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# NOTES

## Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double Standard

STEPHANIE L. MCALISTER†

*That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.*

—U.S. Supreme Court Justice Hugo Black, *Gideon v. Wainwright*,  
372 U.S. 335, 344 (1963).

### I. INTRODUCTION

Few points of constitutional law captivate the American public like the holding of *Gideon v. Wainwright*. Conveyed to the public via history class and television Miranda warnings, the decision represents the rare intersection of modern popular culture and constitutional philosophy. It also represents the less publicized interplay between the state's duties to the accused and the appointed lawyer's duties to the client. It is this interplay that has become the center of a crisis for the Miami-Dade Public Defender.

Underfunding of the Miami-Dade Public Defender's Office<sup>1</sup> creates a substantial risk that its lawyers will be unable to fulfill ethical obligations to clients,<sup>2</sup> as defined by the *Florida Rules of Professional Con-*

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† J.D. 2010, Articles and Comments Editor of the University of Miami Law Review. Thanks to all four of my parents, David and Cathy McAlister and Sandy and Doug Galloway, for their encouragement, support, and occasional financial contributions. Thanks to Jonel Newman for her advice and help with this note.

1. The Public Defender for Miami-Dade County is also known (perhaps more technically) as the Public Defender for the Eleventh Judicial Circuit of Florida. However, the Eleventh Judicial Circuit encompasses only Miami-Dade County, so the terms are used interchangeably. The Public Defender's Office for Miami-Dade County/the Eleventh Judicial Circuit is also commonly abbreviated as PD-11, which will also be used throughout this paper.

2. In fact, the Miami-Dade Public Defender has repeatedly publicly stated that the office's

*duct*.<sup>3</sup> The underfunding of the public defender specifically affects the obligations relating to competence,<sup>4</sup> diligence,<sup>5</sup> communication with clients,<sup>6</sup> and conflicts of interest.<sup>7</sup> The Rules apply to all Florida lawyers, regardless of whether they work in law firms, as in-house counsel for a corporation, or for the government.<sup>8</sup>

In spite of this, the practical meaning of the Rules is different for lawyers working in the Miami-Dade Public Defender's office, who are rarely disciplined by the Florida Bar, than for most other practicing attorneys. A public defender's failure to comply with the Rules is likely overlooked because it is involuntary or probably often inevitable. Consistent underfunding of the Florida judiciary has caused a simultaneous increase in caseloads and decrease in personnel in county public defender's offices. This forces attorneys in the public defender's offices into an ethical quagmire, requiring them to trade time spent on one case for the interests of a different client. While that attorney is certainly less blameworthy than the private attorney who bills clients for time spent on the golf course, the blameworthiness of the attorney is ultimately irrelevant to the true beneficiaries of the Rules—the clients. The clients of the overloaded public defender and the willfully neglectful private attorney find themselves in the exact same situation. Both may receive representation that is inadequate, but only one group receives redress through the Rules that were created to protect them all. This note argues for the elimination of this ethical double standard through adequate funding of Miami-Dade's Public Defender.

A helpful starting point for analysis is the history of the development of the problem, beginning with the development of the doctrine regarding the right underlying the system itself. Part II of this note then surveys the funding crisis for indigent defense on a national and state level. Part III addresses the problem within Miami-Dade County, comparing recommended caseload standards with actual caseloads at PD-11

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lawyers are unable to comply with state ethical rules because of high caseloads. *See, e.g.*, Motion To Appoint Other Counsel in Appointed Noncapital Felony Cases Due to Conflict of Interest, State v. Munoz, No. F08-2314 (Fla. Cir. Ct. June 24, 2008) [hereinafter Public Defender's Motion]; Susannah A. Nesmith, *Dade Public Defender: Caseload Is Untenable*, MIAMI HERALD, July 31, 2008, at B1; Jan Pudlow, *PD-11 Grapples with Increased Caseloads and High Rate of Public Defender Turnover*, FLA. BAR NEWS, Nov. 15, 2008, at 1.

3. *See* RULES REGULATING THE FLA. BAR ch. 4 (2008) (listing the Florida's *Rules of Professional Conduct*).

4. *See* FLA. RULES OF PROF'L CONDUCT R. 4-1.1 (2008).

5. *See id.* at R. 4-1.3.

6. *See id.* at R. 4-1.4.

7. *See id.* at R. 4-1.7.

8. *See* Shreiber v. Rowe, 814 So. 2d 396, 398 (Fla. 2002) ("The public defender is an advocate, who, once appointed, owes a duty only to his client. His role does not differ from that of a privately retained counsel." (quoting Windsor v. Gibson, 424 So. 2d 888 (Fla. 1st DCA 1982))).

and discussing the ethical rules implicated. Part IV offers potential solutions to the problem, and Part V ultimately concludes that the answer is simply adequate funding.

A. *A Brief History of the 6th Amendment Right to Counsel that Underlies Modern Indigent Defense Systems*

The indigent defense system as we know it is a fairly recent development. For most of our country's history, "indigent defense" was not a widely recognized legal concept. Instead, indigent status generally meant no defense (by an attorney) was available. Only over the past eighty years has there been a recognized right to counsel for indigent defendants in the United States.

In 1932, the Supreme Court determined that due process requires representation by counsel for indigent defendants on trial for capital offenses.<sup>9</sup> For the next thirty years, only defendants whose crimes were punishable by death had a right to counsel in the United States. In the seminal case *Gideon v. Wainwright*, decided in 1963, the Supreme Court held that the Sixth Amendment provides indigent defendants in serious criminal cases in state courts with a Constitutional right to representation by counsel.<sup>10</sup> The same year, the right to counsel was expanded to include indigent defendants appealing their first conviction.<sup>11</sup>

While the existence of a right to counsel is the baseline of the guaranteed due process for indigent defendants, the right means little if the counsel provided is permitted to be inadequate. The Supreme Court recognized this principle in *Strickland v. Washington*, where it held that the Sixth Amendment's guarantee of representation is a guarantee to representation that is effective.<sup>12</sup> The Court stated, "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."<sup>13</sup>

However, this guarantee of effectiveness is narrower than it may seem. The standard articulated by the Court to judge the effectiveness of counsel is relatively difficult for defendants to meet. That standard is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>14</sup> The Court imposed a two-pronged test to determine if counsel has been ineffective: (1) counsel's performance must have been

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9. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

10. 372 U.S. 335, 339, 345 (1963).

11. *Douglas v. California*, 372 U.S. 353, 356-58 (1963).

12. 466 U.S. 668, 686 (1984).

13. *Id.* at 685.

14. *Id.* at 686.

deficient (counsel must have “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment”) and (2) the inadequate performance prejudiced the defense (“Counsel’s errors were so serious as to deprive the defendant of a fair trial.”).<sup>15</sup>

The first prong, deficiency of performance, is measured by an objective standard of reasonableness “under prevailing professional norms.”<sup>16</sup> However, courts recognize that there is a range of conduct that is acceptable by attorneys. The *Strickland* Court held that there is therefore a “strong presumption” that counsel’s conduct was professionally reasonable.<sup>17</sup> The second prong, prejudice to the defense, is only met when the outcome of the proceeding would have been different if counsel’s performance had not been deficient.<sup>18</sup> The defendant has the burden of proof to show that each prong has been met.<sup>19</sup> These factors combine to make effective assistance claims difficult for defendants to win.

Thus, the current understanding of the Sixth Amendment right to counsel is that it applies to all defendants facing possible incarceration, and that the only real guarantee is for counsel that is not so defective that it undermines the entire judicial process. These are the conceptions of the rights of the accused that underlie modern indigent defense systems, including the Miami-Dade Public Defender’s Office.

### B. *Prospective Protection of Defendants’ Sixth Amendment Rights*

It is important to note that not every Sixth Amendment issue is handled the same way. Prospective protection of defendants’ right to counsel (the prevention of future harm) is handled differently than attempts to create a retrospective remedy for violation of the right (the compensation of past harm). While it is the most important measure of effective assistance of counsel in American jurisprudence, the *Strickland* test applies only when a convicted defendant seeks the *remedy* of reversal of his conviction *after* his attorney has failed to provide effective assistance.<sup>20</sup> At that point, the parties have already conducted an entire trial. Concerns relating to finality, the deterrent effect that extensive post-trial burdens might have on counsel deciding whether to accept

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15. *Id.* at 687.

16. *Id.* at 688.

17. *Id.* at 689.

18. *See id.* at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

19. *Id.* at 687.

20. *See id.*

cases, and the independence of counsel justify a deferential approach to judging the conduct of counsel after the fact.<sup>21</sup>

However, the Eleventh Circuit Court of Appeals noted that where a lawyer seeks to protect a client's constitutional rights *before* the trial is over and *before* a client has been convicted, the *Strickland* test is not the appropriate measure of performance or conduct. In *Luckey v. Harris*, a plaintiff class of indigent persons accused of crimes in Georgia alleged that systemic flaws in the state indigent defense system violated their Sixth Amendment rights.<sup>22</sup> The court held that the plaintiffs did not have to show the "future inevitability of ineffective assistance of counsel" to state a claim for relief (i.e., that the *Strickland* standards did not apply).<sup>23</sup> The Court reasoned that the Sixth Amendment also protects rights that do not affect the outcome of a trial, so that "deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial."<sup>24</sup> Thus, the traditional *Strickland* requirement of a showing of prejudice is not necessary for cases in which a defendant seeks prospective protection because the same concerns are not implicated. "Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to a question of whether such a right exists and can be protected prospectively."<sup>25</sup>

The standard for plaintiffs seeking prospective relief in Sixth Amendment cases is thus significantly lower, at least in federal courts within the Eleventh Circuit. The appropriate standard for prospective relief claims is that plaintiffs must show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."<sup>26</sup> In *Luckey*, the Court held that plaintiffs met this standard by alleging

systemic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, . . . that their attorneys are denied investigative and expert resources necessary to defend them effectively, [and] that their attorneys are pressured by courts to hurry their case to trial or to enter a

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21. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *rev'd on other grounds sub nom. Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992) (citing *Strickland*, 466 U.S. at 690).

22. *Id.* at 1013.

23. *Id.* at 1016–17.

24. *Id.* at 1017.

25. *Id.*

26. *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

guilty plea . . . .<sup>27</sup>

As explained in later sections of this paper, these types of allegations mirror the reality faced by public defenders in Miami-Dade County and throughout the country.

