible option. Accepting more clients than you can competently represent undermines the representation of all of your clients. It is flatly unethical, and it is

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specifically forbidden by the Rules of Professional Conduct.¹² It is also unconstitutional. It accepts a half-century status quo that is completely unacceptable. It is unworthy of a noble profession.

My central argument in this Article is that if public defender funding is inadequate to provide reasonably effective assistance of counsel pursuant to prevailing professional norms for every client represented by a public defender office, (generally constituting at least eighty percent of the criminal docket), the justice system must provide an effective remedy. Absent meaningful judicial relief, the criminal justice system (or at least eighty percent of it) is systemically unethical and unconstitutional. In this Article, I will describe in some detail precisely what that remedy is. I maintain that public defenders¹³ are well positioned to seek that relief on behalf of all of their clients, and that state supreme courts are uniquely charged with providing that relief. I also maintain that this is not the time to give up on that fight.

At the outset, I acknowledge that some public defenders have faced (and some public defenders will continue to face) judicial, executive, and legislative *61 retaliation for insisting that their duties be performed ethically and constitutionally. Some public defenders have even been ousted in retaliation for this kind of ethically required behavior.¹⁴ But some have not. In any event, the threat of such retaliation is no excuse to continue a systemically unethical and unconstitutional system of legal representation. We have no dearth of models to look to in our profession for guidance. John Adams' defense of the British soldiers arrested in the 1770 Boston Massacre was just the first of many such acts of courage in the long history of a noble profession.¹⁵

I. THE FIFTY-YEAR DEAL

As I have argued elsewhere,¹⁶ for more than fifty years, with a few notable exceptions, courts, legislatures, governors, state bar associations, and yes, even public defenders, have effectively brokered a deal about how to respond to the Supreme Court's decision in *Gideon v. Wainwright*,¹⁷ the landmark case that began this country's right to counsel revolution. The deal was (and is) that legislatures and other public flinders would grossly underfund public defender organizations. Public defenders thus faced with grossly excessive caseloads would then triage these resources, pushing more (though still insufficient) resources to their most serious cases, and providing little more than the illusion of a lawyer for most of their remaining clients with less serious charges, especially those charged with misdemeanors.¹⁸

Note that it is not just public defenders who have made this Faustian bargain. This deal could not have functioned so successfully for the past half century without the active participation of the judiciary and its disciplinary bodies, state legislatures, the executive branch of government, and state bar associations.¹⁹ In sum, our entire profession bears the responsibility for this sordid state of affairs. Absent substantial structural change, this will be the principal legacy of our generation of lawyers to the next.

All of this is true despite the undeniably heroic, Herculean (yet Sisyphean) efforts of thousands of dedicated, hardworking public defenders throughout the country. But the simple fact of the matter is that given the kinds of grossly excessive caseloads that the vast majority of public defenders in this country carry every day, they simply cannot provide reasonably effective assistance of *62 counsel to all of their clients.²⁰ The lawyers these clients have are not functioning as the counsel contemplated by the Sixth Amendment and the Model Rules of Professional Responsibility. This is not a criminal justice system. This is a criminal processing system.

II. THE INFRASTRUCTURE CURRENTLY IN PLACE FOR SUBSTANTIAL CHANGE

A. The Policy Infrastructure

The remarkable work done by Norman Lefstein and the American Bar Association's (ABA) Standing Committee on Legal Aid and Indigent Defense (SCLAID), has provided the basic infrastructure for the substantial structural change required to

end this travesty.²¹ Their work in this regard began in 2002 with the issuance of the *Ten Principles of a Public Defense System* (specifically Principle Five regarding excessive workloads).²² That work continued when Dean Lefstein and SCLAID convinced the ABA Standing Committee on Ethics and Professional Responsibility to issue Formal Opinion 06-441, which specifically found that “public defenders faced with excessive workloads must not accept new clients.”²³ That work concluded in 2009 with the issuance of the *Eight Guidelines of Public Defense Related to Excessive Workloads*, which provided a detailed plan for declining representation in the face of excessive workloads.²⁴

B. The Rules Infrastructure

The ABA’s Model Rules of Professional Conduct (“Model Rules”), which in pertinent part have been adopted virtually verbatim by almost every state in the nation, provide a second part of the infrastructure needed to bring an end to this fifty-year systemically unethical and unconstitutional system of “criminal justice.”²⁵ The pertinent rules are simple and straightforward and admit of no ambiguity, a proposition that the ABA Ethics Opinion in 2006 made abundantly clear.²⁶

Rule 1.7 (a)(2) of the Model Rules provides in pertinent part that “(a) ... a lawyer shall not represent a client if the representation involves a concurrent *63 conflict of interest. A concurrent conflict of interest exists if: ... (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client ...,”²⁷ That is exactly what happens when public defenders represent so many clients that they cannot competently represent each client. As will be shown below, public defenders in that situation have a concurrent conflict with every single client they represent.

Rule 1.16 of the Model Rules, applies to both “Declining or Terminating Representation.”²⁸ It provides in pertinent part that “(a) ... a lawyer shall not represent a client or, where the representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in a violation of the rules of professional conduct or other law [.]”²⁹ Thus, when faced with excessive caseloads that produce a concurrent conflict with each and every client represented by the public defender, under Model Rule 1.16³⁰ the public defender has a mandatory obligation under the Model Rules:

For existing clients: “where [the] representation has commenced, shall withdraw from the representation of a client”³¹

For future clients: “shall not represent a client”³²

As I will discuss below, the public defender’s obligation with respect to each and every one of those clients does not end there.

C. The Case Law Infrastructure

This gets a little trickier, but we have now all the case law we need. We just need to get the courts to faithfully follow the law they have already made. As I will argue below, we need to stop providing the courts with little more than anecdotes, reports and caseload numbers untethered to any reliable standard, and instead provide them the reliable data and analytics they need to rule for us. The cases that tell us the most about this issue, in my judgment, come from the state supreme courts in Florida, Massachusetts, and Missouri. There are some others, but analysis of the case law on this subject in these three courts should suffice for our purposes here.

D. The Florida Supreme Court

Perhaps the best articulation of the jurisprudential principles that should guide a court in this vexing area of the law, which pits the interests of the judiciary against the interests of the legislature, is the Florida Supreme Court’s 1990 decision in *In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*.³³ The court had to confront

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“woefully *64 inadequate funding of the public defenders’ offices, despite repeated appeals to the legislature for assistance.”³⁴ The court acknowledged that the problem was “a statewide concern.”³⁵ The case involved “the tremendous backlog of appeals ... by indigent defendants in which briefs are substantially overdue,”³⁶ but the court noted that “this serious underfunding ... affects both trial and appellate caseload.”³⁷

The court first directly addressed its separation of powers concerns.³⁸ It noted that although the legislature’s failure to adequately fund the public defenders’ offices was “at the heart of this problem, and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount.”³⁹ Then, recognizing both the existence and the limits of its inherent power, the court specifically noted that the “[a]ppropriation of funds for the operation of government is a legislative function.”⁴⁰

Nonetheless, despite its clear respect for the legislature’s special appropriations role, the court concluded that the judiciary was not without a remedy. The court sent a clear message to the Florida legislature:

[A]lthough this court may not be able to order the legislature to appropriate those funds, we must advise the legislature that if sufficient funds are not appropriated within sixty days from the filing of this opinion, and counsel hired and appearances filed within 120 days from the filing of this opinion, the courts of this state with appropriate jurisdiction will entertain motions for writs of habeas corpus from those indigent appellants whose appellate briefs are delinquent sixty days or more, and upon finding merit to those petitions, will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable.⁴¹

The court and the legislature were eyeball to eyeball, and then the legislature blinked. “In the aftermath of the court’s order, the Florida legislature significantly increased funding for the office of the public defender.”⁴² The principle had been *65 established. True the legislature was in charge of state appropriations, but under the court’s inherent power, the court was in charge of the state’s criminal justice system.⁴³ That criminal justice system had to be a systemically constitutional and ethical system.

That was the Florida Supreme Court’s special responsibility under the Florida Constitution.⁴⁴ That’s how the separation of powers worked in Florida.⁴⁵ And the Florida Supreme Court was not about to preside over and tolerate a systemically unconstitutional and unethical criminal justice system in that state. If the only thing the legislature could understand was the threat of the immediate release of thousands of indigent convicted felons onto the streets of the State of Florida, then so be it.

