

IN THE SUPREME COURT OF MISSOURI

SC91150

STATE EX REL. MISSOURI PUBLIC DEFENDER COMMISSION,
J. MARTY ROBINSON & ROD HACKATHORN,

RELATORS,

V.

THE HONORABLE JOHN S. WATERS AND THE HONORABLE MARK ORR,

RESPONDENTS

ON WRIT OF PROHIBITION

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF RELATORS

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INTERESTS OF AMICUS CURIAE

The American Bar Association (“ABA”), as *amicus curiae*, respectfully submits this brief in support of Relators. Although the ABA takes no position on the factual issues or on the Missouri statutory and regulatory issues presented in this case, the ABA respectfully requests that resolution of these issues include consideration of the ethical and professional obligations of the legal profession that require all lawyers, including public defenders, to provide competent and diligent representation to each of their clients.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all 50 states and other jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors and law students.¹

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Since its founding, the ABA has actively worked in the fields of legal ethics and indigent defense. In 1908, the ABA adopted its first CANONS OF PROFESSIONAL ETHICS (now the MODEL RULES OF PROFESSIONAL CONDUCT) (“ABA Model Rules”).² In 1913, the ABA created the entity now known as the ABA Standing Committee on Ethics and Professional Responsibility (the “ABA Ethics Committee”). The ABA Ethics Committee publishes formal ethics opinions on professional and judicial conduct, provides informal responses to ethics inquiries, and, upon request, assists courts in their development, modification, and interpretation of ethical standards such as the ABA Model Rules and the ABA MODEL CODE OF JUDICIAL CONDUCT.³ In 1920, the ABA created the entity now

² The work of ABA entities becomes ABA policy only after presentation to and adoption by the ABA’s House of Delegates, which is composed of over 560 delegates representing states and territories, local and state bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States, among others. *See* ABA General Information, *available* at <http://www.abanet.org/leadership/delegates.html> (last visited May 12, 2011).

³ For information on the Ethics Committee, *see* http://www.americanbar.org/groups/professional_responsibility.html (last visited

known as the Standing Committee of Legal Aid and Indigent Defendants (“SCLAID”), which examines the delivery of legal services to assist the poor.⁴

The ABA believes that two documents from its work in the fields of legal ethics and indigent defense may be helpful to the Court in its consideration of the issues presented in this matter. These documents, which are discussed in this amicus brief, are the ABA Ethics Committee’s Formal Opinion 06-441, a copy of which is attached in the Appendix at A1 to A9⁵; and SCLAID’s Eight Guidelines of Public Defense Related to Excessive Workloads (the “Eight Guidelines”), a copy of which is attached in the Appendix at A10 to A29.⁶

May 12, 2011). The MODEL RULES OF PROFESSIONAL CONDUCT and the MODEL CODE OF JUDICIAL CONDUCT are also available at that site.

⁴ For information on SCLAID, *see*

http://www.americanbar.org/groups/legal_aid_indigent_defendants.html (last visited May 12, 2011).

⁵ The ABA Ethics Committee’s formal opinions are ABA policy, pursuant to ABA By-laws. Formal Opinion 06-441 is also available at

http://www.americanbar.org/groups/professional_responsibility/resources.html (last visited May 12, 2011).

⁶ The black letter, introduction and commentary of the Eight Guidelines were

While ABA policy assumes that public defenders will use public resources efficiently in providing representation to indigent defendants, the ABA takes no position on whether, in this matter, the Missouri Public Defender has done so. The ABA, further, takes no position on the disputed interpretations of Missouri statutory and regulatory provisions. However, based on its 100 years of work to improve the quality of legal representation and its 90 years of work on indigent rights, the ABA respectfully offers this amicus brief as it may assist the Court in considering the relationship of the legal profession's ethical and professional obligations to the issues of this case.

adopted as ABA policy in August 2009. The Eight Guidelines are also available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.authcheckdam.pdf (last visited May 12, 2011).

SUMMARY OF THE ARGUMENT

While the Special Master recognized that individual public defenders have significant professional and ethical obligations to their clients that cannot be properly met due to excessive caseloads, the Special Master concluded that caseload limitation by monthly cutoff makes the problem worse for the rest of the criminal justice system. The ABA respectfully asserts that, in resolving this issue, appropriate weight must be given to the ethical and professional obligations set forth in the Missouri Supreme Court Rules (“Missouri Rules”) and the ABA Model Rules, each of which require, with no exceptions, that all lawyers – including the individual public defenders – must provide diligent and competent representation to each of their clients. Specifically, a lawyer must not take on a new representation, even where court-appointed, or must withdraw from a current representation, if representation will result in violation of the rules of professional conduct.

The ABA also believes that appropriate weight must be given to the responsibility of the Public Defender Office who, in addition to supervising individual public defenders and providing oversight for their workloads, must also take corrective action in advance of a subordinate lawyer’s violation of the ethical and professional rules. When a Public Defender Office concludes that assignments must be stopped or withdrawals permitted, the ABA believes that according

substantial deference to this assessment promotes independence of the defense function from the judiciary and is consistent with the ethical and professional obligations of the Public Defender Office and the individual lawyers to ensure diligent and competent representation for each client.

