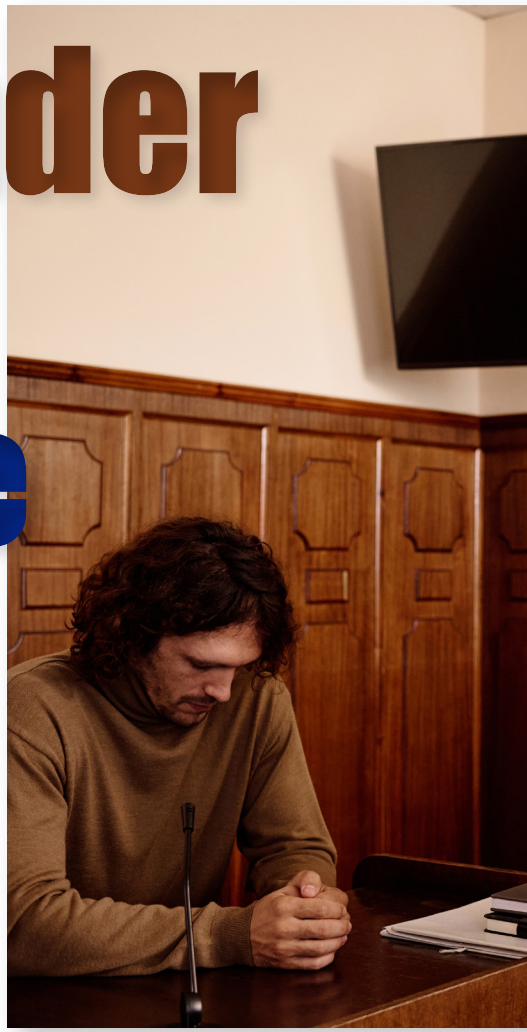
Public Defender Workload and the Promise of *Gideon*



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Gideon v. Wainwright, which was decided in 1963, held that the Sixth Amendment guarantees the right to counsel for poor people charged with crimes in state court.[1] Over the six decades since _Gideon_ was decided, states have grappled with how to provide public defense services.

Meanwhile, the standards of practice for criminal defense have increasingly taken a central role in determining whether the accused received constitutionally effective assistance of counsel. These standards apply to all defense attorneys and have served as the basis for reforming public defender systems through improvements in training, recruitment, supervision, and the reduction of caseloads. This article discusses the evolution of efforts to fulfill *Gideon*'s promise with special attention to excessive caseloads and the role of workload standards in ensuring effective assistance of counsel.

Understanding caseloads and setting workload standards have been thorny issues in public defense. An exciting development occurred in 2023, however, when the RAND Corp. published the National Public Defender Workload Standards (NPDWS), with the intention that the report be used as a starting point for jurisdiction-specific workload standards. The NPDWS study uses a robust version of the "Delphi method," the gold-standard in weighted caseload studies, designed to elicit consensus in professional judgment. By convening a panel of national experts in public defense to discuss lawyering tasks and the time required to meet professional standards, the NPDWS provides a window into what the work of criminal defense looks like for the 21st century criminal defense lawyer.

Effective Assistance of Counsel and Professional Standards of Practice

Twenty years after *Gideon*, the U.S. Supreme Court held that the Sixth Amendment guarantees not just the appointment of counsel, but *effective assistance* of counsel in criminal cases, meaning that the defendant is entitled to a reversal if the defense attorney's performance fell below professional standards, resulting in errors that undermine confidence in the outcome of the case.[2] The most widely cited standards for criminal defense—identical for public defenders and private attorneys—are set forth in the ABA Criminal Justice Standards for the Defense Function.[3] Although a violation of the ABA Standards is not *per se* ineffective assistance of counsel, the ABA Standards are used as evidence of professional norms.

Many state and county public defender offices responded to the constitutional right to effective assistance of counsel by introducing more robust training and supervision programs, with varying degrees of success. Meanwhile, private attorneys providing public defense by contract or appointment often lacked the same resources. This variation in oversight and resources led to the next wave of public defense reform: the establishment of statewide oversight agencies, commissions, or boards. These oversight bodies respond to the reality that it is the obligation of the *state* rather than


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the county or municipality to ensure that the Sixth Amendment right to counsel is protected.

Excessive Caseloads and Effective Assistance of Counsel

As every lawyer knows, excessive caseloads can result in breaches of the ethical duties of competence and diligence and may also create conflicts of interest if the attorney sacrifices the quality of representation in some cases to focus on more pressing or winning issues in other cases.[4] Caseload limits are also essential to the Sixth Amendment right to effective assistance of counsel. When criminal defense attorneys do not have time to work their cases, they are forced to triage, forgoing essential lawyering activities required by the ABA Standards, such as investigation of factual and legal issues before counseling the client on any waiver of rights. Moreover, excessive caseloads can result in structural denial of effective assistance of counsel. In a companion case to *Gideon v. Wainwright,* the Supreme Court gestured to instances where prejudice is presumed because the accused constructively was denied the right to counsel. To have a lawyer who has no time to engage in essential lawyering tasks may be tantamount to having no lawyer at all.[5]

The Struggle to Determine Workload Standards and Set Caseload Limits

Public defender offices have long struggled to determine how much work is too much, and when the caseload interferes with effective representation. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) suggested maximum caseloads based on 1972 reporting from the National Legal Aid and Defender Association (NLADA).[6] The NAC standards are widely viewed as outdated and lacking in both methodology and systematic analysis of variables like case types and attorney activities, but they are still used in jurisdictions that have not conducted their own caseload studies.