In Florida, the First District Court of Appeal has taken a similar approach to a Sixth Amendment claim by an indigent defendant before trial. In *Scott v. State*, the court stated, “Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)’s interests. Any prejudicial effect on the adequacy of counsel’s representation is presumed harmful. Viewed prospectively, any substantial risk of harm is deemed prejudicial.”<sup>28</sup> The conflict of interest claim in *Scott* was based on the public defender’s concurrent representation of a key witness in the defendant’s case, not systemic problems in the indigent defense structure.<sup>29</sup> However, the cause of the harm is irrelevant; what triggers the prospective relief standard articulated in *Luckey* and *Scott* is the timing of the claim—early in the case, before the harm to the client has occurred. Ideally, effective use of the standard prevents the harm.

Prospective relief claims like those in *Luckey* and *Scott* reflect the intersection of the constitutional and ethical obligations of appointed counsel. Under the *Strickland* test, a defendant’s attorney can fail to meet his ethical obligations, but nevertheless be found to have been “effective” because his deficiencies did not affect the trial’s outcome. However, the standard articulated and applied in *Luckey* suggests that at the pre-trial stage, the constitutional and ethical obligations (at least in the Eleventh Circuit) come closer to converging. The plaintiff’s claims in *Luckey* are similar to the types of complaints made to the Florida Bar regarding lawyers’ ethical duties to clients. For example, the claim in *Luckey* that appointed counsel is unable to investigate cases or access experts is analogous to Bar complaints that an attorney has failed to provide competent representation through adequate preparation and investigation,<sup>30</sup> and to act diligently.<sup>31</sup> The claim in *Luckey* that

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27. *Id.* at 1018.

28. *Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008).

29. *Id.*

30. *See Fla. Bar v. Jordan*, 705 So. 2d 1387, 1388–89, 1391 (Fla. 1998) (per curiam) (imposing a one-year suspension for repeated failures to prepare a client’s case and to meet deadlines, which ultimately resulted in dismissal of the case); *Fla. Bar v. Roberts*, 689 So. 2d 1049, 1051 (Fla. 1997) (per curiam) (holding that failure to provide competent representation is ethical violation even in the absence of intentional misrepresentation or fraud); *Fla. Bar v. Sandstrom*, 609 So. 2d 583, 583–84 (Fla. 1992) (per curiam) (holding that inadequate investigation into cause of death of client’s alleged murder victim constitutes failure to adequately prepare for representation of client and is grounds for sixty-day suspension).

31. *See Fla. Bar v. Smith*, 866 So. 2d 41, 46–47, 49 (Fla. 2004) (per curiam) (stating that

appointed counsel is pressured by the courts to rush cases is akin to a complaint that a lawyer has breached his ethical duty to remain free from conflicts of interest and maintain independent professional judgment.<sup>32</sup> This convergence demonstrates the importance of enabling attorneys to meet their ethical obligations—an attorney that fails to meet ethical standards is unlikely to succeed in meeting constitutional standards. Thus, the *Rules of Professional Conduct* can serve not only as a regulator of attorney behavior, but as an additional safeguard for indigent defendants' Sixth Amendment rights.

## II. THE PROBLEM: INADEQUATE FUNDING FOR LOCAL INDIGENT DEFENSE

### A. *The Problem on a National Scale*

Indigent defense systems nationwide are chronically underfunded, forcing individual lawyers to carry excessive caseloads.<sup>33</sup> Studies have shown that as a result of systematic underfunding of the nation's indigent defense offices, "most state indigent defense systems across the country are consistently operating in crisis mode, barely able to function and increasingly unable to handle the number of cases that cycle through those systems each day."<sup>34</sup> Examples of public defenders forced to provide inadequate defense due to underfunding and the subsequent excessive caseloads are rampant.<sup>35</sup> As of November 2008, public defenders' offices in seven states were refusing to take on new cases or had sued to limit them, on the grounds that excessive workloads made it impossible to fulfill their constitutional duties.<sup>36</sup> In Missouri, the indigent defense

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pattern of neglect over one and a half years, even without any prior disciplinary record, may constitute violation of ethical rules, including diligence requirement); Fla. Bar v. Whitaker, 596 So. 2d 672, 673–74 (Fla. 1992) (per curiam) (imposing public reprimand where lawyer failed to file suit on behalf of client before the claim was time-barred).

32. See *In re Certification of Conflict*, 636 So. 2d 18, 19 (Fla. 1994); *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1135 (Fla. 1990) (per curiam).

33. See generally U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULL. NO. NCJ 184932, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999 (2000), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=996> (surveying indigent criminal defense services in most populous counties).

34. Jessica Hafkin, *A Lawyer's Ethical Obligation To Refuse New Cases or To Withdraw from Existing Ones When Faced with Excessive Caseloads That Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657, 658 (2007).

35. See generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1035–36 (2006) (discussing examples of specific public defender offices providing inadequate defense, as well as entire indigent defense systems that have been "viewed as essentially incapable of preserving fundamental constitutional rights").

36. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

system has not increased its staff in eight years, while its annual caseload has risen by 12,000.<sup>37</sup> In New York City, funding for criminal defense fell by \$2.7 million in 2008, while the annual number of cases has grown by 16,000 since 2006.<sup>38</sup> Kentucky's state public advocate, who recently sued to limit public defender caseloads in his state, explained the magnitude of the crisis: "Since Gideon, I don't remember a time when the challenges to adequate representation have been so great."<sup>39</sup>

The most alarming result of the nationwide problems plaguing indigent defense systems is that, contrary to the purpose of both the Sixth Amendment and the very concept of indigent defense, innocent people may go to jail while the actual perpetrator remains free.<sup>40</sup> Innocent defendants, recognizing that their lawyers are unable to spend the required time to put on a real defense, may feel pressure to plead guilty rather than risk a conviction at trial.<sup>41</sup> This type of risk-benefit analysis forced upon defendants is constitutionally unacceptable, and facilitating that choice for clients is ethically unacceptable for attorneys. The widespread existence of inadequately funded public defenders' offices nationwide points to an alarming conclusion: Although the right to representation by effective counsel exists doctrinally, the current state of inadequate funding for indigent defense systems nationwide threatens its existence in reality.<sup>42</sup>

### B. *The Problem in Florida*

The Sunshine State is not exempt from the growing nationwide indigent defense crisis. The problem in Florida is similar to the problems experienced across the country—too little money, too few attorneys, and too many defendants.

At the heart of the problem is inadequate funding. Funding for Florida's judicial branch as a whole, including its public defender's offices, is allocated by the Legislature, and the judiciary has no control over the amount appropriated.<sup>43</sup> The absence of any real influence in appropria-

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37. *Id.*

38. *Id.*

39. *Id.*

40. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA, GIDEON'S Broken Promise 16 (2004) [hereinafter GIDEON'S Broken Promise].

41. Eckholm, *supra* note 36.

42. See Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734–35 (2005) (explaining how the practical consequences of inadequate funding interfere with the right to counsel).

43. FLA. CONST. art. V, § 14 (providing that the court systems will be funded from "state revenues appropriated by general law" and "[t]he judiciary shall have no power to fix appropriations"); see also Jordana Mishory, *Foster Care, Court Funding Top the Docket for Fla.*

tions decisions may explain why the state judiciary's budget constitutes only seven tenths of one percent of the state's \$66 billion budget.<sup>44</sup> Despite this, court spending has been reduced by \$44 million in the past two years, causing a nine percent reduction in personnel.<sup>45</sup> Florida Supreme Court Justice Peggy A. Quince, who ascended to that office in July 2008, publicly stated that resolving court funding problems is a top priority during her two-year term as Chief.<sup>46</sup> Quince urges legislators "to treat the judiciary as a co-equal third branch of government, not another state agency."<sup>47</sup>

The inadequate funding for the judicial branch as a whole has translated into major difficulties for the state's indigent defense systems.<sup>48</sup> However, underfunding is not a new problem for Florida's public defenders.<sup>49</sup> Most notably, in 2005 the Broward Public Defender forbade his attorneys from advising indigent clients to plead guilty at arraignment without first having "meaningful contact" with them.<sup>50</sup> The policy was the result of a determination that public defenders are often ill-informed about clients' cases when advising them whether or not to accept a plea.<sup>51</sup> At that time, about eighty percent of all criminal defendants in Broward County pled guilty at arraignment.<sup>52</sup> Public Defender Howard Finkelstein explained how an excessively high caseload translates into a so-called "meet, greet, and plead" policy: "They meet with an attorney for sixty seconds, then they plead guilty and surrender their rights."<sup>53</sup>

Although the state has seen extremely serious problems in indigent

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*High Court's New Chief*, DAILY BUS. REV., July 1, 2008, at 1 (discussing Florida judges' requests for court funding from legislature).

44. Jan Pudlow, *Quince Takes Court's Helm*, FLA. BAR NEWS, July 15, 2008, at 1, 9.

45. *Chief Justice Quince's Initiatives*, FLA. BAR J., Oct. 1, 2008, at 19, 20.

46. *Id.*

47. *Id.*

48. While this paper focuses on how Florida's funding crisis has affected its public defenders, it is not meant to detract from how profoundly the lack of funding has affected other areas of the criminal justice system. Prosecutors, police, prison personnel, and the courts themselves are struggling to continue operations in the face of tighter budgets. For a brief explanation of how these other state offices and agencies have been affected, see Gary Blankenship, *Criminal Law Section Sets Out To Find Court Budget Solutions*, FLA. BAR NEWS, Aug. 15, 2008, at 1.

49. For discussions of similar problems experienced in Florida over the past twenty years, see, for example, Bob Levenson, *So Many Clients-So Little Time: Public Defenders Ask To Drop Cases*, ORLANDO SENTINEL, Feb. 5, 1989, at B1; John Pacenti, *Massive Cuts Loom over State's Judicial System*, PALM BEACH POST, Oct. 5, 2001, at 1A; and Andres Viglucci, *Public Defender Seeks Relief from 500 Juvenile Cases*, MIAMI HERALD, Oct. 26, 1992, at 2B.