E. The Massachusetts Supreme Court

In 2004, the Massachusetts Supreme Judicial Court had its own experience with the release remedy.⁴⁶ Indigent pretrial detainees had no lawyers to represent them due to a shortage of private lawyers in the Massachusetts assigned counsel program.⁴⁷ The shortage was caused by the low rate of attorney compensation provided in the Massachusetts budget appropriation.⁴⁸ Rates had not been significantly adjusted in almost twenty years.⁴⁹

On May 6, 2004, indigent pretrial detainees in a Massachusetts county “and the statewide public defender filed a petition seeking relief pursuant to the general superintendence power of the Massachusetts Supreme Judicial Court.”⁵⁰ Using that power of general superintendence, “[t]he court ordered that any indigent defendant incarcerated pretrial” in that county “must be released after seven days if counsel was not appointed, and any case pending against such a defendant” must be dismissed after forty-five days if no lawyer had filed a court appearance on that defendant’s behalf.⁵¹

“Then-Governor Mitt Romney, in an adroit political move, suggested that if the Massachusetts Supreme Judicial Court wished to release violent felons onto the streets of Massachusetts, that would be its prerogative.”⁵² Thus confronted, one lone judge of the Massachusetts Supreme Judicial Court then entered an order allowing judges in that county to assign lawyers from the private bar even if the *66 private counsel were unwilling or not certified to accept such cases.⁵³

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On June 28, 2004, a class action lawsuit challenging the statewide assigned counsel system was filed in the Massachusetts Supreme Judicial Court,⁵⁴ and the Massachusetts Legislature then established a commission to study the problem.⁵⁵ As a result, the Massachusetts Supreme Judicial Court stayed the lawsuit “to give the legislative commission an opportunity to carry out its work.”⁵⁶ Ultimately, the commission recommended a substantial increase in bar advocate rates, but the legislature made no additional appropriation to cover them.⁵⁷ In response, private assigned counsel across Massachusetts then refused to renew their contracts to provide indigent representation, and at one point nearly 500 indigent defendants were without counsel.⁵⁸

The petitioners in the class action case then filed a motion to lift the stay in those proceedings in the Massachusetts Supreme Judicial Court.⁵⁹ Three days before the scheduled hearing on the motion, the Massachusetts Legislature passed bills providing for an increase in counsel rates that eventually substantially increased rates of compensation for the private lawyers increasing appropriations “from \$98 million in 2004 to \$ 154.5 million in 2006.”⁶⁰

But the retreat from the kind of legal and moral clarity found in the Florida Supreme Court’s 1990 decision in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender* was clear to all.⁶¹ When the Governor and the Legislature were eyeball to eyeball with the Massachusetts Supreme Judicial Court, it was the Massachusetts Supreme Judicial Court that blinked.⁶² The Court backed down from its earlier dismiss and release order and allowed trial judges to appoint lawyers to represent indigent criminal defendants even if they were not qualified and even if they were unwilling to accept these cases.⁶³

The Massachusetts Supreme Judicial Court was neither the first nor the last state supreme court to blink when confronted with obstinacy or resistance from *67 one or both of the other branches of government on the issue of persistent and gross underfunding of a state’s indigent defense system.

F. The Missouri Supreme Court

Finally, we examine the Missouri Supreme Court’s struggle to fulfill its obligation to ensure a constitutional criminal justice system with a legislature persistently and grossly underfunding the state’s indigent defense system.⁶⁴

As set forth in some detail by the Missouri Supreme Court in *State v. Pratte*,⁶⁵ during the two decades preceding this 2009 decision, the number of persons sentenced for felonies in Missouri had nearly tripled.⁶⁶ In the preceding five years, “the number of offenders convicted of drug offenses ... ha[d] increased by 650 percent, while non-drug sentencing ha [d] increased by almost 230 percent.”⁶⁷ “The public defender represent [ed] about 80 percent of those charged with crimes that carr[ied] the potential for incarceration.”⁶⁸ However, as had been the case nearly everywhere else in the nation during that period of time, the state’s vast increase in criminal prosecutions had not included a commensurate increase in resources for the public defender.⁶⁹

In 2010, The Missouri State Public Defender sought relief from the grossly excessive caseloads that resulted from this legislative refusal to adequately fund the defense function due to this dramatic increase in its caseload.⁷⁰ A public defender office in Springfield, Missouri sought relief from these excessive caseloads, asserting claims under the Missouri Rules of Professional Conduct, the Missouri and U.S. Constitutions, and a duly promulgated state rule authorizing such action.⁷¹ After a trial court acknowledged that that public defender had too many cases to handle competently, but denied caseload relief and ordered that public defender to continue to represent all eligible individuals, the Missouri State Public Defender appealed to the Missouri Supreme Court.⁷²

On July 31, 2012 the Missouri Supreme Court issued its opinion in *State v. Waters*.⁷³ The *Waters* case has been described as “a watershed moment” in *68 indigent defense.⁷⁴ The *Waters* court held that when a statewide public defender office can show that it has so many cases that its lawyers cannot provide competent and effective representation to all their clients, lawyers are required to refuse appointments, and judges may not appoint them to represent additional defendants, citing with

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approval the ABA's Eight Guidelines.⁷⁵

The decision was a ringing endorsement for case refusal. In fact, since at least 1981, the Missouri Supreme Court had made it clear that "where the court is unable to find and appoint counsel for the indigent accused who can prepare for trial within the time required by law, the court should on proper motion where necessary to protect the constitutional rights of the accused, order discharge of the accused."⁷⁶

But, as Professor Gross correctly notes, the Missouri Supreme Court then waffled on the appropriate remedy when the state could not provide competent and effective counsel for an indigent defendant.⁷⁷ The *Waters* opinion made it clear that a public defender office is ethically prohibited from triaging its cases.⁷⁸ That is, a public defender office cannot push its resources to more serious cases in an effort to provide competent and effective representation to those clients, while depriving its clients in less serious cases of the effective and competent representation that they are due under the Constitution and the Missouri Rules of Professional Conduct.⁷⁹

However, the Missouri Supreme Court advised:

[U]nlike a public defender office, a trial court has the authority to grant a motion filed by a public defender to be relieved, at least for some period of time, from being required to provide representation in less serious cases because the lack of resources will not allow the public defender simultaneously to provide competent representation in more serious cases.⁸⁰

The court did not, as it should have, spell out what it meant by "at least for some *69 period of time."⁸¹ The only fair reading of the court's opinion, though, is that "some period of time" should mean until appropriate funding is forthcoming from the legislature to provide reasonably effective assistance of counsel pursuant to "prevailing professional norms" for every eligible client of the public defender (or adequately compensated and trained counsel from the private bar, or preferably, both).⁸²

Furthermore, the court did not exercise its power of general superintendence over all lower courts in the Missouri criminal justice system and direct trial judges to enter such an order when a public defender shows that it has excessive caseloads.⁸³ It simply noted that trial judges were authorized to do that.⁸⁴

[A] trial court can use its inherent authority over its docket to 'triage' cases so that those alleging the most serious offenses ... *are* given priority in appointing the public defender and scheduling trials, even if it means that other categories of cases are continued or delayed ... as a result of the failure to appoint counsel for those unable to afford private counsel.⁸⁵

"Continued or delayed" until when? The court would tiptoe a little further into the muck it had created, but only so far, noting that "[u]se of these mechanisms to avoid burdening public defenders with more clients than they constitutionally can represent is not without its potential costs," including delayed prosecution of cases.⁸⁶ The court appropriately noted that such delay "may result in the release of some offenders because of a violation of their rights to a speedy trial."⁸⁷ But as Professor Gross correctly notes, "[a]bsent from the court's decision, however, is any suggestion that the denial of a defendant's fundamental right to counsel will result in a dismissal of the charges against them."⁸⁸

III. THE APPROPRIATE REMEDY IN AN EXCESSIVE CASELOADS CASE

The Missouri Supreme Court deserves credit for clearly articulating the ethical and constitutional predicate for the case refusal remedy in an excessive caseloads case.⁸⁹ Furthermore, the Missouri Supreme Court deserves considerable credit for introducing the concept of judicial triage to address the problem of *70 excessive caseloads.⁹⁰ But the court failed to provide a complete, explicit, and mandatory remedy for judicial relief in excessive caseload cases, despite the fact that it had both the authority and the obligation to do so under its power of general superintendence in the Missouri Constitution.⁹¹

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Here is what the court should have done that it did not do. The court should have exercised its power of general superintendence over all lower courts in Missouri by instructing those courts that if a public defender office established with competent evidence that it could not provide reasonably effective assistance of counsel pursuant to prevailing professional norms to all of its clients, the trial court should enter an order:

(1). Directing the public defender office to advise the trial court with respect to its excessive caseload by providing the court reliable data on its excessive caseload,⁹² on a continuing basis, until the public defender has sufficient funding from the legislature to provide reasonably effective assistance of counsel pursuant to prevailing professional norms to each of its clients.

(2). Invoking judicial triage to manage its docket, as set forth in *Waters*, until such time as such appropriate funding is forthcoming, by granting a motion filed by the public defender office to be relieved from being required to provide representation in less serious cases until such time as such appropriate funding is forthcoming.

(3). Dismissing all such less serious cases.

(4). Releasing from custody all such defendants in all such dismissed cases.