One problem with the 1973 standards is that the practice of criminal defense is more time consuming than it was 50 years ago. Attorneys today review mountains of digital discovery from body-worn cameras, cell phones, and social media. Current criminal practice involves more forensic evidence, consideration of collateral consequences, and representation in specialty courts. Workload standards must take into consideration these expanded lawyering activities.

The 2023 National Public Defender Workload Standards

The RAND Corp. published the National Public Defender Workload Standards (NPDWS), the first attempt at national standards since 1973.[7] The NPDWS included a review of 17 state-specific workload studies conducted between 2005-22. Next, the researchers used the Delphi method, designed to elicit expert opinion on difficult and complex questions. The researchers convened a group of 33 attorneys with decades of experience in public defense. Their task was to develop an expert consensus on the length of time needed to provide reasonably effective assistance of counsel in various types of criminal cases. The cases were divided into six felony types, two levels of DUI cases, two levels of misdemeanors, and parole and probation revocation cases.

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After a period of review and instruction on methods, each attorney in the Delphi panel anonymously and individually provided estimates of the average time it takes to conduct lawyering tasks for each case type. The lawyering tasks include: (1) client communication and care; (2) discovery and investigation; (3) experts; (4) legal research, motions practice and other writing; (5) negotiation; (6) court preparation; (7) court time; (8) sentencing, mitigation, and post-adjudication.[8]

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Then, the attorneys on the Delphi panel shared their answers and worked toward consensus on the average time needed in order to provide "reasonably effective assistance of counsel pursuant to prevailing professional norms for each case type."[9]

Notably, the Delphi panel assigned average times that are much higher than the 1973 NAC standards. The average times range from 13.8 hours for the lowest level of misdemeanor to 286 hours for the average felony case carrying a sentence of life without parole.

Thinking Through the Work of an Effective Defender

The NPDWS Delphi panel's professional consensus about how long it takes to be effective in various lawyering tasks and case types provides a starting point for discussions with policymakers, the judiciary, and others involved in criminal legal practice. Indeed, the NPDWS study is spurring debate among criminal defense attorneys, given that the time-per-case agreed upon by the Delphi panel seems like a utopian vision to the busy public defender or private attorney. Attorneys with excessive caseloads often bring skill and judgment, making quick decisions based on the evidence they can collect in the time available. In so doing, however, they may become accustomed to triaging cases in a manner inconsistent with the ABA Standards for the Defense Function.

Workload Standards for Effective Assistance of Counsel

The ABA stresses the importance of workload standards to control the attorney's caseload, stating that a lawyer must not accept new clients if her "workload prevents [her] from providing competent and diligent representation to existing clients," and that she "must move to withdraw from representation if she cannot provide competent and diligent representation."[10] The third principle of the "Ten Principles of a Public Defense Delivery System," revised November 9, 2023, states that public defense workloads should be "regularly monitored and controlled," and that, if the workload becomes excessive, defense providers should refuse new appointments and possibly withdraw from existing cases. ABA Defense Function Standard 4-1.8 (2017) also states that defense counsel should not carry excessive workloads and that public defender offices should review attorney workload on a regular basis. Because the state is responsible for ensuring compliance with the Sixth Amendment right to counsel, the responsibility for setting workload standards for public defense ultimately falls to the state and its public defender system.

Equal justice requires that public defenders have adequate time to engage in the lawyering activities required by professional standards for criminal defense. Given that the rate of incarceration increased seven-fold between 1972 and 2009, it is easy to imagine how caseloads increased dramatically in jurisdictions without a commensurate increase in public defenders. The NPDWS study gives individual jurisdictions a starting point and a methodology for determining workload standards in modern criminal practice. More broadly, the study provides critical insight into what effective representation looks like in today's criminal courts.

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In her individual capacity, Hanan serves as the monitor for the consent judgment in *Davis v. State* pending in the First Judicial District (170C02271B) and thus does not comment in this article on public defense in Nevada and/or on the *Davis* lawsuit.

ENDNOTES:

1. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("our adversary system of criminal justice, any person [hauled] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided."). Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending the right to counsel to misdemeanors where jail time is imposed); Johnson v. Zerbst, 304 U.S. 548 (1938) (establishing the right to counsel in federal criminal prosecutions).
2. *Strickland v. Washington,* 466 U.S. 668, 687-688 (1984) (holding that the Sixth Amendment right to counsel includes the right to "reasonably effective assistance" under "prevailing professional norms").
3. American Bar Association Criminal Justice Standards for the Defense Function (4th ed., 2017).
4. ABA Model Rule of Professional Conduct (2023)1.1 (competence); 1.3 (diligence); 1.7 (conflict of interest); ABA Eight Guidelines of Public Defense Related to Excessive Workloads, Commentary to Guideline 1 (stating that "an excessive number of cases create[s] a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.").
5. *Cronic,* 466 U.S. 648, 666 (1984).
6. National Advisory Commission on Criminal Justice Standards and Goals (NAC). National Advisory Commission on Criminal Justice Standards and Goals, Courts, 1973, p. 276.
7. RAND Justice Policy Program, National Center for State Courts, in partnership with the American Bar Association Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID) and Stephen F. Hanlon, Principal, Law Office of Lawyer Hanlon. Funded by Arnold Ventures.
8. *Id.* at ix. Note that the attorney activities are almost identical to those found in Guideline 1 of the ABA Eight Guidelines of Public Defense Related to Excessive Workloads, August 2009.
9. *Id.* at ix. Note that the attorney activities are almost identical to those found in Guideline 1 of the ABA Eight Guidelines of Public Defense Related to Excessive Workloads, August 2009.
10. American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06- 441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation, May 13, 2006 (hereafter ABA Formal Opinion 06-441), p.1.