50. Dan Christensen, *Broward PD Says No to Instant Plea Deals*, DAILY BUS. REV., June 6, 2005, at 1.

51. *Id.*

52. *Id.*

53. *Id.*

defense before, the current crisis is unique. Legislative action in the past three years has drastically changed the landscape of indigent defense in Florida. Before 2007, private attorneys were appointed from a registry to represent indigent defendants when the local public defender's office had a conflict of interest.<sup>54</sup> That year, the Legislature created a system of regional offices, the Offices of Criminal Conflict and Civil Regional Counsel, to handle such conflict cases.<sup>55</sup> The Legislature provided that the state's five offices be staffed by a total of 384 lawyers, paralegals and investigators, who would handle about 33,000 cases a year, an arrangement critics called "unrealistic."<sup>56</sup>

Under the new system, private attorneys are only appointed from a registry (as in the old system) in cases where both the public defender and the regional offices are conflicted.<sup>57</sup> The fees that may be paid to the private attorneys are capped for each category of case, ranging from \$1,000 for misdemeanors to \$15,000 for death penalty cases.<sup>58</sup> Compared to the old system, where some attorneys billed the state over \$150,000 for their representation of indigent defendants in capital cases, the maximum fees fail to adequately compensate the specially trained attorneys who handle death penalty cases.<sup>59</sup> The arrangement drew criticism from the Bar before it was even put into effect—attorneys called the fees "unreasonably low" and some predicted that private attorneys would simply stop accepting capital cases altogether.<sup>60</sup>

The effects of the 2007 re-structuring were worsened by drastic budget cuts in 2008. The 2007–2008 fiscal year saw three rounds of budget cuts, including "current year cuts."<sup>61</sup> These types of budget cuts occur after the current year's personnel and operations have already been planned for and begun operations; thus, such "current year cuts" often result in substantial disruption.<sup>62</sup> The 2008 budget cuts caused the state court system to eliminate the equivalent of 268.25 full-time positions,<sup>63</sup> and prompted concern from Florida agencies relating to law

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54. Susannah A. Nesmith & Trenton Daniel, *Legal Plan for Poor Faulted*, MIAMI HERALD, May 5, 2007, at 1B.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (quoting Miami lawyer Bruce Fleisher as saying the process in death cases is "long and 'gut wrenching'" and that "no one's going to do that for \$15,000").

60. *Id.*

61. *Impact of the Budget Cuts on the Court System*, FULL COURT PRESS (State Courts Sys. of Fla., Tallahassee, Fla.), Summer 2008, at 2, available at [http://www.flcourts.org/gen\\_public/pubs/bin/fcp\\_summer08.pdf](http://www.flcourts.org/gen_public/pubs/bin/fcp_summer08.pdf)

62. *Id.*

63. *Id.*

enforcement, as well as the business community.<sup>64</sup>

Public Defender's offices across the state are experiencing difficulties as a result of the budget cuts. During a fifteen-month period in 2007 and 2008, the Fifth Circuit Public Defender's Office<sup>65</sup> was forced to eliminate five full-time attorney positions and leave another five positions unfilled.<sup>66</sup> The Eighth Circuit Public Defender stated, "We are struggling to provide even minimally acceptable services to the clients who are assigned to us."<sup>67</sup> By June 2008, the Miami-Dade Public Defender began refusing to represent certain defendants because of the budget cuts and public defenders in Broward, Pasco, and Pinellas Counties were threatening similar action.<sup>68</sup> In November of that year, a Twelfth Circuit judge in Manatee County forced attorneys to take criminal cases because both the Public Defender and Regional Counsel offices were conflicted, and there were not enough private attorneys listed on the appointment registry.<sup>69</sup> One appointed lawyer claimed that if his placement on the so-called "Involuntary Appointment List" required him to represent his assigned indigent client in a RICO case, it may bankrupt him and shut down his practice.<sup>70</sup> The affected lawyers blame the Legislature for their predicament, stating that if the Public Defender's Office and Regional Counsel offices were adequately funded, there would be no shortage of available attorneys.<sup>71</sup>

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64. Gary Blankenship, *Building Support for Court Funding*, FLA. BAR NEWS, Nov. 15, 2008, at 1, 1.

65. The Fifth Judicial Circuit encompasses Citrus, Hernando, Lake Marion, and Sumter Counties. See Florida State Circuit Courts, <http://www.flcourts.org/courts/circuit/circuit.shtml> (last visited May 31, 2010).

66. Suevon Lee, *What Is the Breaking Point for the Public Defender's Office?*, Ocala Star-Banner, Oct. 6, 2008, available at [http://www.ocala.com/article/20081006/NEWS/810050341/1001/NEWS01?Title=breaking\\_point\\_for\\_Public\\_Defender\\_s\\_Office](http://www.ocala.com/article/20081006/NEWS/810050341/1001/NEWS01?Title=breaking_point_for_Public_Defender_s_Office) (last visited Aug. 15, 2010).

67. Blankenship, *supra* note 64, at 5.

68. Susannah E. Nesmith, *Dade Defender's Office Refuses Cases*, MIAMI HERALD, June 24, 2008.

69. Gary Blankenship, *Lawyers Being Forced To Take Criminal Cases*, FLA. BAR NEWS, Nov. 15, 2008, at 1, 16; see also *Could Compelled Appointments Be Coming to Your Circuit?*, FLA. BAR NEWS, Nov. 15, 2008, at 17, 17.

70. Blankenship, *supra* note 69, at 16. The lawyer, Gregory Hagopian, successfully petitioned the Second District Court of Appeal to quash the denial of his motion to withdraw as counsel in the RICO case on the ground that he could not ethically represent his client. *Hagopian v. Justice Admin. Comm'n*, 18 So. 2d 625 (Fla. 2d DCA 2009).

71. Blankenship, *supra* note 69, at 16 ("Nowhere in the Constitution does it say a local lawyer has to shut down their practice to make sure a person is represented properly. What it says is the government will provide you with an attorney free of charge, and that is not being done right now.").

III. MIAMI-DADE COUNTY AND THE PUBLIC DEFENDER FOR THE ELEVENTH CIRCUIT: "THE DETERIORATING SITUATION HAS REACHED A CRITICAL MASS"<sup>72</sup>

The Miami-Dade Public Defender's Office, which has been named the nation's most outstanding public defender's office,<sup>73</sup> has been struggling to continue operations since the Legislature finalized the 2008–2009 budget in May 2008. However, this situation has been building slowly over time, with gradual decreases in funding over the years culminating into the current crisis. Former Dade Public Defender Bennett Brummer<sup>74</sup> says that funding for his office has been "deteriorating for many years."<sup>75</sup> However, he stated that the current crisis is "the most devastating time I've seen in thirty years."<sup>76</sup>

The numbers support Brummer's statements. Since the beginning of fiscal year 2007–2008, his office's budget has been cut by \$2.48 million, or 8.5 percent.<sup>77</sup> In addition, the Legislature has imposed a one percent quarterly cutback for fiscal year 2008–2009, which operates as an additional four percent budget cut.<sup>78</sup> In spite of the smaller budget, caseloads have been rising. Between fiscal year 2003–2004 and fiscal year 2006–2007, noncapital felony cases rose by 16.2 percent.<sup>79</sup> At the same time, the office has had trouble retaining its attorneys. Because the starting salary for attorneys is only \$42,000 (about half the starting salary for other government positions in the area),<sup>80</sup> young lawyers facing the expiration of student loan deferrals or just seeking to pay the bills are unable to do so on their assistant public defenders' salaries.<sup>81</sup> Dade's public defenders have seen no raises for two out of the past five years and there are no expectations of future raises.<sup>82</sup> Some assistant public defenders rely on their parents to make ends meet, while a number hold

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72. Affidavit of Carlos Martinez at 4, *In re Reassignment & Consolidation of Pub. Defender's Motion To Appoint Other Counsel in Unappointed Noncapital Felony Cases*, No. 3D08-2272 (Fla. Cir. Ct. Sept. 15, 2008).

73. *11th Circuit PD Honored Nationally*, FLA. BAR NEWS, Jan. 15, 2008, at 15, 15.

74. Brummer served as the Eleventh Circuit Public Defender for thirty-two years and retired at the end of 2008. He led PD-11 through the majority of this crisis.

75. Jan Pudlow, *Citing Financial Woes, PD Stops Accepting Cases*, FLA. BAR NEWS, Aug. 1, 2008, at 1, 1.

76. *Id.*

77. *Id.* at 6.

78. *Id.*

79. *Id.*

80. *Id.*

81. Susannah A. Nesmith, *In Debt, Young Lawyers Struggle To Make It*, MIAMI HERALD, May 1, 2007, at 1B [hereinafter Nesmith, *In Debt*]; Susannah A. Nesmith, *Lure of Higher Salaries in Private Arena Hurts Retention Efforts*, MIAMI HERALD, May 1, 2007, at 5B.

82. Pudlow, *supra* note 2, at 4.

second jobs on nights and weekends.<sup>83</sup> The result has been an annual turnover rate of about twenty percent for the past five years.<sup>84</sup> Many of the public defender's attorneys leave to work at the Office of Criminal Conflict and Civil Regional Counsel for the Third District (RCC-3), where part-time attorneys are paid \$50,000 a year.<sup>85</sup> The Public Defender's office is unable to compete with that salary for experienced full-time attorneys, and leaving PD-11 for RCC-3 is especially attractive because the part-time arrangement allows attorneys to earn additional fees from private clients.<sup>86</sup>

The combination of these factors has created a dangerous cycle for the Miami-Dade Public Defender's Office. This year's budget cuts have forced the office to stop replacing attorneys who leave the office, which creates more work for attorneys who remain, which in turn causes more attorneys to leave.<sup>87</sup> This cycle has dramatic consequences for day-to-day operations at PD-11. Between August and November 2008, PD-11 lost four to five attorneys each month.<sup>88</sup> By January 2009, only 96 attorneys were handling noncapital felonies.<sup>89</sup>

#### A. *Individual Caseloads in PD-11 Compared to National and State Standards*

The inevitable result of an increasing volume of work and a decreasing number of attorneys is more work for individual attorneys. PD-11's assistant public defenders are carrying caseloads that greatly exceed any recognized standard for indigent defense counsel. While there is no single nationally recognized caseload standard,<sup>90</sup> a variety of national and state organizations have conducted studies and made recommendations as to how many cases an individual attorney can effec-

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83. Nesmith, *In Debt*, *supra* note 81; *see also* Order Granting in Part and Denying in Part Public Defender's Motion To Appoint Other Counsel in Unappointed Noncapital Felony Cases at 5, *In re* Reassignment & Consolidation of Pub. Defender's Motion To Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 3D08-2272 (Fla. Cir. Ct. Sept. 3, 2008) [hereinafter Order] ("[A] number of assistant public defenders hold second jobs on nights and weekends simply to make ends meet.").

84. Pudlow, *supra* note 75, at 6.

85. Pudlow, *supra* note 2, at 4.

86. Pudlow, *supra* note 2, at 4.

87. Nesmith, *supra* note 2; *see also* Pudlow, *supra* note 2, at 4 ("A chain reaction is taking place in which every attorney who leaves and cannot be replaced increases the workload and inefficiency of the remaining attorneys. Those remaining attorneys also begin looking for other employment.").