Providing that in the event such appropriate funding is forthcoming at some future time, all such less serious cases can be refiled, assuming the statute of limitations has not run in those cases, and assuming the filing of such cases would not again present the public defender office with an excessive caseload whereby that office would be unable to provide reasonably effective assistance of counsel pursuant to prevailing norms to all of its clients.

Why are the public defender office and its clients entitled to these remedies? With rare exception, since at least 1980 the legislatures in our nation have provided their citizens systemically unconstitutional and unethical indigent *71 defense systems by grossly underfunding those systems.⁹³ Neither the public defenders nor their clients had any responsibility for that massive abdication of the rule of law in our criminal justice system.⁹⁴ As between those parties, it is clear who should bear the responsibility and the burden for that problem: the same state legislatures that failed to adequately fund indigent defense systems in our criminal courts.

That is particularly true when one realizes that these same state legislatures have been exclusively responsible for the criminalization of poverty, homelessness, mental illness, and addiction that has occurred for at least the last thirty-five years, dramatically increasing the workload of the entire criminal justice system, including the defense function.⁹⁵ Indeed, the Brennan Center has recently issued a report finding that no less than thirty-nine percent of the people in our prisons should not be there; i.e., there is no public safety reason why these individuals could not be released from prison and treated much more effectively and at much less cost elsewhere.⁹⁶ In 2010, the American Bar Association resolved Resolution 102C,⁹⁷ urging local and state governments “to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties, including fines and incarceration.”⁹⁸

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The most important reason why public defenders and their clients are entitled to this five-part remedy is found in the oral argument archives of the U.S. Supreme Court. In January 1963, in his historic argument in *Gideon v. Wainwright*, future Supreme Court justice Abe Fortas told the court:

Indeed, I believe that the right way to look at this, if I may put it that way, is that a court, *a criminal court is not properly constituted*--and this has been said in some of your own opinions--under our adversary system of law, unless there is a judge, and unless there is a counsel for *72 the prosecution, and *unless there is a counsel for the defense*.⁹⁹

The principal Supreme Court opinion that Abe Fortas was referring to in his argument and in his brief to the court¹⁰⁰ was *Johnson v. Zerbst*,¹⁰¹ where the Supreme Court specifically set out why such a criminal court is not properly constituted, holding that if the accused is not represented by counsel and has not validly waived his constitutional right to counsel, the Sixth Amendment is “a *jurisdictional bar* to a valid conviction and sentence” that deprives the accused of his life or liberty.¹⁰² “A court’s jurisdiction at the hearing of trial *may be lost*,” the court elaborated, “in the course of the proceedings due to *failure to complete the court*--as the Sixth Amendment requires--by providing counsel for an accused.”¹⁰³ Finally, in case anyone still missed the point, the court bluntly stated: “If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void”¹⁰⁴

Neither Abe Fortas nor any of the justices on the Supreme Court at that time could have possibly imagined what would happen to the right to counsel over the course of the next fifty years. But today, with a system of public defender triage firmly in place, far too often public defenders are unable to provide most of their clients with anything more than the illusion of a lawyer due to their excessive caseloads, and we can certainly say with confidence, paraphrasing Abe Fortas, that unless there is *competent and effective* counsel for the defense, these criminal courts are not properly constituted.

Public defenders, the courts, and the public itself are entitled to an explicit, mandatory remedy that will restore the rule of law to our indigent defense system so that these criminal courts can then be fairly characterized as properly constituted. For many decades now, they could not fairly be so characterized.¹⁰⁵

The primary obligation to ensure competent and effective representation of counsel to every individual entitled to it rests squarely on the shoulders of the trial courts.¹⁰⁶ “Beyond simply ensuring that counsel is appointed to assist every defendant who faces the possibility of imprisonment, a judge must also ensure that the defendant has *effective* assistance of counsel.”¹⁰⁷

*73 When state trial judges fail to do that, state supreme courts have the obligation to explicitly order them to do that.¹⁰⁸ The state should never be allowed to proceed with its effort to deprive any indigent person of his or her liberty, unless and until the state can provide that indigent person with a lawyer who can be competent and effective, free of the burden of grossly excessive caseloads.

IV. WHEN YOU AIM FOR THE KING, DON’T MISS

The Missouri Supreme Court issued its decision in *Waters* on July 31, 2012.¹⁰⁹ In September, 2012, the Missouri Public Defender began refusing cases pursuant to a caseload protocol that it had developed to determine when its caseloads were excessive.¹¹⁰ Not surprisingly, trial judges were not generally receptive to this new way of doing things.¹¹¹ They had a lot of people in orange jumpsuits in their courtrooms every Monday morning, and they wanted to continue processing those cases just like they always had.

The Missouri legislature also did not respond well to the *Waters* decision and the case refusal actions that it spawned.¹¹² There were legislative “threats to privatize large parts of the defender system and cap compensation for the private bar at unreasonably low levels.”¹¹³ Fortunately, the Director of the Missouri State Public Defender, Cat Kelly, led a vigorous campaign to persuade the legislature of the negative costs of most of its proposals, and even emerged from the legislative

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session that year with a case refusal statute.¹¹⁴

In October, 2012, in the midst of this legislative and judicial pushback to the *Waters* decision, Missouri's Auditor, Tom Schweich, raised an important and principled objection to the protocol that the Missouri State Public Defender had used as a basis for case refusal.¹¹⁵ In developing its protocol, the Missouri State Public Defender had relied in part on the 1973 NAC Standards.¹¹⁶ That proved problematic.

***74** “The NAC Standards were not evidence-based and did not account for changes in technology, changes in complexity or even differences in the seriousness of cases (e.g., “felonies” in the NAC Standards [were] not broken down into felony categories based upon their seriousness).”¹¹⁷ For those reasons, Auditor Schweich rejected the Missouri State Public Defender's protocol as invalid.¹¹⁸ For these same sorts of reasons, Norman Lefstein has specifically recommended that “[p]ublic defender agencies and programs that furnish private lawyers to provide indigent defense representation “should not rely upon” the 1973 NAC Standards.¹¹⁹

That was the end of case refusal in Missouri. The lesson was clear: unless a public defender office could support its decision to seek case refusal based on excessive caseloads with reliable data and analytics, the courts would not grant relief, and for good reason.¹²⁰ The remedy of case refusal is a drastic remedy of last resort, and if the factual predicate for case refusal is defective, the courts will appropriately reject it.¹²¹

That Missouri experience began our search to answer the most important question for case refusal litigation: Where do you draw the line? How many cases is too many cases? That is the task the ABA's Standing Committee on Legal Aid and Indigent Defense (ABA/SCLAID) set out to answer in 2013, in the aftermath of the Missouri experience.¹²²

After almost five years of extensive work on workload studies in Missouri, Louisiana, Rhode Island, and Colorado, ABA/SCLAID, working together with some of our nation's leading accounting and consulting firms, has produced public defender workload studies utilizing a methodology developed by the Rand Corporation, that is standards-based, and that can provide reliable data and analytics to support case refusal motions.¹²³

***75 V. ANOTHER FIRST FOR MISSOURI**

Missouri was the first state to have a state bar association (and its former president, Doug Copeland) go to the state legislature to get a case refusal statute for a statewide public defender office.¹²⁴ Missouri was also the first state to have a legislature pass a case refusal statute.¹²⁵ Missouri was the first state where the state supreme court explicitly approved the case refusal remedy, relying on the ABA's Eight Guidelines.¹²⁶

Now Missouri has become the first state to discipline a public defender for violation of the [Rules of Professional Conduct \(Rule 1.3, Diligence, and Rule. 1.4, Communication\)](#).¹²⁷ This case has sent shivers through public defender offices all over the country. It should give public defender organizations even more motivation to bring case refusal motions when they are faced with excessive caseloads.