ARGUMENT

I. Appropriate Weight Must Be Given To The Rules Regulating the Missouri Bar That Mandate Individual Public Defenders Provide Competent And Diligent Representation.

In this case, the Special Master recognized that individual public defenders have significant professional and ethical obligations to their clients that cannot be properly met due to excessive caseloads. The Special Master found that individual public defenders face an untenable dilemma when they are assigned too many cases. He stated, “There is not enough time in the day to properly represent all the defendants assigned, but the defender must adequately defend clients because there is no immunity from the profession’s ethical requirements nor from civil liability for legal malpractice.” Report at 5. Nevertheless, the Special Master concluded, “Caseload limitation by monthly cutoff goes a long way toward solving the public defender dilemma, but makes the problem worse for everyone else.” *Id.*

The ABA respectfully asserts that in evaluating the issues in this case, appropriate weight must be given to the ethical and professional obligations of the

Missouri Rules. Those Rules clearly require that all lawyers – including the individual public defenders – provide competent and diligent representation.

The effects of excessive caseloads on the representation of indigent defendants and on the indigent criminal defense systems have been studied by organizations, including the ABA, in the half-century since *Gideon v. Wainwright*, 372 U.S. 335 (1963).⁷ Consistent with the results of these studies, the ABA’s

⁷ For example, to commemorate the 40th anniversary of *Gideon v. Wainwright*, SCLAID conducted four public hearings at which 32 witnesses from 22 states presented testimony on excessive caseloads; SCLAID then produced its report, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (“*Gideon’s Broken Promise*”), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/brokenpromise/right_to_counsel_in_criminal_proceedings_fullreport.authcheckdam.pdf (last visited May 12, 2011). This report concluded that indigent defense lawyers “frequently are burdened by overwhelming caseloads . . . in defense systems that fail to provide the bare necessities for an adequate defense (*e.g.*, sufficient time to prepare, experts, investigators, and other paralegals), resulting in routine violations of the Sixth Amendment obligation to provide effective assistance of counsel.” *Id.* At 38. The report also concluded that “ethical

Formal Opinion 06-441 concluded that all lawyers, including individual public defenders, must move to withdraw from cases when, because of excessive caseloads, they are unable to furnish representation in compliance with their ethical duties. App. at A1. Further, under Formal Opinion 06-441, when court-appointed lawyers are unable to effectively take on additional representations because of existing caseloads, they should advise the court not to make any new appointments. *Id.* “The Rules provide no exceptions for lawyers who represent indigent persons charged with crimes.” *Id.* at 3.⁸

To be sure, Formal Opinion 06-441 is based on the ABA Model Rules as amended through August 2003, rather than the rules of any particular jurisdiction.

violations routinely are ignored not only by the lawyers themselves, but also by judges and disciplinary authorities.” *Id.* At 39.

⁸ Compare ABA STANDARDS FOR CRIMINAL JUSTICE, Defense Function Standard 4-1.3(e), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html (last visited May 12, 2011) (requiring that defense counsel “not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client’s interest in the speedy disposition of charges, or may lead to the breach of professional obligations.”).

But the Missouri Rules are based on the ABA Model Rules, and both rules require that a lawyer “provide competent representation to a client.” Mo. Sup. Ct. Rule 4-1.1; ABA Model Rule 1.1. This includes both knowledge and skill, and the time for the “thoroughness and preparation reasonably necessary for the representation.” *Id.* As the comments to both rules emphasize, an essential element of the competent handling of any matter includes “adequate preparation.” Comment 5 to Mo. Sup. Ct. Rule 4-1.1; Comment 5 to ABA Model Rule 1.1.

Similarly, the Missouri Rules and the ABA Model Rules require a lawyer to act with “reasonable diligence and promptness in representing the client.” Mo. Sup. Ct. Rule 4-1.3; ABA Model Rule 1.3. The comments to the rules explain that this obligation requires that a lawyer’s “work load be controlled so that each matter can be handled competently.” Comment 2 to Mo. Sup. Ct. Rule 4-1.3; Comment 2 to ABA Model Rule 1.3. Thus, in taking on a new matter, the lawyer must consider the impact of the new representation on current clients. The lawyer must not take on any representation when there is a significant risk that the new representation “will be materially limited by the lawyer’s responsibilities to another client.” Mo. Sup. Ct. Rule 4-1.7; ABA Model Rule 1.7(a)(2).

A lawyer must follow these rules at the outset and during the course of the representation. The lawyer “shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the

representation will result in violation of the rules of professional conduct.” Mo. Sup. Ct. Rule 4-1.16(a)(1); ABA Model Rule 1.16(a)(1). And, where counsel is court-appointed, counsel should not seek to avoid court appointments except for good cause, which includes representation that “is likely to result in a violation of the Rules of Professional Conduct.” Mo. Sup. Ct. Rule 4-6-2(a); ABA Model Rule 6.2(a).

Indeed, the Special Master recognized the import of the ethical and professional obligations that undergird the Missouri Rules. The ABA respectfully asserts that, in this Court’s evaluation of the issues before it, appropriate weight must be given to the clear requirement of the Rules that all clients must be represented competently and diligently.