88. Pudlow, *supra* note 2, at 4.

89. Jan Pudlow, *11th Circuit PD Says His Office Is at "the Breaking Point,"* FLA. BAR NEWS, Jan. 15, 2009, at 1, 5.

90. *See* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 7 (2001) (discussing different methods for formulating a caseload standard).

tively take on.<sup>91</sup> The National Advisory Commission on Criminal Justice Standards and Goals (NAC) has recommended that full-time public defenders accept a maximum of 150 felony cases in a year.<sup>92</sup> The NAC's standards, established in 1973, have been incorporated by the ABA's Standards Relating to the Administration of Criminal Justice and have "proven resilient over time."<sup>93</sup>

State organizations have determined different standards are appropriate for Florida's public defenders. Florida's Governor's Commission established maximum caseload standards of 100 felony cases per year.<sup>94</sup> However, the Florida Public Defender's Association determined that public defenders should handle no more than 200 felonies per year.<sup>95</sup>

Regardless of which standard serves as the benchmark for acceptable caseloads, PD-11's caseload is far from acceptable.<sup>96</sup> In June 2008, the average caseload was 387 noncapital felonies per attorney.<sup>97</sup> By August 2008, then-Public Defender Bennett Brummer estimated that individual caseloads were closer to 440 noncapital cases, and feared that they would climb to 500 (more than triple the nationally recommended maximum, and two and a half times the highest recommended state standard) in the coming months.<sup>98</sup>

PD-11 has also looked beyond the national standards themselves to compare how these standards relate to the practice of criminal law by other attorneys. For example, in Los Angeles, public defenders' caseloads "are more in the range of 40 to 45 pending felonies at any one time."<sup>99</sup> There has been no suggestion or indication that criminal cases in Los Angeles are less complex or entail fewer legal issues than those in Miami. Perhaps more disturbing is the difference in caseloads between public defenders and private criminal defense attorneys in Miami. One private attorney stated that he only handles 50–100 criminal

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91. *See id.*

92. *Id.* at 8; Pudlow, *supra* note 75, at 6.

93. OFFICE OF JUSTICE PROGRAMS, *supra* note 90, at 8.

94. Pudlow, *supra* note 75, at 6.

95. OFFICE OF JUSTICE PROGRAMS, *supra* note 90, at 11.

96. Any determination of a caseload standard, or a comparison of caseloads to a standard, requires a definition of a "case." PD-11 counts cases in the manner prescribed by the NAC, which defines a case as "a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding." Public Defender's Post-Hearing Closing Statement in Support of Motions To Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest at 12, *In re* Reassignment & Consolidation of Pub. Defender's Motion To Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 3D08-2272 (Fla. Cir. Ct. Aug. 11, 2008) [hereinafter Public Defender's Closing Statement]. These standards count cases from the initial appointment immediately after arrest. *See id.*

97. Pudlow, *supra* note 75, at 6.

98. Pudlow, *supra* note 75, at 6.

99. Public Defender's Closing Statement, *supra* note 96, at 11.

and personal injury cases per year because that is his “comfort level” for providing competent representation.<sup>100</sup> He went on to say, “If I had to handle 436 cases [a year], I would be up 24 hours a day, seven days a week, 365 days a year . . . . I still would not be able to effectively represent that many people.”<sup>101</sup> He further stated that he would hire four associates in order to handle that number of cases.<sup>102</sup> The mere suggestion that private attorneys in the same city would provide five times the staff to handle the caseload that public defenders handle raises serious constitutional and ethical questions.

Despite these alarming disparities and their implications, the caseload numbers only tell part of the story. The raw number of cases that an attorney handles does not accurately reflect the attorney’s workload because attorneys’ work entails more than representing their clients.<sup>103</sup> For example, the caseload numbers do not take into account time that must be spent on administrative tasks, attending training sessions, fulfilling supervisory responsibilities, or consulting with colleagues about each other’s cases—all tasks that are essential to keep a defender’s office functioning, but that detract from time spent working on clients’ cases and are not taken into account in determining caseloads.<sup>104</sup> Thus, while caseload standards are a useful starting point for evaluating the ability of public defenders to meet their constitutional and ethical obligations, no attorney’s workload can be accurately measured by the number of cases handled alone.<sup>105</sup>

The Miami-Dade Public Defender has indicated that its caseload numbers alone leave out a significant part of the story. PD-11 has listed a variety of unique “local factors” that increase the workload of its attorneys (without affecting the caseload statistics):

- (1) the need for interpreters to interview clients and witnesses (and the unavailability of those interpreters),
- (2) the remote locations of clients detained pretrial and the amount of driving time to reach such facilities,
- (3) the waiting time at such detention facilities because of a lack of jail staff to escort clients and interview rooms,
- (4) the scheduling of cases “off-week” so that days when attorneys should be preparing cases are instead spent in court,
- (5) the practice of having

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100. Public Defender’s Closing Statement, *supra* note 96, at 14.

101. Public Defender’s Closing Statement, *supra* note 96, at 14.

102. Public Defender’s Closing Statement, *supra* note 96, at 14.

103. OFFICE OF JUSTICE PROGRAMS, *supra* note 90, at 3.

104. OFFICE OF JUSTICE PROGRAMS, *supra* note 90, 3–4.

105. See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) (“National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.” (footnotes omitted)).

private counsel cases heard before PD-11 cases on calendar (resulting in assistant public defenders waiting in court), (6) the (over)charging decisions of the State Attorney, (7) waiting in court for specialized prosecutors to appear, and (8) the lack of experienced prosecutors in the courtrooms, requiring . . . supervising prosecutors' [involvement] in plea negotiations.<sup>106</sup>

Ironically, the magnitude of the workload-caseload distinction has likely been worsened in the past year by PD-11's attempts to remedy the situation. By spending time seeking either more money from the Legislature, or relief from a portion of the office's caseload, the Public Defender is forced to take away more time that could be spent on client cases.

B. *PD-11's Motion to Appoint Other Counsel in Unappointed Noncapital Felonies Due to Conflict of Interest*

The lack of funds and glut of cases came to a head for PD-11 in 2008, when the Miami-Dade Public Defender determined that his office simply could not ethically defend its current clients and continue to take on new ones. The result has been two years of litigation, marked by alternating victories and defeats for PD-11.

In June 2008, Miami-Dade's Public Defender's Office began refusing to represent certain indigent defendants because its attorneys were already overburdened with existing clients.<sup>107</sup> Later that month, the Miami-Dade Public Defender Bennett Brummer asked a Circuit Court judge to allow his office to refuse all new non-capital felony cases because his attorneys would be unable to perform their constitutional duties relating to any new clients.<sup>108</sup> On September 3, Circuit Judge Stanford Blake granted the motion in part and denied it in part, ruling that PD-11 could decline to accept appointments to "C" cases (third-degree felonies) but that it would continue to fulfill its duties in all "A" and "B" cases (first and second degree felonies).<sup>109</sup>

The State appealed the ruling, arguing that the Miami-Dade Public Defender will have to "share the burden of falling state revenues" just like every other state agency.<sup>110</sup> Before the order granting partial relief could go into effect, the state filed an emergency motion for stay with

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106. Public Defender's Closing Statement, *supra* note 96, at 13.

107. Nesmith, *supra* note 68.

108. Nesmith, *supra* note 2, at 4. The Florida Legislature created a statutory procedure by which a public defender may move a court to appoint other counsel when the office has a conflict of interest. FLA. STAT. § 27.5303(1)(a) (2007).

109. Order, *supra* note 83, at 6.

110. Eckholm, *supra* note 36.

the Third District Court of Appeal.<sup>111</sup> The Third District certified that the case required immediate resolution by the Supreme Court of Florida because it “passes upon a question of great importance,”<sup>112</sup> but the Supreme Court dismissed for lack of jurisdiction.<sup>113</sup>

The case returned to the Third District, which reversed.<sup>114</sup> The court held that the public defender could not decline appointments as an office on the ground that all its lawyers were overworked and therefore conflicted.<sup>115</sup> Instead, the “trial court [must] determine whether counsel is sufficiently competent . . . on a case-by-case basis.”<sup>116</sup> The court further found that PD-11 showed only that its attorneys were laboring under an excessive caseload, and not that any individual clients were actually receiving inadequate representation.<sup>117</sup> The court articulated a new standard for assessing alleged conflicts of interest by overworked public defenders: “Only after a defender proves prejudice or conflict, separate from excessive caseload, may that attorney withdraw from a particular case.”<sup>118</sup>

Additionally, the Third District rejected PD-11’s reliance on the Rules of Professional Conduct as a basis for declining new appointments, finding that those rules “are only meant to apply to attorneys, individually, and not the office of the Public Defender as a whole.”<sup>119</sup> The court ultimately signaled its weariness with the public defender’s complaints about funding, stating that, “PD11’s complaint that it receives inadequate funding is not novel. Nor is our response.”<sup>120</sup> That response culminated in a suggestion to leave the courts out of this dispute, and instead take it to the legislature.<sup>121</sup>

PD-11 continued the fight for manageable caseloads by pursuing

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111. Pudlow, *supra* note 2, at 5.

112. *Id.*; see also FLA. CONST. art. V, § 3(b)(5) (“[The Florida Supreme Court] may review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.”).

113. *State v. Pub. Defender*, Eleventh Judicial Circuit, 996 So. 2d 213, 213 (Fla. 2008).

114. *State v. Pub. Defender*, Eleventh Judicial Circuit, 12 So. 3d 798, 806–7 (Fla. 3d DCA 2009).

115. *Id.* at 802–4.

116. *Id.* at 802.

117. *Id.* at 802–3 (“PD11 presented evidence of excessive caseload and no more. . . . [W]henver an attorney is burdened with an excessive caseload, there exists the possibility of inadequate representation. . . . However, there was no showing that individual attorneys were providing inadequate representation.”).

118. *Id.* at 806.

119. *Id.* at 803.

120. *Id.* at 805.