By all accounts, Karl Hinkebein was and is a good public defender.¹²⁸ He was described by his supervisors as a “dedicated” lawyer with “a very good work ethic.”¹²⁹ However, during the period of 2010 to 2014, he had serious health problems and a significant caseload.¹³⁰ Every other public defender in his Columbia, Missouri office (and throughout Missouri) also had seriously excessive caseloads during that period of time.¹³¹ That situation continues unabated to the present day, and litigation against the Missouri State Public Defender has been instituted based in part on those excessive caseloads.¹³²

Hinkebein's caseload was higher than anyone in his office.¹³³ He typically worked more hours (average fifty hours per week) than any other attorney in his ***76** office.¹³⁴ He was the highest producer in his office.¹³⁵ His dedication to his clients was “beyond reproach.”¹³⁶ He was “honest and ha[d] a good reputation among coworkers and judges.”¹³⁷ But because of his health problems and his excessive caseload, he failed to timely communicate with his clients and missed filing deadlines.¹³⁸ He had

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three prior admonishments.¹³⁹ There was no evidence any client of his was harmed by anything he did or failed to do.¹⁴⁰

A prisoner client of Hinkebein filed a bar grievance against him.¹⁴¹ A disciplinary panel conducted a hearing on his case.¹⁴² The panel concluded that Hinkebein violated Rules 4-1.3 (Diligence) and 4-1.4 (Communication) and recommended that he be placed on probation for one year.¹⁴³ Although the Chief Disciplinary Counsel and Hinkebein's lawyer advised the Missouri Supreme Court they would accept the panel's decision, the Missouri Supreme Court *sua sponte* ordered the case briefed and argued.¹⁴⁴

Before the Missouri Supreme Court, Hinkebein's lawyer argued that Hinkebein was "working far beyond what should have been expected of him in an effort to do his best to represent all of his clients, despite his health and unreasonable caseload," claiming that "[i]ndividual public defenders are trapped."¹⁴⁵ She insisted that Hinkebein "had no intent to violate the rules," and that he "was doing the best he could under impossible circumstances."¹⁴⁶

The Chief Disciplinary Counsel noted that the Missouri Supreme Court "has not addressed whether an 'excessive caseload' is a mitigating factor in a disciplinary case."¹⁴⁷ However, the Chief Disciplinary Counsel pointed out that the Missouri Supreme Court had said that public defenders with large caseloads "are risking their own professional lives."¹⁴⁸ Finally, the Chief Disciplinary Counsel argued that Hinkebein's license to practice law should be suspended for a year, noting that in ABA Formal Opinion 06-441¹⁴⁹ the ABA stated that there *77 is "no exception [to the Model Rules of Professional Responsibility] for lawyers who represent indigent persons charged with crimes."¹⁵⁰

The Missouri Supreme Court found that Hinkebein had violated Rules 4-1.3 and 4-1.4(a) of the Rules of Professional Conduct, suspended Hinkebein's license indefinitely, stayed the suspension, placed Hinkebein on probation for a year, and taxed a fee of \$ 1500 to Hinkebein.¹⁵¹

Until the *Hinkebein* case, there had been a tacit understanding between all players involved in the fifty-year deal about what to do about grossly underfunded public defender organizations with grossly excessive caseloads.¹⁵² The understanding was that the courts, state bar associations, and state disciplinary counsels would do nothing about obscene public defender caseloads in terms of enforcing the Rules of Professional Conduct.¹⁵³ That would allow public defender organizations to process as many cases as possible and move the cases through the system, satisfying trial courts who saw themselves as case processors rather than ministers of justice.¹⁵⁴

The *Hinkebein* case stands for the proposition that the courts will no longer turn a blind eye toward the deeply disturbing professional responsibility problems created by a system that routinely ignores, and indeed accepts and relies upon, systemic lawyer misconduct to sustain a criminal processing system.¹⁵⁵

VI. THE DUTY OF A PUBLIC DEFENDER OFFICE WITH EXCESSIVE CASELOADS TO ALL OF ITS CLIENTS, CURRENT AND FUTURE

As noted above, not all public defenders are in a position to bring a case refusal motion for a variety of reasons.¹⁵⁶ What kind of public defender is in the best position to bring a case refusal motion? For reasons set forth below, I make the following recommendations for selecting such a public defender:

- (1). A large public defender office,¹⁵⁷ either statewide or based in a large *78 metropolitan area;
- (2). A public defender office that can provide reliable data and analytics with its existing management information system or appropriate improvements to that system;

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(3). A public defender office with substantial independence, relatively speaking, either lodged in the state constitution or created by state statute, with the chief public defender reporting to a commission or a board; and

(4). A public defender office in one of the vast majority of states in this country where the public defender's governing statute mandates that the public defender "shall provide" representation of persons unable to afford counsel in particular kinds of cases or its substantial equivalent,¹⁵⁸ and

(5). A public defender office in one of the twenty-three states in this country in which the state supreme court has a power of general superintendence or its functional equivalent.¹⁵⁹

Ideally, such a public defender office would have completed a data-based, standards-based workload study such as the ABA studies described here. But to date, only four states have completed and published such workload studies, and many public defender offices throughout the nation are in dire need of some workload relief now.¹⁶⁰ Fortunately, it is now possible to review and analyze the reliable data and analytics we have in the four ABA published workload studies in order to demonstrate that the 1973 NAC Standards, as well as the standards produced in the NCSC studies, permit public defenders to handle far too many cases. Most public defender offices have caseloads that significantly exceed the NAC and NCSC standards.¹⁶¹ Thus, it is now possible to show that public defender offices with caseloads that exceed the NAC and NCSC standards should be entitled to relief from excessive caseloads at least to that extent, as an interim remedy until either reliable national standards are established with a sufficient number of ABA workload studies or the public defender office conducts its own reliable workload study.¹⁶²

***79** The Model Rules of Professional Conduct provide appropriate guidance to the office of such a public defender faced with excessive caseloads.¹⁶³ Model Rule 1.7(a) ("Conflict of Interest: Current Clients") provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."¹⁶⁴ Further, the Rule explains that a concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."¹⁶⁵ When a public defender office has grossly excessive caseloads, it is quite likely that most, if not all of the public defenders in that office will have a concurrent conflict with every single client they are representing because there is significant risk that the representation of every one of their clients will be materially limited by their representation of every one of their other clients.¹⁶⁶

We can now establish that claim with reliable data and analytics, and we are doing that in the ABA/SCLAID studies referred to above.¹⁶⁷ These data-based, standards-based studies demonstrate that public defenders in these offices have approximately one-fifth to approximately one-third of the lawyers that they need to provide reasonably effective assistance of counsel to their clients pursuant to prevailing professional norms.¹⁶⁸ As a result, every time a public defender works ***80** on one client's case he or she does so at the expense of every other client, which means there is a significant risk that their representation of any one client is materially limited by their duty to represent every one of their other clients in individual and systemic violation of Model Rule 1.7.¹⁶⁹

Model Rule 1.16 (a) covers both "Declining or Terminating Representation," and unlike Model Rule 1.7, it is not limited to current clients.¹⁷⁰ With respect to existing clients where representation has commenced, Model Rule 1.16(a) provides that such lawyer "shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law"¹⁷¹ Model Rule 1.16(a)(1) applies to privately retained counsel as well as individual public defenders with respect to existing clients: both are required to move to withdraw from the representation of those clients where they have concurrent conflicts and other violations of professional conduct rules.¹⁷²

Subsection (d) of Model Rule 1.16 then provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for

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employment of other counsel.”¹⁷³ This part of Model Rule 1.16 requires both privately retained lawyers and individual public defenders who seek leave to withdraw from the representation of existing clients to “take steps to the extent reasonably practicable to protect a client’s interests,”¹⁷⁴ or in the words of the Comment to the Model Rule, to “take all reasonable steps to mitigate the consequences to the client.”¹⁷⁵ Examples are given of what a withdrawing lawyer should do, such as giving reasonable notice to the client.¹⁷⁶ So under Model Rule 1.16(d), a withdrawing lawyer should notify the client by serving the client with a copy of the motion to withdraw.¹⁷⁷ And, both the individual public defender and privately retained counsel should ask the court to give the client a reasonable *81 period of time to employ or obtain other counsel.¹⁷⁸

Of course, privately retained lawyers generally have no obligation to represent future clients.¹⁷⁹ With respect to prospective clients of privately retained lawyers, Model Rule 1.7(a) simply provides that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”¹⁸⁰ And the private practitioner who refuses representation for a fee has no obligation under Model Rule 1.16(d) to do anything further with such a prospective client because representation of the client was never undertaken.¹⁸¹

A public defender office, however, stands in a very different place than a privately retained lawyer when seeking either to terminate representation of existing clients or to decline representation of future clients. In the vast majority of states in this country, statutes mandate, in substance, that the public defender “shall provide” representation of persons unable to afford counsel in particular kinds of cases.¹⁸² In *Waters*, for example, the Missouri State Public Defender statute mandated that the public defender “shall provide” legal services to all eligible persons.¹⁸³ Despite that statutory mandate, the *Waters* court easily preserved the constitutionality of the statute by holding that the statutory mandate had to be balanced with the obligation of an attorney to provide competent and effective assistance of counsel.¹⁸⁴

But the important point for our purposes here is that the public defender *82 office, and all of its lawyers, generally have an obligation under the statute or ordinance creating the office of the public defender to represent all eligible persons, and that includes both present and future clients.¹⁸⁵ That is why the public defender, faced with a concurrent conflict due to excessive caseloads, must not only seek trial court approval to withdraw from cases of existing clients, but also, unlike the private practitioner, must seek the court’s permission to decline additional cases of future clients.¹⁸⁶

The 2006 formal opinion of the ABA Standing Committee on Ethics and Professional Responsibility pertaining to excessive public defender workloads, provides that “[a] lawyer’s *primary* ethical duty is owed to existing clients.”¹⁸⁷ For that reason, the opinion notes, a public defender “must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in the [lawyer’s] workload becoming excessive.”¹⁸⁸ The opinion further notes that if the excessive workload cannot be resolved simply by a court not assigning new cases, the lawyer should file a motion requesting permission of the court to “withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.”¹⁸⁹ Finally, the opinion notes that whenever a lawyer seeks to withdraw from a representation, the client should be notified, even if court rules do not require such notification, citing the obligation under Model Rule 1.4 to keep the client properly informed about the status of the case.¹⁹⁰

However, the opinion makes no reference whatsoever to Model Rule 1.16(d), which addresses the obligation of the withdrawing lawyer under that rule upon termination of representation to “take steps to the extent practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel.”¹⁹¹ The only one of these obligations of the withdrawing lawyer under the rule that the opinion acknowledges (without reference to Model Rule 1.16(d)) is the lawyer’s duty to give notice of withdrawal to the client, citing Model Rule 1.4, which deals with keeping the client properly informed about the status of the case.¹⁹² The failure of the opinion to acknowledge the withdrawing lawyer’s obligation under Rule 1.16(d) “to protect a client’s interests” is a glaring omission.¹⁹³ This critical omission may be the reason that so little attention has been paid to this important obligation that a public defender has to its existing clients when filing a motion to withdraw from representing existing clients in a case refusal case.