II. Appropriate Weight Must Be Given To The Responsibility of The Public Defender Office To Ensure That Its Lawyers Provide Competent And Diligent Representation.

In considering the effects of excessive caseloads, the ABA’s Formal Opinion also considered the ethical responsibility of the Public Defender Office and concluded that Model Rule 5.1 requires that “[i]f any subordinate lawyer’s workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical responsibilities in regard to the representation of her clients.” App. at A7. The

ABA believes that, when evaluating the effects of the caseload limitations on the criminal justice system as a whole, appropriate weight must be given to the Public Defender Office's responsibility to ensure that the individual public defender lawyers provide competent and diligent representation to each of their clients.

Formal Opinion 06-441 states that the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This includes "consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers." *Id.* The Formal Opinion also states, "If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct." *Id.* at 9.

In 2009, SCLAID recognized that ABA policy, including Formal Opinion 06-441, did not include an action plan to assist defender organizations in complying with their ethical and professional responsibilities when faced with excessive caseloads. SCLAID accordingly issued its "Eight Guidelines of Public Defense Related to Excessive Workloads," a copy of which is attached as Appendix B, which were adopted as ABA policy in 2009. The Eight Guidelines

set out steps the public defense provider should take to identify excessive workloads. Guideline 1 urges the public defense provider to assess whether excessive workloads are preventing its lawyers from fulfilling performance obligations. App. at A17-A18. Guidelines 2-4 discuss the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for the provider to determine if excessive workloads exist. *Id.* at A19-A22. Guidelines 6-8 address the range of options that the provider and its lawyers should consider when excessive workloads are present. *Id.* at A25-A28. The Comment to Guideline 6 counsels the provider to take corrective action in advance, “to avoid furnishing legal services in violation of professional conduct rules”; it also counsels that the circumstances may warrant that the provider or the individual lawyers seek redress in the courts. *Id.* at A25. Guideline 5, however, suggests that the provider consider other choices before redress is required. *Id.* at A22-A24.

As stated in the Comment to Guideline 6, where the public defense provider has followed the Eight Guidelines, “it should be in an especially strong position to show that its workload is excessive, and its representations regarding workloads should be accepted by the court.” *Id.* at A25. As also stated in the Comment to

Guideline 6, this showing should include “statistical data, anecdotal information, as well as other kinds of evidence.”⁹ *Id.*

Finally, as stated in the Comment to Guideline 7, “When Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers.” *Id.* at A26. When, as officers of the court, they “address the judge solemnly upon a matter before the court, their declarations are virtually made under oath” and their representations “should be given the weight commensurate with the grave penalties risked for misrepresentation.” *Id.* (citing *Holloway v. Arkansas*, 435 U.S. 475, 486, 486 n. 9 (1978)). This consideration also promotes the independence of the

⁹ Although the ABA does not endorse specific numerical caseload standards, it has adopted the principle that “[n]ational caseload standards should in no event be exceeded.” Comment to Guideline 4, App at A21-A22 (quoting ABA Ten Principles of A Public Defense Delivery System, Commentary to Principle 5 (2002), *available* at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sc_laid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf (last visited May 12, 2011)).

defense function. *See* Comment to Guideline 2, *Id.* at A19 (“the ABA endorses complete independence of the defense function, in which the judiciary is neither involved in the selection of counsel nor in their supervision”).

While taking no position on the factual issues regarding the propriety of the particular Protocol at issue in this case, the ABA believes that, in this Court’s evaluation of the issues before it, appropriate weight should be given to the Public Defender Office’s knowledge of the workloads handled by the individual public defender lawyers. Similarly, appropriate weight should be given to the Public Defender Office’s obligation to ensure that excessive caseloads do not prevent its lawyers from providing competent and diligent representation to each of their clients. Consistent with Formal Opinion 06-441 and the Eight Guidelines, the ABA urges the Court to consider the responsibilities of the Public Defender Office in ensuring that each of its clients is represented consistent with the ethical and professional obligations of the legal profession.

CONCLUSION

For the foregoing reasons, and taking no position on any of the factual or the Missouri statutory or regulatory issues presented by this case, *amicus curiae* American Bar Association requests that the Missouri Supreme Court consider the ethical and professional obligations of the legal profession in reaching its decision in this case.

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief (1) contains the information required by Mo. Sup. Ct. R. 55.03, (2) complies with Mo. Sup. Ct. R. 84.06(b) and (3) contains 2,821 words (excluding the cover, certificates of compliance and service and signature block), as calculated by Microsoft Word, the software used to prepare this brief.

The undersigned further certifies that a computer diskette containing the full text of the Brief of *Amicus Curiae* the American Bar Association, is enclosed with the brief. The diskette has been scanned for viruses and is virus free.

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 84.07(a) and 84.06(g), the undersigned hereby certifies that one copy of this brief, along with a disk complying with Supreme Court Rule 84.06(g) and containing an electronic version of the brief, were sent by U.S. Mail, postage prepaid, on this _____ day of May 2011, to the following counsel of record:

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