121. *Id.* (“[I]t is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function.”) (citation omitted).

dual avenues of litigation. The Public Defender's Office appealed the Third District's reversal to the Florida Supreme Court, which granted discretionary review.<sup>122</sup> Meanwhile, PD-11 also attempted to conform its approach to the blueprints laid out by the Third District Court of Appeal. This time, the Public Defender's Office moved to withdraw from a single felony case because a single attorney had too many cases to competently represent a single defendant.<sup>123</sup> The trial court considered the motion within the framework established by the Third District Court of Appeal in *Public Defender v. State*, focusing on whether PD-11 showed "individualized proof of prejudice."<sup>124</sup> Citing *Luckey v. Harris* and *Scott v. State*, the trial court decided that it could consider "the possibility of future harm [to the client] based upon the demands on an assistant public defender's time" in making the prejudice determination.<sup>125</sup> Because the assistant public defender "show[ed] that he has been able to do virtually nothing in preparation of [the defendant]'s defense," the court found that he had met his burden of demonstrating individualized prejudice and granted the motion to withdraw.<sup>126</sup>

The Third District Court of Appeal disagreed. The court quashed the lower court's order, finding "no evidence of actual or imminent prejudice to [the defendant]'s constitutional rights."<sup>127</sup> Despite the trial court's lengthy list of omissions by the assistant public defender, the Third District found that "the prejudice is speculative" because PD-11 did not "demonstrate[ ] that there was something substantial or material that [the public defender] has or will be compelled to refrain from doing."<sup>128</sup> Given the list of serious omissions found by the trial court, it is difficult to imagine the actions would meet the Third District Court of Appeal's "substantial or material" standard.<sup>129</sup>

It is, however, clear that at least in the Third District, the analysis

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122. Pub. Defender, Eleventh Judicial Circuit v. State, No. SC09-1181 (Fla. May 19, 2010) (order accepting jurisdiction).

123. Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting Public Defender's Motion to Withdraw at 1, *State v. Bowens*, No. F09-019364 (Fla. Cir. Ct. Oct. 23, 2009) [hereinafter *Bowens Order*].

124. *Id.* at 8.

125. *Id.* at 9.

126. *Id.* at 10, 11 (explaining that the assistant public defender had not obtained a list of defense witnesses from the defendant, taken any depositions, visited the crime scene, looked for or interviewed defense witnesses, prepared a mitigation package or filed any motions in the case).

127. *State v. Bowen*, No. 3D09-3023, 2010 Fla. App. LEXIS 9851, at \*1, \*5 (3d DCA July 7, 2010).

128. *Id.* at \*5-\*6.

129. This may change, as the rulings on both of PD-11's excessive caseload motions are before the Florida Supreme Court. As noted above, the Court has accepted jurisdiction in *Public Defender v. State*. At the time of publication, the briefs on jurisdiction for the *State v. Bowen* motion are pending before the Florida Supreme Court.

governing conflicts cases for public defenders is closer to that created in *Strickland* than in *Luckey* and *Scott*. The court's reliance on a conflicts test that resembles the constitutional standard for ineffective assistance of counsel is problematic. The backward-looking prejudice requirement espoused by the Third Circuit ignores the ethical responsibilities of the affected attorneys and the rights of their clients. In the above cases, the court has refused to allow the attorneys to withdraw. But, as explained in the following section, the ethical rules arguably require them to withdraw in order to comply with the Rules. The funding crisis has thus created a paradox for the overworked attorney in the Miami-Dade Public Defender's Office: You may not withdraw, but you must withdraw. The indigent client with an overloaded attorney is in a worse position: Your lawyer is aware he is too busy to put together an adequate defense, but there is nothing he can do about it.

### C. *Ethical Rules Implicated*

One of PD-11's principal arguments in both its motions was that its attorneys could not ethically represent their clients.<sup>130</sup> A comparison of anecdotal evidence from Miami-Dade Public Defenders and the relevant law suggests not only that PD-11's assertion is true, but that the ethics rules apply differently in practice to public defenders than to private attorneys with paying clients.

Although PD-11 was partially successful in its lawsuit, this type of litigation is not the ordinary way that the ethical obligations embodied in Florida's Code of Professional Responsibility are enforced. Ordinarily, a grievance is filed against an attorney with the Florida Bar and the attorney is called before the Bar to defend him or herself. The rules are normally enforced through disciplinary proceedings against an attorney who appeals against his or her will before the Bar; it is extremely uncommon for a group of attorneys to sue the state for the *opportunity* to meet their ethical obligations.

Despite the reality that attorneys working for the Public Defender's Offices are rarely, if ever, called before the Florida Bar to defend themselves in disciplinary proceedings,<sup>131</sup> the conduct of Miami-Dade Public Defenders may constitute violations of four related ethical rules.

#### 1. COMPETENCE

According to Rule Regulating the Florida Bar 4-1.1, "A lawyer

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130. See Order, *supra* note 83, at 2; Bowens Order, *supra* note 123.

131. A WestLaw search revealed no cases where the Florida Bar took disciplinary action against an attorney working as or for a public defender for violation of any of the Rules discussed as a result of systematic underfunding or case overloads.

shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” A comment to the rule explains:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . . It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.<sup>132</sup>

Thus, the language suggests that not only does the rule require all attorneys to investigate the facts and law relevant to a client’s case, but a higher level of investigation and preparation is necessary when the stakes are high enough to include the potential loss of the client’s liberty.

The preparation aspect of the competence rule, arguably its most crucial aspect,<sup>133</sup> has proved problematic for PD-11’s lawyers. During the hearing on PD-11’s June 2008 motion, both an assistant public defender and a supervising attorney at PD-11 testified that “approximately an hour is all the time an assistant public defender has to interview a client *through the duration of the case.*”<sup>134</sup> PD-11 also has a policy of not interviewing clients who are out of custody until after arraignment, which is often three to four weeks after arrest.<sup>135</sup> This means that the lawyer generally knows nothing about the client’s case at arraignment except what is written in the arrest form, which of course does not contain exculpatory information necessary to build a defense.<sup>136</sup>

Excessive caseloads often force assistant public defenders to ask for a continuance, which waives their clients’ rights to a speedy trial within 175 days.<sup>137</sup> Assistant Public Defender Amy Weber testified that she does not have time to visit crime scenes or to “fully prepare” for depositions, and that she does “very little” investigation into her clients’ cases herself.<sup>138</sup> She also explained how this is a result of the underfunding of PD-11 and the excessive caseloads. Ms. Weber testified that she handles about fifty felonies at a time, and once had thirteen cases set for

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132. FLA. RULES OF PROF’L CONDUCT R. 4-1.1 (2008).

133. Rory Stein, a PD-11 attorney, testified during the July 2008 motion hearing that “what an attorney can do in trial ‘is a factor of the preparation that they were able to do prior to court.’” Public Defender’s Closing Statement, *supra* note 96, at 6.

134. Public Defender’s Closing Statement, *supra* note 96, at 4 (emphasis added).

135. Public Defender’s Closing Statement, *supra* note 96, at 17.

136. Public Defender’s Closing Statement, *supra* note 96, at 17.

137. Public Defender’s Closing Statement, *supra* note 96, at 5.

138. Public Defender’s Closing Statement, *supra* note 96, at 6.

trial on the same day.<sup>139</sup> In his September 3 order, Judge Blake acknowledged that these numbers are excessive, stating, “the evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused.”<sup>140</sup>

However, Judge Blake did not mention that this type of conduct normally exposes private attorneys to the risk of disciplinary sanctions by the Florida Bar. Due to the reality that public defenders are overloaded, any violations of Rule 4-1.1. they commit due to time constraints often go unnoticed (or deliberately unrecognized) by the Florida Bar, whereas private attorneys engaging in the same kinds of behavior may be subject to disciplinary actions.<sup>141</sup> For example, in *Florida Bar v. Broome*, a lawyer was suspended for one year after committing a series of Rule violations that affected several clients, including a violation of Rule 4-1.1.<sup>142</sup> The conduct that led to this finding and the subsequent discipline includes failure to investigate or perform legal work in cases of criminal defendants she was hired to represent,<sup>143</sup> and waiver of a clients’ right to a speedy trial through the filing of a continuance (which was required because the attorney was unprepared) without discussing it with the clients.<sup>144</sup> Additionally, a lack of preparation has been ruled to constitute incompetence even in civil matters, where no loss of liberty is at stake.<sup>145</sup>

The Florida Supreme Court has spoken on the issue of how an excessive caseload affects the ability of public defenders to provide competent representation. The Court has ruled that because of an excessive backlog of cases in the appellate public defender’s office, the public

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139. Eckholm, *supra* note 36.

140. Order, *supra* note 83, at 4.

141. *See, e.g.*, Fla. Bar v. Jordan, 705 So. 2d 1387, 1388–90, 1391 (Fla. 1998) (per curiam) (holding that repeated failures to meet deadlines and inform client about case constitutes incompetent representation); Fla. Bar v. Roberts, 689 So. 2d 1049, 1051 (Fla. 1997) (per curiam) (holding that failure to provide competent representation is ethical violation even in the absence of intentional misrepresentation or fraud); Fla. Bar v. Sandstrom, 609 So. 2d 583, 583, 585 (Fla. 1992) (per curiam) (holding that inadequate investigation into cause of death of client’s alleged murder victim constitutes failure to adequately prepare for representation of client and is grounds for sixty-day suspension).

142. 932 So. 2d 1036, 1038, 1041 (Fla. 2006) (per curiam).

143. *Id.* at 1038–40.

144. *Id.* at 1040.

145. *See, e.g.* Fla. Bar v. Dabold, No. SC03-406, 2003 WL 23112705, at \*1–2 (Fla. 2003) (recommending ninety-one-day suspension as sanction for incompetence where attorney failed to adequately prepare for a medical malpractice action by failing to fulfill pre-suit screening requirements and failed to file the lawsuit within the limitations period); Fla. Bar v. Racin, No. SC03-451, 2003 WL 23112712, at \*12, \*14–16 (Fla. 2003) (finding violation of Rule 4-1.1 in four civil cases where attorney failed to complete work in a timely manner or to adequately prepare for court dates and deadlines).

defender had not provided an indigent defendant with effective representation.<sup>146</sup> The court stated that a lack of financial support by the legislature does not relieve the public defender of the duty to act competently for each client.<sup>147</sup> PD-11 contends that although the lack of financial support by the legislature does not excuse its attorneys from performing their duty of competence, it is hampering their ability to fulfill that duty.<sup>148</sup>

## 2. DILIGENCE

A lawyer's duty of diligence is conceptually related to the duty of competence. Under Rule Regulating the Florida Bar 4-1.3, "A lawyer shall act with reasonable diligence and promptness in representing a client." The comment to this Rule specifically states: "A lawyer's workload must be controlled so that each matter can be handled competently."<sup>149</sup> As explained above, PD-11's workload has not been controlled to ensure the ability of its attorneys to handle their assigned cases competently.