It will normally be the case in case refusal motions filed by public defender *83 offices with the kinds of grossly excessive caseloads referred to above¹⁹⁴ that the public defender office will seek to be relieved of the obligation to represent *both* some existing and all future clients.¹⁹⁵ This is so because the office’s workload for existing clients, standing alone, will almost

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invariably violate the prohibition against concurrent conflicts.¹⁹⁶ Thus, the public defender office will need to seek to withdraw from representing some group of its existing clients (lower risk cases) while continuing to represent other groups of its existing clients (higher risk cases) in order to provide competent and effective representation to all of its clients.¹⁹⁷

A review of what actually happened in *Waters* is instructive. *Waters* began as a case refusal motion filed in defendant Jared Blacksher's individual criminal case in Springfield, Missouri.¹⁹⁸ Blacksher appeared at his initial arraignment before Judge John S. Waters, who over the public defender's objection appointed "'the (Springfield) public defender's office' to represent him."¹⁹⁹ The Missouri State Public Defender's office then filed a motion to set aside the appointment, citing excessive caseloads in its Springfield office established pursuant to a protocol it had developed under a validly enacted rule.²⁰⁰ Judge Waters held an evidentiary hearing at which the Missouri State Public Defender "presented evidence it had exceeded its caseload capacity" under that rule.²⁰¹ It was undisputed that the public defender had exceeded its caseload capacity under the rule and that the rule was valid.²⁰² Nonetheless, Judge Waters appointed the Springfield public defender office to represent Jared Blacksher.²⁰³ The Missouri *84 State Public Defender then sought and obtained case refusal relief in the Missouri Supreme Court in *Waters*.²⁰⁴

Waters, of course, started out as a case seeking relief in an individual criminal case.²⁰⁵ But in the decision in *Waters*, the Missouri Supreme Court necessarily dealt with the broader implications of granting relief in Jared Blacksher's case because the trial courts and the public defenders in Springfield and throughout Missouri needed the Supreme Court's guidance respecting all other pending criminal cases in which public defender offices had excessive caseloads.²⁰⁶ So acting pursuant to its power (and duty) of general superintendence under the Missouri Constitution, the Missouri Supreme Court did just that, holding that trial judges in Missouri have inherent authority and responsibility to control their dockets, and that they could triage pending cases on their dockets and appoint public defenders only to the most serious cases needing legal representation.²⁰⁷

The holding in *Waters* demonstrates that an individual case refusal motion filed in a single pending criminal case effectively seeks the functional equivalent of prospective injunctive relief for a class of all current and future clients, relieving the public defender office (and all other similarly situated public defender offices in the state) of the statutory obligation to represent a large number of both existing and future clients so that competent and effective representation can be provided to each one of the public defender office's clients.²⁰⁸ In a state like Missouri with a statewide public defender system, that relief was easily extended to every public defender office in the state, as the court exercised its power (and fulfilled its duty) under its constitutional power of general superintendence.²⁰⁹

When a public defender office moves to withdraw from representation of its current and future clients under Model Rule 1.16 (a)(1), what obligation, if any, does the public defender's office have under Model Rule 1.16(d) to "take steps to the extent reasonably practicable to protect" its *future* clients' interests, "such as giving reasonable notice to the client, [and] allowing time for employment of other counsel."²¹⁰ By its terms, Model Rule 1.16(d) applies only "[u]pon termination of representation," so it only applies to existing and not future clients.²¹¹

*85 There does not appear to be any case law or written commentary on this important question of a public defender's obligation to *future* clients in seeking to avoid future appointments, probably because this issue is not covered by the Model Rule.²¹² Moreover, the 2006 ABA Formal Opinion does not even mention the Model Rule 1.16(d) obligation of a lawyer seeking to withdraw from representing *existing* clients to "take steps to the extent practicable to protect a client's interests."²¹³ Professor Gross appropriately notes that "[s]ince most public defenders see themselves as representing an entire class of defendants, not individual clients, the impact of case refusal on prospective clients is a factor that will impact a decision to refuse new cases."²¹⁴ Future clients of public defenders who seek to decline future cases in order to meet their obligations under the Rules of Professional Conduct and the Constitution appear to be a completely forgotten class.

Despite the fact Rule 1.16(d) does not provide any protection for future clients of a public defender office seeking to decline future cases, a compelling argument can be made that there may well be such an obligation under law. The law creates a duty between persons based on the nature of their relationship, their reasonable expectations of one another as a result of that relationship, and the circumstances of the case.²¹⁵ When a statute provides, in substance, that a public defender "shall

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represent” all eligible individuals, there is a reasonable expectation, I submit, on the part of the public defender’s client community, as well as all three branches of government, that public defender representation will be forthcoming, which should suffice to trigger an obligation of the public defender to “protect [their future] client’s interests” in obtaining competent counsel when they seek to decline future appointments.²¹⁶

But even if there is no such duty under law, there is no good reason for a public defender seeking to decline future appointments not to “take steps to the extent reasonably practicable to protect a [future] client’s interests.” And there is every good reason to do so, not the least of which is that the public defender’s client community and all three branches of government have a reasonable expectation that the public defender will not abandon these future clients in the process of seeking to decline future cases in order to abide by Model Rule 1.7’s prohibition of concurrent conflicts.²¹⁷

A public defender office seeking to be relieved of the obligation to represent both current and future clients because of an excessive caseload, so that it can provide representation to as many of its existing clients it can competently and effectively represent, should therefore take the following steps and seek the following specific remedies for all such current and future clients:

*86 (1). for existing clients that the public defender office cannot continue to represent, request an order that the representation be terminated, and dismissal of their clients’ cases and their clients’ immediate release if competent and adequately compensated counsel cannot be found; and

(2). for future clients that the public defender office cannot represent, request an order granting the public defender office’s motion to decline that representation, and dismissal of these defendants’ cases and their clients’ immediate release if competent and adequately funded counsel cannot be found.

In such a motion, the public defender office should remind the court of its paramount duty, as noted above, to ensure reasonably effective assistance of counsel pursuant to prevailing professional norms for *all* indigent defendants who appear in the court.²¹⁸ In their motion for case refusal, public defenders should urge the court to provide for administrative procedures and reports to the chief judge and/or court administrator regarding a list of indigent defendants whose cases must be dismissed and who must be immediately released because of the state’s failure to provide competent and effective representation of counsel for all persons eligible for the public defense representation.

Of course, the public defender office making such a motion must be in a position to provide the court with reliable data and analytics demonstrating that above a certain line, the public defender office is no longer able to provide reasonably effective assistance of counsel pursuant to prevailing professional norms, and therefore must be relieved of responsibility for those cases. As noted previously, we now have in some states, and are developing in others, data-based, standards-based workload studies that enable public defenders to explain exactly where the line should be drawn to determine what constitutes an excessive caseload.²¹⁹ The public defender office should also be prepared to show the court the percentages of its caseload devoted to higher risk cases and lower risk cases, and to suggest to the court how the court might conduct the judicial triage contemplated by *Waters*.

CONCLUSION

I agree with Professor Gross that the courts have not given us the dismissal remedy that we deserve in case refusal cases, even for the kinds of grossly excessive public defender caseloads that we can now reliably demonstrate. My point of departure with Professor Gross is that just at the time that we are finally making some progress in the courts, and now that we have the reliable data and analytics to establish our case refusal claims, he urges us to accept a status quo that provides some

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of our clients with effective representation (when we unethically triage our resources to them) but provides far too many of our clients *87 with little more than the illusion of a lawyer, despite the heroic efforts of hard working public defenders all over the country.²²⁰ We simply cannot accept that status quo.

Let us be clear. That status quo is a systemically unethical and unconstitutional system of indigent defense that vitiates lawyers' professional competence and wreaks havoc in the lives of their clients. We deserve better. More importantly, our clients deserve better. And there are powerful protections potentially available to both our existing and future clients in the event our well-founded case refusal motions are granted.