The comment to Rule 4-1.3 also states: "Perhaps no professional shortcoming is more widely resented than procrastination."<sup>150</sup> There is no evidence that PD-11's attorneys procrastinate in handling their cases; however, there is substantial evidence that there are often significant delays in the resolution of the office's cases. From the client's perspective, the result is the same. Regardless of whether a lawyer simply procrastinates by putting work off, or is working long and hard hours on an excessive number of other cases, the client's matter remains unresolved. "A client's interests often can be adversely affected by the passage of time or the change of conditions . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer."<sup>151</sup> As discussed above, PD-11's attorneys often must ask for continuances in their cases.<sup>152</sup> If an attorney seeks a continuance and then is unable to certify readiness by the new trial date, the case can be delayed for up to five years.<sup>153</sup> In contrast, a private attorney in Florida was disciplined for failing to take action in a civil matter for a period of only

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146. *Hatten v. State*, 561 So. 2d 562, 565 (Fla. 1990).

147. *Id.*

148. See Public Defender's Motion, *supra* note 2.

149. FLA. RULES OF PROF'L CONDUCT R. 4-1.3 cmt. (2008).

150. *Id.*

151. *Id.*

152. See Public Defender's Closing Statement, *supra* note 96, at 5.

153. Public Defender's Closing Statement, *supra* note 96, at 5; see also Eckholm, *supra* note 36 (explaining that, in some cases, delays in indigent defense systems have become so severe that prosecutors were forced to drop charges against unrepresented defendants).

seventeen months.<sup>154</sup>

The Florida Supreme Court has ruled on this issue in the same way as it ruled on the duty to provide competent representation. An excessive case backlog in a public defender's office may preclude a public defender from acting diligently, but a backlog resulting from a lack of funding from the legislature does not relieve the public defender from his duty of diligence with respect to each client.<sup>155</sup> Thus, the Court has recognized that a lack of funding can force a public defender to fail to meet ethical obligations, but it did not find that outcome acceptable. Nevertheless, much of the procedure that is relatively normal at PD-11 may form the basis for sanctions for private attorneys.<sup>156</sup>

### 3. COMMUNICATION WITH CLIENTS

The foundation of the attorney-client relationship is effective communication. Rule 4.1-4 states:

A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information . . . .

A later subsection of the rule further states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>157</sup>

Like the prior two Rules, much of the behavior that constitutes violation of this Rule is punished if it is engaged in by private lawyers, but not by lawyers providing indigent defense.<sup>158</sup> For example, Assistant Public Defender Amy Weber stated she is unable to comply with this rule. One of her clients, James A. Simmons, was charged with child

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154. Fla. Bar v. Pierce, 498 So. 2d 431, 432 (Fla. 1986) (per curiam).

155. Hatten v. State, 561 So. 2d 562, 565 (Fla. 1990).

156. See, e.g., Fla. Bar v. Smith, 866 So. 2d 41, 46-47, 49 (Fla. 2004) (per curiam) (stating that pattern of neglect over one and a half years, even without any prior disciplinary record, may result in disciplinary action); Fla. Bar v. Whitaker, 596 So. 2d 672, 673-74 (Fla. 1992) (per curiam) (imposing public reprimand where lawyer neglected to file suit and failed to communicate with lawyer).

157. FLA. RULES OF PROF'L CONDUCT R. 4-1.4(b) (2008).

158. See, e.g., Fla. Bar v. Williams, 753 So. 2d 1258, 1259-60, 1261 (Fla. 2000) (per curiam) (holding that failure to file documents on client's behalf and failure to maintain adequate contact with client constitutes violation of Rule 4-1.4); Fla. Bar v. Jordan, 705 So. 2d 1387, 1388-91 (Fla. 1998) (per curiam) (finding that repeated failures to respond to phone calls from client and failure to inform client of developments in her case amounted to ethical violation); Fla. Bar v. Jaspersen, 625 So. 2d 459, 460-61, 463 (Fla. 1993) (per curiam) (finding that filing petition with bankruptcy court on behalf of client that attorney had never met or advised constitutes violation of disciplinary rules).

pornography and was offered a plea that carried a one-year sentence.<sup>159</sup> However, Weber was too busy to discuss the offer with him (although he would have accepted it and ended his case).<sup>160</sup> Prosecutors gathered more evidence and rescinded the offer, leaving Simmons with little choice but to accept their new offer: a five-year sentence.<sup>161</sup> By contrast, in *Florida Bar v. Murray*, a private criminal defense attorney was disbarred for five years, in part for failing to follow through on a plea offer made by the State that would have placed his client, who was subsequently convicted and sentenced as a habitual offender, on probation.<sup>162</sup>

Less dramatic failures to properly communicate a plea offer occur often at PD-11. Because PD-11 is unable to interview clients or investigate cases prior to arraignment,<sup>163</sup> its attorneys are unable to counsel clients so that they can make a knowing and intelligent decision about a plea offer (which is often presented at arraignment).<sup>164</sup> In *Broome*, the sanctioned attorney failed to properly advise a client facing criminal charges so that he could make a knowing and intelligent decision about whether to take a plea or go to trial.<sup>165</sup> The client went to trial and was convicted.<sup>166</sup> The attorney's failure to discuss the plea resulted in a finding by the Bar that the lawyer had breached her duty to communicate with her client, and contributed to the decision to suspend her from the practice of law.<sup>167</sup>

The lack of time to communicate with clients extends beyond simply the explanation of a plea. Rule 4-1.7 requires attorneys to "reasonably consult" clients regarding the objectives of the representation and to "promptly comply with reasonable requests for information." However, PD-11 is often unable to keep clients informed about their cases. According to the president of the Miami chapter of the Florida Association of Criminal Defense Lawyers, the most common complaint he hears from PD-11's clients is, "I can't get them on [the] telephone. . . . I can't meet them in person and I don't know who they are, and they spent . . . ten minutes with me in the corridor outside the courtroom."<sup>168</sup> Amy Weber also testified that because she spends so little time with her clients, she is unable to facilitate effective communication because they do

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159. Eckholm, *supra* note 36.

160. Eckholm, *supra* note 36.

161. Eckholm, *supra* note 36.

162. Fla. Bar v. Murray, 489 So. 2d 30, 30 (Fla. 1986).

163. Public Defender's Closing Statement, *supra* note 96, at 17.

164. Public Defender's Closing Statement, *supra* note 96, at 17.

165. Fla. Bar v. Broome, 932 So. 2d 1036, 1038 (Fla. 2006) (*per curiam*).

166. *Id.*

167. *Id.*

168. Public Defender's Closing Statement, *supra* note 96, at 4-5 (first and second alterations in original) (internal quotation marks omitted).

not trust her.<sup>169</sup>

#### 4. CONFLICTS OF INTEREST

Fla. Bar Reg. R. 4-1.7 regulates conflicts of interest. The Rule deals with more than simply the classic and most obvious conflict of interest scenario, where one lawyer represents two clients whose interests are directly adverse to each other (for example, a single lawyer represents both the plaintiff and defendant in a civil lawsuit, or a single lawyer represents criminal co-defendants who each wish to assert the guilt of the other as their defense). The Rule states, in part, “A lawyer shall not represent a client if . . . there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”<sup>170</sup>

The Florida Supreme Court has held that this type of “material limitation” conflict may exist when a public defender is faced with an extreme number of cases. The Court stated, “When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”<sup>171</sup>

PD-11 contends that this scenario is the reality at its office every day. Several PD-11 attorneys testified at the July 2008 motion hearing that the office is forced to practice “triage.”<sup>172</sup> Triage refers to the practice of prioritizing certain cases over others, and spending the most time on those that are the most important.<sup>173</sup> By definition, the practice of triage “forces the public defender to choose between the rights of the various indigent criminal defendants he represents.”<sup>174</sup> Thus, the sheer number of cases PD-11 handles creates a conflict of interest.

#### IV. SOLVING THE PROBLEM

The ethical dilemma faced by Miami-Dade County’s public defenders and the resulting double ethical standard is a controllable problem. However, solving it will require a collaborative effort from everyone involved: the affected attorneys, the Florida Bar, and most importantly, the Florida Legislature. These players are particularly important given

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169. Public Defender’s Closing Statement, *supra* note 96, at 4.

170. FLA. RULES OF PROF’L CONDUCT R. 4-1.7 (2008).

171. *In re* Order on Prosecution of Criminal Appeals, 561 So. 2d 1130, 1135 (Fla. 1990) (*per curiam*); *see also In re* Certification of Conflict, 636 So. 2d 18, 19 (Fla. 1994) (“An inundated attorney may be only a little better than no attorney at all.”).

172. Public Defender’s Closing Statement, *supra* note 96, at 5.

173. Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 320 (2007).

174. *In re* Order on Prosecution of Criminal Appeals, 561 So. 2d at 1135.

the courts' resistance to adopting the *Luckey* standard. While there are different paths to coming to a solution, that solution must entail one outcome: the public defender must be adequately funded.

#### A. *What Affected Attorneys Can Do*

Without assistance from other public officials, the power of individual public defenders to affect their situation is limited. Public defenders faced with excessive caseloads have two options: (1) continue taking new cases and attempt to function as normally and effectively as possible; or (2) stop taking at least some new cases. Florida legislators and the State Attorney's Office favor the first option. However, the American Bar Association firmly supports the latter.<sup>175</sup> The ideal strategy for overworked appointed counsel is to take action designed to influence appropriations decisions in the future.

##### 1. DECLINE APPOINTMENT TO NEW CASES

In a formal ethics opinion, the ABA's Standing Committee on Ethics and Professional Responsibility advises lawyers who represent indigent defendants to refuse to accept new cases or to withdraw from existing ones when the lawyers' caseload prevents them from providing "competent and diligent" representation to their clients.<sup>176</sup> Specifically, the ABA recommends that a lawyer with an excessive caseload: (1) transfer "non-representational responsibilities" to others within the office; (2) refuse new cases; and (3) transfer current cases to another lawyer within the firm who can reasonably handle additional cases.<sup>177</sup> While these alternatives may be viable when a single attorney in an office is operating under an excessive caseload, two of the three options offered by the ABA are not useful when an entire office is faced with case overloads. When *every attorney* in an office has an excessive caseload, there is no one to whom a lawyer can refer "non-representational responsibilities," and there is no one to whom a lawyer can trans-

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175. The American Bar Association is not a governing body in the sense that its formally issued ethics opinions are not binding on American lawyers or even on ABA members. However, the ABA promulgates the *Model Rules of Professional Responsibility*, which are then incorporated (often with changes) into many state codes of conduct and professional responsibility by their respective state bar associations. State bar associations do govern the conduct of the lawyers they license for practice and may issue binding ethics opinions or disciplinary sanctions. The Florida Bar's *Rules of Professional Conduct* is based on the *ABA Model Rules*. Therefore, despite its status as non-binding precedent, the ABA's interpretation of the appropriate response to this type of ethical problem does have some precedential value. It is highly relevant in providing guidance to public attorneys, as well as significantly persuasive authority for governing bodies like the Florida Bar.

176. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

177. *Id.* at 5.

fer current cases. Thus, according to the ABA, the only way for an attorney in PD-11's position to meet his ethical and constitutional obligations is to refuse to accept new cases.

This is especially true given the ABA's position on lawyer-supervisors. The ABA places responsibility for managing caseloads on lawyers who supervise public defenders.<sup>178</sup> The Committee on Ethics and Professional Responsibility stated that supervisors should monitor subordinates' caseloads and work to provide a more manageable caseload for any lawyer who is unable to meet his ethical duties due to an excessive number of cases.<sup>179</sup> Placing the burden for maintaining appropriate caseloads on supervisors creates a powerful incentive for supervisors to decline new cases, and often makes such action the best ethical choice.<sup>180</sup>

However, despite its relative attractiveness in desperate circumstances, litigation is not a long-term solution to this problem. While seeking judicial permission to decline new cases yielded some recent success for Miami-Dade's Public Defender in this case and in the past, litigation is not a long-term solution. Miami-Dade Public Defender Carlos Martinez is already calling the partial relief granted to his office in September 2008 "purely academic."<sup>181</sup>

Successful litigation yields temporary relief (nonappointment to some new cases), which may ease the public defender's workload in the short term, but does not affect the underlying causes of the problem that prompted the litigation. A caseload/workload problem is more than just a problem of having too many cases coming in—it is a structural flaw in the state's indigent defense system. The real issue is not that there are too many indigent defendants on a given day in Miami-Dade County; the problem is that the Miami-Dade Public Defender does not have the appropriate tools to constitutionally and ethically assist those indigent defendants. Those tools include the funding to attract and retain enough quality lawyers to represent their clients and to respond to rising numbers of cases. Additionally, litigation is expensive, even if the public defender wins. Hiring private counsel on a case-by-case basis to represent indigent defendants costs three to five times more than an

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178. *Id.* at 1–2.

179. *Id.* at 7–8.

180. *Id.* at 8 (“If a supervisor knows that the subordinate’s workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, . . . the supervisor himself is responsible for the subordinate’s violation of the Rules of Professional Conduct.”).

181. Pudlow, *supra* note 89, at 1.

appropriately funded public defender.<sup>182</sup> The main long-term value in a litigation strategy like that employed by PD-11 is to signal the legislature that public defenders must be adequately funded in order to operate.

## 2. START WITH MISDEMEANORS

The State Attorney's Office and the Legislature have pointed out that there are options other than declining felony appointments. The State Attorney suggests that seeking to decline appointments in misdemeanors rather than felonies is a better choice.<sup>183</sup> The State Attorney also objected to the public defender's "chosen method to air his grievances,"<sup>184</sup> arguing that the better option is to "sit down and work these things out."<sup>185</sup> Legislators have also pushed for creative action. For example, other public defenders have negotiated with local prosecutors and judges to ensure that jail time will not be sought in certain types of misdemeanor cases. If the accused does not face the possibility of incarceration, the state does not have an obligation to appoint an attorney.<sup>186</sup>

These are potential options for overworked public defenders who are unable to meet ethical obligations. However, these solutions are flawed. The main problem is that these are not permanent, across-the-board solutions for Florida's public defenders. Whether these types of strategies will work in any particular judicial circuit depends on many details unique to that circuit. What works in Broward might be inappropriate for Miami-Dade, and the success of any remedy ultimately depends on legislative action.

The first alternative, declining appointments in misdemeanors rather than felonies, may be workable for some public defenders but is not always feasible. For example, PD-11 stated that it considered declining misdemeanors rather than felonies, but chose not to do so because it would not have a great enough impact on the workload of individual attorneys.<sup>187</sup> Because felony cases are more expensive, time-consuming, and the biggest contributor to the problem at PD-11, declining felony

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182. Gary Blankenship, *Criminal Law Section Sets Out To Find Court Budget Solutions*, FLA. BAR NEWS, Aug. 15, 2008, at 1, 5.

183. State Attorney's Response to Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases 5-6, *In re Reassignment & Consolidation of Pub. Defender's Motion To Appoint Other Counsel in Unappointed Noncapital Felony Cases*, No. 3D08-2272 (Fla. Cir. Ct. Aug. 11, 2008) [*hereinafter* State Attorney's Response]; *see also* Lee Molloy, *A Class C Defense*, SUNPOST.COM, Sept. 11, 2008, [http://www.sftimes.com/index.php?option=com\\_content&task=view&id=2361&Itemid=144](http://www.sftimes.com/index.php?option=com_content&task=view&id=2361&Itemid=144) (last visited Aug. 15, 2010).

184. State Attorney's Response, *supra* note 168, at 2.

185. Public Defender's Closing Statement, *supra* note 96, at 20.

186. *Id.*

187. Public Defender's Closing Statement, *supra* note 96, at 20-21.

appointments will actually impact the public defenders' workloads.<sup>188</sup> Also, declining misdemeanors would destroy PD-11's "farm system," by which new lawyers gain trial experience handling misdemeanors and are later promoted to felonies.<sup>189</sup> Without this training system, PD-11 would be left without a way to train new attorneys to competently represent defendants in felony cases.

The State Attorney's preferred plan of action for PD-11, "sitting down and working things out," should of course be the first choice for any public defender facing a funding problem. In the legal world, settlement is almost always preferred over litigation, and this situation is no different—obtaining more funding is obviously more ideal than suing to halt the appointment of new cases. However, when "sitting down" does not result in "working things out," an overworked public defender's office must take further action. The Miami-Dade Public Defender is an example of failed negotiations with the State. PD-11 repeatedly asked the Legislature and courts for help, but assistance was not forthcoming.<sup>190</sup> Although this option is always the first choice, it is often not the last.

Avoiding appointment of public defenders through a "bulk plea deal" with prosecutors is also not an ideal solution. This approach suffers from the same temporariness problems as litigation. Additionally, it undermines the purpose of the criminal justice system—the idea of this system is to generate a legislature-created scheme for the criminalization of certain activities that its constituents deem to be unacceptable, and punishment for those who then engage in those activities. If the activity is reprehensible enough to the public to be deemed a crime, it should be punished accordingly; if it is not reprehensible enough to be punished, it should not be designated a crime. A circuit-wide decision that some activities are reprehensible enough to be criminal, but that they will nevertheless not be punished as such, makes little sense in any scheme of criminal justice. This raises a simple question: Why bother to legislatively criminalize activities that cannot be truly treated as crimes by the judiciary? This type of solution addresses one symptom of the problems of underfunding and excessive caseloads for public defenders, but wholly avoids the underlying causes of the problem.

### B. *The Florida Bar's Role*

The legal profession has always been independent in the sense that it is self-regulating. It is this independence that has allowed members of

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188. Public Defender's Closing Statement, *supra* note 96, at 21.

189. Public Defender's Closing Statement, *supra* note 96, at 21.

190. Public Defender's Closing Statement, *supra* note 96, at 20.

the Bar to maintain the integrity of the profession through the creation and enforcement of the state rules of legal ethics and professional responsibility.<sup>191</sup> While full financial independence is not a realistic aspiration, some participation in the appropriations decisions is a reasonable goal. The Florida Bar should take a more active role in making recommendations to the Legislature regarding how much money the judicial branch, including the public defenders' offices, needs to operate. While the Bar has taken some action already, more is needed.

### 1. ETHICS OPINIONS AS GUIDANCE TO PRACTITIONERS AND LAWMAKERS

There is no Florida corollary to ABA Ethics Opinion 06-441. The Florida Bar has not formally spoken directly on this issue in either an advisory or disciplinary capacity. At a minimum, a published Florida Bar ethics opinion like ABA Ethics Opinion 06-441 would afford the state's public defenders with some leverage in making arguments similar to those made by PD-11 both during litigation to seek permission to decline additional cases and in seeking more funding from the Legislature. An ethics opinion would not have the power to force the Legislature to appropriate more funds to the state's public defenders, but it might encourage more public defenders facing excessive caseloads to take action by signaling the Bar's support for such action. It would also indicate the importance of professionalism to legislators who make appropriations decisions. An ethics opinion that emphasizes the importance of protecting the constitutional rights of indigent defendants may also push the courts toward adopting a *Luckey*-type approach to ineffective assistance claims seeking prospective relief.

### 2. DISCIPLINING PUBLIC DEFENDERS FOR ETHICAL VIOLATIONS

Even without taking a formal position, the Florida Bar may be better able to influence how excessive caseloads are managed by public defenders than the individual public defenders themselves.

One extreme way the Florida Bar could strongly and almost immediately influence how funds are appropriated to the state's public defender's offices is to strictly enforce the *Rules of Professional Conduct*. This means enforcing the rules with respect to public defenders in the same way that the Bar enforces rules with respect to private attor-

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191. See the *Florida Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities*, FLA. RULES OF PROF'L CONDUCT pmbi., for a brief discussion on the importance of the independence of the judiciary and how that concept relates to the professional responsibility of members of the Florida Bar.

neys.<sup>192</sup> So far, state courts have recognized that overworked public defenders may not be able to meet ethical obligations in one of two ways: (1) finding for a convicted defendant in an ineffective assistance of counsel claim; or (2) finding for a public defender's office that sues to avoid taking on additional appointments. These types of rulings may be sufficient to create a remedy for some defendants harmed by the working conditions of public defenders (assuming the defendant was convicted and is able to meet both prongs of the *Strickland* test), or for granting temporary relief to an overworked public defender's office. However, these proceedings do little to prevent the same harm from happening to a different defendant in the future. Ineffective assistance claims and suits to decline additional appointments lack the deterrent effect of a formal disciplinary proceeding initiated by the Florida Bar. In Bar disciplinary proceedings, sanctions are assessed against an attorney personally, and range in severity from a private reprimand to disbarment. Attorneys have a serious incentive to avoid ethical violations that carry the risk of Bar sanctions.