At this critical moment in the struggle to provide equal justice under law to every indigent criminal defendant entitled to reasonably effective assistance of counsel in this country, all of us in the legal profession must speak simply and candidly to one another.

Public defenders are lawyers. Lawyers can no longer do what we have done for the last fifty years.²²¹ Trial judges can no longer order public defenders to do that.²²² On the contrary, trial judges have the primary obligation to ensure reasonably effective assistance of counsel in their courtrooms.²²³ State supreme courts have the primary obligation to ensure that the criminal justice system in their state is constitutional and ethical.²²⁴

Public defenders now have the tools available to them to initiate proceedings to bring this tragic state of affairs to an end.²²⁵ We must provide the courts with the reliable data and analytics that they need--in addition to the anecdotes, reports and caseload numbers untethered to any reliable standard we have traditionally given them--to grant us the case refusal relief that we must seek, and to protect those we cannot competently and effectively represent from unconstitutional deprivations of their liberty.

Footnotes

^{a1} General Counsel, National Association for Public Defense, www.publicdefenders.us, a national organization of more than 16,000 public defenders and other public defense officials. Mr. Hanlon also serves as the American Bar Associations' Project Director for the public defender workload studies described herein. He is also Adjunct Professor of Practice at St. Louis University School of Law. This Article was originally to be based on the author's remarks at a symposium held April 7, 2017, at the Indiana University Robert F. McKinney School of Law ("Implementing Gideon's Promise: The Right to Counsel in the Nation and Indiana") Subsequently, the author's friend, noted scholar and former public defender John P. Gross published the article referred to in note 1 below. This Article is now largely a rejoinder to Professor Gross' article. The author wishes to express his gratitude for the review and editing of the article to Norman Lefstein, Professor of Law and Dean Emeritus of the Indiana University School of Law. The views expressed herein are those of the author himself, and all errors of judgment or otherwise are his and his alone.

¹ See generally John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253 (2017), available at http://openscholarship.wustl.edu/law_lawreview/vol195/iss1/10 [<https://perma.cc/PCP6-J7GE>].

² *Id.* at 253.

³ *Id.*

⁴ *Id.*

⁵ See generally *id.*

6 *Id.* at 256-59.

7 *Id.* at 259.

8 *Id.*

9 *See generally* Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261 (Fla. 2013); State v. Peart, 621 So. 2d 780 (La. 1993); State *ex rel.* Mo. Pub. Def. Comm'n v. Waters, 370 S.W. 3d 592 (Mo. 2012) (en banc).

10 Gross, *supra* note 1, at 259-65.

11 *Strickland v. Washington*, 466 U.S. 668, 688 (1984). As I have argued elsewhere, in systemic case refusal litigation, this is a risk-based standard, with no obligation to prove prejudice. *See* Stephen F. Hanlon, *Childress Lecture: The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS L.J. 625 (2017).

12 Remarkably, the Rules of Professional Conduct are nowhere mentioned in Professor Gross' article.

13 Specifically, public defender offices; *see infra* note 157.

14 Gross, *supra* note 1, at 256.

15 As General Counsel for the National Association for Public Defense, I know that we have our fair share of chief public defenders who are ready to stand up to the executive, the judiciary, and the legislature on this compelling ethical and constitutional issue. Not every one of them should (for pragmatic reasons), and not every one of them will. But under the right circumstances and at the right time and with the right chief public defender, it will happen, and we will prevail.

16 Stephen F. Hanlon, *The Gideon Decision: Constitutional Mandate or Empty Promise? A Fifty-Year Deal Under Fire*, 52 U. LOUISVILLE L. REV. ONLINE 32 (2013).

17 *See generally* 372 U.S. 335 (1963).

18 Hanlon, *supra* note 16, at 32.

19 *Id.*

20 *Id.*

21 *Id.* 33-36.

22 *Id.* at 33.

23 *Id.*

24 *Id.* All of these documents are available at https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/standards-and-policies.html. Dean Lefstein can truly be considered the architect of the modern indigent defense reform movement.

25 Hanlon, *supra* note 16, at 32-33.

26 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006); *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf [<https://perma.cc/N55X-KMY7>] [hereinafter ABA Formal Op. 06-441].

27 MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (Am. Bar Ass'n 2016).

28 MODEL RULES r. 1.16.

29 MODEL RULES r. 1.16(a)(1).

30 *See infra* pages 80-85.

31 MODEL RULES r. 1.16(a).

32 *Id.*

33 561 So. 2d 1130 (Fla. 1990).

34 *Id.* at 1132.

35 *Id.*

36 *Id.* at 1131.

37 *Id.* at 1132.

38 *Id.* at 1133.

39 *Id.* at 1136.

40 *Id.*

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41 *Id.* at 1139. The court could not have been more blunt in explaining its rationale: “There can be no justification for their continued incarceration during the time that their constitutional rights are being ignored or violated.” *Id.*

42 See Stephen F. Hanlon, *Symposium: Boots on the Ground: The Ethical and Professional Battles of Public Defenders: State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 757 (2010).

43 *Id.*

44 *Id.* at 759.

45 *Id.*

46 *Id.* (citing *Lavallee v. Justices in the Hampden Super. Ct.*, 812 N.E.2d 895 (Mass. 2004)).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 759-60.

51 *Id.* at 760; *Lavallee*, 812 N.E.2d at 909.

52 See Hanlon, *supra* note 42, at 760 (citing Michael Levenson, *Officials Told to Testify in Public Defender Dispute*, BOS. GLOBE, Aug. 19, 2004, at B4).

53 *Id.* (citing *Cooper v. Reg’l Admin. Judge of the Dist. Ct. for Region V*, 854 N.E.2d 966, 969 (Mass. 2006)).

54 Arianna S. *ex rel.* Weber v. Mass., No. SJ 2004-0282 (Mass. Filed June 28, 2004). The author was one of the class counsel in this case.

55 Hanlon, *supra* note 42, at 760; see also H.B. 5038, 2004 Leg., 183rd Sess. (Mass. 2004).

56 See Hanlon, *supra* note 42, at 760 (citing University of Mich. Law School, *Case Profile*, CIVIL RIGHTS LING CLEARINGHOUSE, [available at https://www.clearinghouse.net/detail.php?id=11196&search=sourcegeneral;caseNameArianna%20S.;searchStateMA;orderbycaseSate,%20caseName](https://www.clearinghouse.net/detail.php?id=11196&search=sourcegeneral;caseNameArianna%20S.;searchStateMA;orderbycaseSate,%20caseName) [https://perma.cc/C57Y-ZUHZ] (last visited Nov. 5, 2017)).

57 *Id.* at 760-61.

58 *Id.* at 760.

59 *Id.*

60 *Id.* at 761.

61 *See generally* 561 So. 2d 1130 (Fla. 1990).

62 *See generally* Cooper v. Reg'l Admin. Judge of the Dist. Ct. for Region V, 854 N.E.2d 966 (Mass. 2006).

63 *Id.* at 969.

64 *State ex rel* Mo. Pub. Def. Comm'n v. Pratte, 298 S.W. 3d 870, 877-78 (Mo. 2009) (en banc).

65 *Id.*

66 *Id.* at 877.

67 *Id.*

68 *Id.*

69 *Id.*

70 *See* MO. PUBLIC DEFENDER CASELOAD RELIEF EFFORTS TIMELINE, AM. BAR ASS'N 3-4, available at https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/02/annual_summit_onindigentdefenseimprovement/ls_sclaid_annual_review_gross_mo_pub_def.authcheckdam.pdf [<https://perma.cc/2NNP-NKPX>] (last visited Nov. 5, 2017).

71 *Id.*; *State ex rel*. Mo. Pub. Def. Comm'n v. Waters, 370 S.W. 3d 592 (Mo. 2012) (en banc).

72 *Waters*, 370 S.W. 3d at 592-617.

73 *Id.* The author was lead counsel for the Missouri Public Defender in this case, and the American Bar Association (ABA) filed an amicus brief on behalf of the Missouri State Public Defender in this case. A year later, in 2013, the Florida Supreme Court similarly endorsed case refusal for a public defender faced with excessive caseloads. *See Pub. Def., Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261 (Fla. 2013). The ABA also filed an amicus in that case.

74 Andrew Lucas Blaize Davies, *How Do We "Do Data" in Public Defense?*, 78 ALB. L. REV. 1179, 1179 (2015).

75 *Waters*, 370 S.W.3d at 607-08.

76 [State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 67 \(Mo. 1981\)](#) (en banc).

77 Gross, *supra* note 1, at 262-63.

78 [Waters, 370 S.W.3d at 610-11](#).

79 In the author's experience representing and assisting public defenders during the last twenty years, this is what most public defender offices do to "resolve" the ethical problem presented by excessive caseloads. It is also what the preliminary data from the ABA workload studies we are currently conducting show. *See infra* notes 109-123 and accompanying text.