Of course, there are obvious practical reasons for the Florida Bar's reluctance to initiate such actions against public defenders. No one would suggest that the lawyers themselves are incompetent or unethical; these types of violations of the *Rules of Professional Conduct* are a result of conditions beyond the lawyer's control. It therefore seems that punishing these lawyers would serve little purpose. Furthermore, no lawyer would want to work as a public defender if it meant unavoidable personal exposure to sanctions by the Florida Bar.

Thus, pursuing disciplinary actions against public defenders for Rule violations that occur because of excessive caseloads would likely discourage lawyers from seeking employment in a public defender's office. Many lawyers working as public defenders would likely quit. That result would cause the "chaos in the system" that the State Attorney's Office for the Eleventh Circuit feared.<sup>193</sup> State Attorneys would not be able to prosecute a massive number of cases because the State could not appoint lawyers to defend the accused. The criminal justice system would come to a grinding halt and the public would be outraged. However, this extreme consequence would force the Legislature to take swift and decisive action, namely, funding Florida's public defenders' offices at a level that will not force them to violate the Rules of Professional Responsibility.

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192. The ABA recommends equal treatment of all lawyers under the disciplinary rules and urges judges to report violations of ethical rules by attorneys representing the indigent. See GIDEON'S BROKEN PROMISE, *supra* note 40, at 43-44.

193. See State Attorney's Response, *supra* note 168, at 3.

### 3. COLLABORATIVE, INTERAGENCY PLANNING

A more viable option is collaboration between the Bar, public defenders, prosecutors, and other criminal justice officials. The Spangenberg Group advocates for the maintenance of a “constant dialogue among judges, public defenders, and prosecutors about the need for balanced funding and resources.”<sup>194</sup> The reason for this dialogue is to ensure that “potential supporters of public defenders [ ] understand the complexities of providing effective indigent defense representation and the vital need to uphold this constitutional right.”<sup>195</sup>

A variety of states have pursued this strategy by creating commissions or task forces consisting of representatives from different criminal justice agencies, state and local government, and the judiciary.<sup>196</sup> California, Georgia, Kentucky, and Nebraska have followed the Criminal Justice Planning Commission Model, which “bring[s] together representatives from key criminal justice agencies in a given jurisdiction to conduct planning from a multiagency or systemwide perspective.”<sup>197</sup> In California, the Los Angeles Countywide Criminal Justice Coordination Committee (CCJCC) includes a wide range of officials from county and municipal governments, including representatives from criminal justice agencies as well as education, health, and human services.<sup>198</sup> The CCJCC has successfully implemented programs to reduce trial delays and relieve jail overcrowding; make legislative proposals regarding video arraignment, revenue collection, drug court diversion, and child abuse; and develop a fully automated countywide link between the courts and a proprietary justice agency data system.<sup>199</sup> Georgia’s Fulton County Ad Hoc Committee on Criminal Justice, formed to implement changes to the indigent defense system, has achieved similar success.<sup>200</sup> What began as an ad hoc body became the permanent Fulton County Justice System and Coordinating Committee, and now advises elected officials on projects that benefit “all components of the criminal justice system.”<sup>201</sup> Notably, the Committee was able to secure more adequate funding for the county’s public defender’s office, which had been “on

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194. OFFICE OF JUSTICE PROGRAMS, *supra* note 90, at 25.

195. OFFICE OF JUSTICE PROGRAMS, *supra* note 90, at 25.

196. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, IMPROVING STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS: A REPORT ON HOW PUBLIC DEFENDERS, PROSECUTORS, AND OTHER CRIMINAL JUSTICE SYSTEM PRACTITIONERS ARE COLLABORATING ACROSS THE COUNTRY 1 (1998), available at <http://www.ncjrs.gov/pdffiles/173391.pdf>.

197. *Id.*

198. *Id.* at 2.

199. *Id.*

200. *Id.* at 2.

201. *Id.* at 2–3.

the verge of collapse” before the formation of the Ad Hoc Committee.<sup>202</sup>

Broad-based task forces have also been effective in bringing about changes in indigent defense.<sup>203</sup> This model brings together representatives from criminal justice agencies, the legislature, the judiciary, and the executive branch to work together on a particular problem.<sup>204</sup> “The common ground found by task forces addressing problems in the indigent defense system can result in sensible, broadly-supported proposals to improve indigent defense within the context of the overall criminal justice system.”<sup>205</sup> Another major selling point for this type of collaborative planning is that proposals backed by most components of the criminal justice system and representatives from all three branches of state government “are difficult for policymakers to reject.”<sup>206</sup>

This approach has worked in Florida in the past. The Florida “Fill the Gap” Coalition was created to demonstrate to the Legislature during its 1995 session that more funding was needed for courts, prosecution and public defense.<sup>207</sup> The Legislature had slated significantly increased funding for law enforcement (termed “the front end” by the Coalition) and corrections (“the back end”), without a corresponding increase for courts, prosecution and defense (“the middle”).<sup>208</sup> The Coalition successfully advocated for the Legislature to “fill the gap” in funding, resulting in doubled budget increases for the “middle” components for fiscal year 1996 than in fiscal year 1995.<sup>209</sup>

### C. *The Legislature*

Ultimately, resolving the problems presented by excessive caseloads for public defenders is in the hands of the Florida Legislature. All of the actions that can be taken by affected attorneys and the Florida Bar are designed to encourage action by the Legislature. To ensure that public defenders can meet their ethical and constitutional obligations, the Legislature needs to listen to the Judiciary and allocate more money to the third branch of government.<sup>210</sup>

The state’s budget as a whole is facing more problems than ever before. Legislators and members of other state agencies have not been

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202. *Id.* at 2–3.

203. See GIDEON’S BROKEN PROMISE, *supra* note 40, at 36–37.

204. OFFICE OF JUSTICE PROGRAMS, *supra* note 196, at 5.

205. *Id.*

206. *Id.*

207. *Id.* at 6.

208. *Id.*

209. *Id.*

210. See Mishory, *supra* note 43 (“We have to have an open dialogue with the other branches of government and continue to press upon them the importance of the third branch.”).

receptive to PD-11's requests for help, taking the position that public defenders must deal with budget cuts just like everyone else.<sup>211</sup> However, the public defenders, and the court system in general, cannot be treated like any other state agency. Other state government agencies are better able to absorb budget cuts because they can cut certain projects or activities. The court system is different because "it has a very specific, circumscribed mission: judges, magistrates and court support personnel are there for only one essential purpose—to ensure that society has a forum for the peaceful and orderly resolution of disputes in a timely manner."<sup>212</sup> Whereas another agency can decide to eliminate a particular project or activity, the courts cannot decide to stop hearing particular cases and public defenders cannot decide to stop satisfying their ethical obligations to certain defendants.

The Legislature can better fund public defender offices like PD-11 by adequately funding the court system as a whole, and by considering the budgetary effects of laws they pass. There are two commonly proffered approaches for achieving this goal: designate to the courts either a fixed percentage of the state budget or a dedicated source of funding.<sup>213</sup> Each has its drawbacks. A designation of a fixed percentage of the budget will likely be difficult to obtain.<sup>214</sup> However, a dedicated funding source is problematic because the Legislature may simply reduce the amount of general revenues allocated to the judiciary by an identical amount.<sup>215</sup> Nevertheless, dedicating court access fees to fund the court system (via a trust fund) is pragmatic and supported by the court system itself.<sup>216</sup> Currently only a small portion of revenue from court filing fees, fines and costs is dedicated to the courts.<sup>217</sup> Instead, "people continue to pay filing fees for timely justice, but the justice they are receiving is being delayed."<sup>218</sup>

Regardless of how the Legislature chooses to fund Florida's public

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211. See Susannah A. Nesmith, *Miami-Dade Public Defender: Attorneys for Poor Vow To Spurn Most Felony Cases*, MIAMI HERALD, June 3, 2008, at 1A (reporting that one state senator viewed the public defender's refusal to accept felonies as "grandstanding," while the state attorney's office called the action "too absurd to contemplate").

212. OFFICE OF THE STATE COURTS ADM'R, SEVEN PRINCIPLES FOR STABILIZING COURT FUNDING 1 (2009).

213. Blankenship, *supra* note 64, at 5.

214. See *id.* Former State Senator Rod Smith is pessimistic about the probability that the legislature would agree to a fixed percentage arrangement: "[T]he answer is plainly the Legislature is never going to designate dollars in that fashion. If that's going to happen, that is something that will have to be imposed from the outside." *Id.*

215. *Id.*

216. OFFICE OF THE STATE COURTS ADM'R, *supra* note 212, at 3.

217. *Id.*

218. *Id.*

defenders, PD-11's plight demonstrates that an adequate level of funding is necessary, and that it can not wait.

## V. CONCLUSION

The growing crisis in indigent defense is much bigger than Miami-Dade County or the state of Florida. Indigent defense systems nationwide are struggling to provide adequate representation to their clients. While the crisis at PD-11 in Miami-Dade County is a small part of the story, it is an important and an illustrative one. It is the nation's fourth largest public defender's office in one of the nation's largest and poorest metropolitan cities. But perhaps the most important aspect of PD-11's role in the national story is that it has been hailed as the nation's best public defender's office. Despite its budgetary problems, PD-11 may serve as a model for other public defenders across the nation. Commenting on what this suggests about the state of indigent defense in the United States, counsel for Bennett Brummer said, "The reputation of the degree of professionalism at PD-11 is national, if not international. It's widely considered one of the best public defender offices there is. Then you must shudder and wonder: What is the worst?"<sup>219</sup>

The fact that public defenders in Florida and elsewhere are rarely, if ever, called before disciplinary bodies to defend ethical violations due to case overloads is not evidence that there is no problem in the current system. This absence of disciplinary action should also not be interpreted to mean that the existing problems are not fundamentally important. This problem is incredibly important, because it creates a double ethical standard for attorneys with indigent clients and attorneys with paying clients. This double standard, in turn, encourages sub-par representation for the poor that falls short of ethical and constitutional standards, despite the best efforts of Miami-Dade's public defenders. The unavoidable result of a persistent failure to meet constitutional minimums for indigent clients is an undermined confidence in the judicial process.<sup>220</sup>

Adequate funding for public defenders in Miami-Dade County and nationwide is the answer to the ethical and constitutional concerns raised by the crisis in indigent defense. Without sufficient resources for public defenders, the famous words of *Gideon* are just words, a guarantee of little more than a companion at arraignment.

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219. Jan Pudlow, *Judge Allows 11th PD To Stop Taking Cases*, FLA. BAR NEWS, Sept. 15, 2008, at 1, 6.

220. Christensen, *supra* note 50 ("You don't want people in the community thinking there is one kind of justice for the rich and one kind for the poor.").