80 [Waters, 370 S.W.3d at 611](#).

81 *Id.*

82 *Id.*; [Strickland v. Washington, 466 U.S. 668, 688 \(1984\)](#).

83 *See Waters, 370 S.W.3d at 611*.

84 *Id.*

85 *Id.* (emphasis in original).

86 *Id.* at 612.

87 *Id.*

88 Gross, *supra* note 1, at 263. I argue elsewhere that there is such an implicit suggestion in *Waters*, but in any event it is only that, and it is not an explicit direction to trial courts, and Professor Gross' essential point on this issue is correct. *See Waters, 370 S.W. 3d at 638*.

89 *See generally Waters, 370 S.W.3d at 605-12*.

90 *Id.* at 598.

91 *Id.* at 605-12.

92 I discuss the need for public defenders to provide such reliable data at *infra* Part IV, at 74-76, especially note 123.

93 Gross, *supra* note 1, at 254.

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⁹⁴ Hanlon, *supra* note 42, at 768-69 (State supreme courts “have the authority and the responsibility to ensure competent representation” to combat “legislative underfunding of [the] indigent defense system.”).

⁹⁵ Lauren-Brooke Eisen & Inimai M. Chettiar, *39 Percent of Prisoners Should Not Be In Prison*, BRENNAN CTR. FOR JUST. (Dec. 9, 2016), <https://www.brennancenter.org/analysis/39-prisoners-should-not-be-prison> [<https://perma.cc/UK2K-VTER>].

⁹⁶ *Id.*

⁹⁷ *See generally* AM. BAR ASS’N, CRIMINAL JUSTICE SECTION COMM’N ON HOMELESSNESS & POVERTY: REP. TO THE HOUSE OF DELEGATES 1-21 (Feb. 2010), *available at* https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102c.authcheckdam.pdf [<https://perma.cc/JJ4T-LWNX>].

⁹⁸ *Id.* at 1. Of course, in the aftermath of the Department of Justice’s report on practices in the municipal courts of the City of Ferguson, Missouri, and the ongoing examination of how these lower level courts actually operate as revenue generators for cash-strapped state and local governments, serious attention must be paid to the problem of excessive fees and fines, even if they are made civil rather than criminal remedies.

⁹⁹ Oral Argument at 13:56, *Gideon v. Wainright*, 372 U.S. 355 (1963) (No. 155), <https://www.oyez.org/cases/1962/155> [<https://perma.cc/V5C7-R42W>] (last visited Oct. 18, 2017) (emphasis added).

¹⁰⁰ Brief for the Petitioner at 19-20, *Gideon v. Cochran*, 82 S. Ct. 1259 (1962) (No. 155).

¹⁰¹ 304 U.S. 458 (1938).

¹⁰² *Id.* at 468 (emphasis added).

¹⁰³ *Id.* (emphasis added in both).

¹⁰⁴ *Id.*

¹⁰⁵ Hanlon, *supra* note 42, at 755 (decades of denied attempts to address underfunding for indigent defense in United States).

¹⁰⁶ *State ex rel. Mo. Pub. Def Comm’n v. Pratte*, 298 S.W. 3d 870, 875-76 (Mo. 2009) (en banc).

¹⁰⁷ *Id.* (emphasis in original).

¹⁰⁸ *See generally State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W. 3d 592 (Mo. 2012) (en banc).

¹⁰⁹ *Id.*

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110 *Pratte*, 298 S.W. 3d at 873-74.

111 *Id.* at 880.

112 Dan Margolies, *Lawsuit Says Missouri Public Defender System Faces 'Urgent Constitutional Crisis'*, KCUR 89.3 (Mar. 9, 2017, 1:26PM), <http://kcur.org/post/lawsuit-says-missouri-public-defender-system-faces-urgent-constitutional-crisis#stream/0> [<https://perma.cc/3PA4-5GLU>].

113 Hanlon, *supra* note 16, at 35.

114 *Id.*

115 See THOMAS A. SCHWEICH, MO. STATE PUB. DEF. REP. NO. 2012-129, at 11-21 (2012), available at <https://www.ils.ny.gov/files/MO%20audit%20of%20PD%20system.pdf> [<https://perma.cc/D5TH-Y9GE>].

116 See NAT'L LEGAL AID & DEF. ASS'N, NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS: THE DEFENSE (1973), available at <http://www.nlada.org/defender-standards/national-advisory-commission/black-letter> [<https://perma.cc/Z9WM-C3FA>].

117 Hanlon, *supra* note 16, at 35; see SCHWEICH, *supra* note 115, at 11-21.

118 See SCHWEICH, *supra* note 115, at 11-21.

119 NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, at 34 (Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants 2012), available at https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads_supplement.authcheckdam.pdf [<https://perma.cc/8TEU-BNKY>].

120 *Id.* at 34-35 (Missouri auditor rejects NAC standards).

121 NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, at 250 (Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants 2011), available at https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf [<https://perma.cc/AWV3-KX27>] (litigation is "last resort" with discussion of litigation strategies).

122 Hanlon, *supra* note 11, at 650-52.

123 This work has been described in some detail elsewhere. See *id.* The four studies are available at www.indigentdefense.org. The author has been the ABA's Project Director for each of these studies. A fifth study is now being conducted in Indiana. At least five more studies are contemplated as part of this ABA project that seeks to replace the 1973 NAC Standards with data-driven, standards-based workload standards.

124 See Hanlon, *supra* note 16, at 33-34; Hanlon, *supra* note 42, at 762-768.

¹²⁵ See Hanlon, *supra* note 16, at 34-37.

¹²⁶ See generally *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W. 3d 592 (Mo. 2012) (en banc).

¹²⁷ See generally Order, *In re Karl William Hinkebein*, No. SC96089, MO. COURTS (Sept. 12, 2017), available at <https://www.courts.mo.gov/page.jsp?id=117575> [<https://perma.cc/T968-RJ2W>] [hereinafter Hinkebein Order].

¹²⁸ Brief for Respondent at 9, *Hinkebein*, No. SC96089, MO COURTS (May 17, 2017, 6:01 PM), available at <https://www.courts.mo.gov/file.jsp?id=115189>.

¹²⁹ *Id.*

¹³⁰ See Brief for Informant at 27, *Hinkebein*, No. SC96089, MOCOURTS (Apr. 28, 2017, 3:28 PM), available at <https://www.courts.mo.gov/file.jsp?id=115188> [<https://perma.cc/Y3RP-LTP7>].

¹³¹ Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case To the Governor*, NAT'L PUB. RADIO (Aug. 4, 2016, 12:34 PM), <https://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-govern> [<https://perma.cc/YMG5-QTTJ>].

¹³² Margolies, *supra* note 112.

¹³³ See Brief for Informant, *supra* note 130, at 27.

¹³⁴ See Brief for Respondent, *supra* note 128, at 9.

¹³⁵ See Brief for Informant, *supra* note 130, at 27.

¹³⁶ *Id.* at 28.

¹³⁷ Brief for Respondent, *supra* note 128, at 18.

¹³⁸ See Brief for Informant *supra* note 130, at 10, 26-27, 43.

¹³⁹ *Id.* at 7, 45.

¹⁴⁰ See Brief for Respondent, *supra* note 128, at 17-18, 22; *but see* Brief for Informant, note 130, at 46 (“the evidence does not suggest that Respondent intentionally set out to harm his clients”).

¹⁴¹ Brief for Informant, *supra* note 130, at 8.

142 *Id.*

143 *Id.*

144 *Id.* at 9.

145 Brief for Respondent, *supra* note 128, at 10, 15

146 *Id.* at 21.

147 *See* Brief for Informant, *supra* note 130, at 43.

148 *Id.* (citing *State ex rel. Mo. Pub. Def Comm'n v. Pratte*, 298 S.W.3d 870, 880 (Mo. 2009) (en banc)).

149 *Id.* at 43, 47; ABA Formal Op. 06-441, *supra* note 26.

150 *See* Brief for Informant, *supra* note 130, at 43 (citing *Pratte*, 298 S.W.3d at 880); ABA Formal Op. 06-441, *supra* note 26, at 3.

151 Hinkebein Order, *supra* note 127.

152 *See* Hanlon, *supra* note 16, at 32.

153 *See id.* at 32-33.

154 *See id.* at 32.

155 Hinkebein Order, *supra* note 127.

156 *See generally supra* pages 60-62.

157 The ABA's Eight Guidelines provide in the Comment to Guideline 6 that "[n]ormally, Providers, rather than individual lawyers, will take the initiative and move to suspend new case assignments and, if necessary, move to withdraw from cases since the Provider has the responsibility to monitor lawyer workloads." AM BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOAD 12 (2009), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_eight_guidelines.authcheckdam.pdf [<https://perma.cc/J2UV-RZPY>] [hereinafter ABA EIGHT GUIDELINES].

158 *See* LEFSTEIN, *supra* note 119, at 30-34.

¹⁵⁹ See Hanlon, *supra* note 42, at 767 n. 106.

¹⁶⁰ The four studies are available at https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement.html [<https://perma.cc/2BYY-ZYNA>].

¹⁶¹ While no formal study has been conducted with respect to public defender caseloads generally, the author's experience in representing and advising public defenders for over twenty years confirms this fact.

¹⁶² Accordingly, this Article does not address the kinds of case refusal motions that have been attempted in the past, including individual actions by public defenders and assigned counsel, actions seeking relief from a certain class of cases, actions based on the 1973 NAC standards, and the traditional action composed of caseload statistics, reports, anecdotes, documentary evidence and expert opinion testimony untethered to any reliable data-based, standards-based standard. Rather, I address here a new kind of case refusal motion grounded on reliable data and analytics, such as the ABA data-based, standards-based workload studies described in this Article.

¹⁶³ See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016).

¹⁶⁴ MODEL RULES r. 1.7(a).

¹⁶⁵ MODEL RULES r. 1.7(a)(2). As noted above, Professor Gross makes no reference whatsoever to the applicability of the Model Rules of Professional Conduct in his analysis of the choices a public defender faces when presented with a concurrent conflict because of excessive caseloads. See *supra* notes 1, 12 and accompanying text. Virtually all of the case refusal cases and all of the prior written commentary on this issue are driven by reference to this binding ethical obligation on all lawyers, including public defenders. Now that *Hinkebein* has made it abundantly clear that public defenders who ignore the commands of Rule 1.7 and 1.16 are risking their own professional lives, it is simply impossible to ignore the Rules of Professional Conduct in any serious analysis of the problem of excessive caseloads.

¹⁶⁶ See LEFSTEIN, *supra* note 119, at 9, 40.

¹⁶⁷ See *supra* note 123 and accompanying text. Of course, we should support this claim with expert testimony with respect to both the data and analytics provided and the lived experience of public defenders working in that system, including their inability to provide reasonably effective assistance of counsel pursuant to prevailing professional norms to all of their clients because of their excessive caseloads.

¹⁶⁸ See e.g., RUBIN BROWN, THE MISSOURI PROJECT REPORT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 22-26 (Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants 2014), available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lis_sclaid_5c_the_missouri_project_report_tauthcheckdam.pdf [<http://perma.cc/QSP8-5CEQ>].

¹⁶⁹ See LEFSTEIN, *supra* note 119, at 12-13 (referencing malpractice claims for attorney negligence).

¹⁷⁰ See MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2016).

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- ¹⁷¹ This obviously includes Model Rule 1.7(a)(2)'s prohibition on concurrent conflicts. See MODEL RULES r. 1.7(a)(2), as well as the other Model Rules that would invariably be compromised in the event of a concurrent conflict resulting from excessive caseloads. *See, e.g.*, MODEL RULES r. 1.1 (Competence); MODEL RULES r. 1.3 (Diligence); and MODEL RULES r. 1.4 (Communication). Such "other law" would, of course, include the Sixth Amendment to the U.S. Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963).
- ¹⁷² *See* MODEL RULES r. 1.16(a)(1). Model Rule 1.16 (c) provides: "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." *Id.* In the vast majority of jurisdictions, withdrawal from representation requires judicial approval for withdrawal. *See* MODEL RULES r. 1.16 cmt. 3, 7.
- ¹⁷³ MODEL RULES r. 1.16(d).
- ¹⁷⁴ *Id.*
- ¹⁷⁵ MODEL RULES r. 1.16 cmt. 9.
- ¹⁷⁶ *See* MODEL RULES r. 1.16(d).
- ¹⁷⁷ *See id.*
- ¹⁷⁸ *See id.* Subsection (d) uses the word "employment," and not "obtain" with respect to the withdrawing lawyer's obligation to ask to court to give the client a reasonable period of time to secure other counsel. *Id.* So, at this point it is clear that the drafters of subsection (d) were not thinking of the withdrawing public defender's obligation to protect the interests of the client. And, the rest of the examples given in Subsection (d) similarly contemplate a withdrawing private practitioner, not a withdrawing public defender. But, the point is that both the withdrawing private practitioner and the withdrawing public defender have an obligation under the rule to "take steps to the extent reasonably practicable to protect a client's interests." MODEL RULES r. 1.16(d). Or, in the words of the Comment to the rule, to "take all reasonable steps to mitigate the consequences to the client." MODEL RULES r. 1.16 cmt. 9.
- ¹⁷⁹ *See* MODEL RULES r. 1.7(a); MODEL RULES r. 1.16 cmt. 1.
- ¹⁸⁰ MODEL RULES r. 1.7(a).
- ¹⁸¹ *See* MODEL RULES r. 1.16(d).
- ¹⁸² *See* LEFSTEIN, *supra* note 119, at 8, 30-34.
- ¹⁸³ *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W. 3d 592, 605 (Mo. 2012) (en banc). To the extent that slightly different language exists in various statutes in other states (and it does), the relevant point is that there is a reason why a public defender shows up in a courtroom to defend a person eligible for the public defender's services: a state or local law provides in one way or another for representation of all eligible persons by the public defender.
- ¹⁸⁴ *Id.* "[S]tatutes must be read with the presumption that the General Assembly 'did not intend to violate the constitution.'" *Id.* (citation omitted). Similarly, the ABA's Eight Guidelines refer to "the implicit premise that governments, which establish and fund

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providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules.” ABA EIGHT GUIDELINES, *supra* note 157, at 11.

185 *See generally Waters*, 370 S.W. 3d 592.

186 *Id.*

187 ABA Formal Op. 06-441, *supra* note 26, at 4.

188 *Id.* at 5.

189 *Id.*

190 *Id.* at 3-5.

191 MODEL RULES OF PROF’L CONDUCT r. 1.16(d) (AM. BAR ASS’N 2016).

192 ABA Formal Op. 06-441, *supra* note 26, at 3-5.

193 MODEL RULES r. 1.16(d).

194 *See supra* note 167 and accompanying text. The reference here is to public defender offices with approximately one-fifth to one-third of the lawyers needed to provide reasonably effective assistance of counsel pursuant to prevailing professional norms.

195 ABA Formal Op. 06-441, *supra* note 26, at 6.

196 *Id.* at 4-6.

197 For a more detailed description of such a motion, see *infra* Part VI.

198 *See State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W. 3d 592, 601-02 (Mo. 2012) (en banc)).

199 *Id.* at 601. Such an appointment is typically a necessary step for representation by the public defender in a state that has a statute that provides that a public defender “shall represent” all eligible individuals.

200 *Id.*

201 *Id.*

202 *Id.* The existence of this validly enacted rule is not essential to the import of the decision in *Waters*. The rule simply provided a

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presumption of validity for the public defender's protocol. But as would soon become apparent, the protocol and the rule relied on the unreliable 1973 NAC Standards, and when the state auditor pointed that out, the presumptive validity of the rule vanished, and case refusal in Missouri came to an end. *See supra* Part IV. It is the Sixth Amendment holding and the Rules of Professional Conduct holding that establish the compelling precedent that *Waters* stands for. The factual predicate for those claims is now available with reliable data and analytics. *Id.* Those claims are far stronger claims than the claim based on a rule and a protocol supported by an unreliable 1973 standard.

203 *Waters*, 370 S.W. 3d at 601.

204 *Id.* at 602.

205 *Id.* at 601-02.

206 *Id.* at 602-06.

207 *Id.* at 612.

208 *Id.*

209 *Id.* Statewide evidence of excessive caseloads will usually need to be presented to respond to the normal judicial reaction to excessive caseloads occurring in one district by asking if the problem could be solved by simply reassigning public defenders from one district to another. The court needs to be shown that such a "remedy" is akin to a whack-a-mole game, where one attempts to solve a capacity problem in one district only to have the same capacity problem pop up in the district whose lawyers were reassigned, ad infinitum.

210 MODEL RULES OF PROF'L CONDUCT r. 1.16(d) (AM. BAR ASS'N 2016).

211 *Id.*

212 *See generally* ABA Formal Op. 06-441, *supra* note 26.

213 MODEL RULES r. 1.16(d).

214 Gross, *supra* note 1, at 266.

215 *See generally* MODEL RULES r. 1.16(d).

216 *See generally id.*

217 MODEL RULES r. 1.7.

218 *See generally* MODEL RULES r. 1.16; Gross, *supra* note 1, at 266.

²¹⁹ See Hanlon, *supra* note 11, at 650-53; *see also supra* note 123.

²²⁰ See generally Gross, *supra* note 1.

²²¹ See generally Hanlon, *supra* note 16.

²²² *Id.*

²²³ See *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W. 3d 592, 611-12 (Mo. 2012) (en banc).

²²⁴ *Id.*

²²⁵ See ABA EIGHT GUIDELINES, *supra* note 157.

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