2010

Dealing with Excessive Caseloads with Litigation - Panel Two (NATIONAL PUBLIC DEFENSE SYMPOSIUM: ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT: NON-CAPITAL AND CAPITAL DEFENSE SERVICES)

Adele Bernhard

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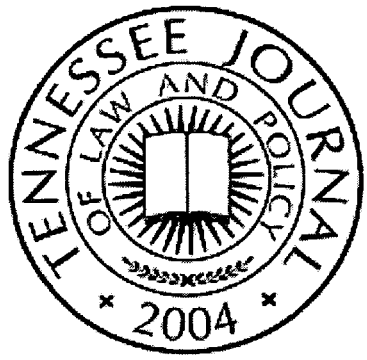

NATIONAL PUBLIC DEFENSE SYMPOSIUM

ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT: NON-CAPITAL AND CAPITAL DEFENSE SERVICES

"DEALING WITH EXCESSIVE CASELOADS WITH LITIGATION"

PANEL TWO

FRIDAY, MAY 21, 2010
MORNING SESSION

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

INTRODUCTION OF DEAN:

NORMAN LEFSTEIN,
Professor of Law and Dean Emeritus
Indiana University School of Law - Indianapolis

DEAN DOUGLAS A. BLAZE,
University of Tennessee College of Law

PANEL TWO SPEAKERS:

MODERATOR: MARK E. STEPHENS,
District Public Defender
Knoxville, Tennessee

RORY STEIN,
Executive Assistant Public Defender and General
Counsel, Dade County (Miami), Florida

MAX BAHNER,
Chambliss, Bahner & Stophel, PC
Chattanooga, Tennessee

PROFESSOR CARA H. DRINAN,
Columbus School of Law, Catholic University of America
Washington, D.C.

PROFESSOR ADELE BERNHARD,
Pace Law School
White Plains, New York

NORMAN LEFSTEIN: I know we're going to be joined by a few folks in just a minute. When we began the program yesterday afternoon, the Dean of the College of Law, Doug Blaze, was unable to be with us because he was visiting with alumni and raising large amounts of money for the College of Law, which is what Deans do. He's taking a break from fundraising this morning, and I'm very pleased to welcome Dean Doug Blaze to his own law school to greet all of you this morning. Thank you.

DEAN BLAZE: Thanks, Norm. We are really excited to have you all here. I am sorry that I wasn't here yesterday. I heard that it was an excellent day—very productive—and that you got a chance to see the Baker Center. I was out meeting with alumni. And just to digress for a second, I was in Nashville. I just have to say, and there may be some folks from Nashville here today, it is remarkable how that city and the surrounding community has responded to what has been a devastating two-and-a-half weeks. That community has pulled together. I know as a Tennessean, I'm extremely proud of what they've done over there to deal with some incredibly difficult issues and pull together. I think the whole country can be proud of how disasters like the one experienced in Nashville have been handled in that particular locality.

Again, we are very, very proud. I think it's incredibly appropriate that this conference is being held here. Hopefully, as you walk in and out of our doors, you see that it says "Equal Justice Under Law" at one side and "To Have the Assistance of Counsel" at the other side. We are very, very proud of the law school, of our long tradition of connection with the profession and involvement in the very issues that you all are talking about.

As you may know, we have the oldest, continuously operating legal clinic program in the country. We're headed on sixty-three years right now. And we have been

heavily involved in criminal defense, Sixth Amendment[1] issues for a long time and increasingly so lately. Our clinical program, in fact, was a public defender for quite a while before we had a full-time public defender program in the state of Tennessee. It was also the legal services provider for a four-county area up until 1981. So it has had a long and rich history of that.

More recently, though, I'm very proud of something we've done. We now have an Innocence Project Clinic at the law school, and thanks to the hard work of Penny White, Steve Bright will be working in that program this fall. We're really excited about that occurring. We also have some amazing faculty. Dwight Aarons has done a lot of work for the ABA Death Penalty Moratorium Implementation Project, particularly focusing on Tennessee. Hopefully, you all have met Jerry Black, who is finishing up as president of TACDL, Tennessee Association of Criminal Defense Lawyers. He also just received an award, the Law & Liberty Award, from the Knoxville Bar Association for his long-time commitment to representing citizens accused of crime.

And then there's the incomparable Penny White and everything she's done to help put this together. You know, Harvard asks her to write law review articles, she puts together conferences, she makes sure that there are flowers spread around our law school, she writes a death penalty manual for handling cases in Tennessee. She's just remarkable.

Obviously, I'm very, very proud of our program, our association. It is wonderful that you all are here. If there is anything anybody in this building can do to make your visit more enjoyable and more productive, just let us know. So welcome and thank you.

NORMAN LEFSTEIN: Thank you very much, Dean Blaze. I should have also mentioned that the Dean comes

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

from a clinical law background and has worked in legal services and in public defense. And there aren't too many Deans around the country who can make that claim. It's my pleasure now to turn the program over to Mark Stephens.

MARK STEPHENS: Well, good morning. I'm delighted to be here and to have the opportunity to serve as moderator of this panel; I look forward to their remarks. But before we get started, I do want to take just a couple of minutes. I'm kind of a child of the 1960s, and I am from time to time reminded of Max Yasgur standing on the stage screaming, "I'm a farmer," and then addressing the half a million or so people that were there at Woodstock.

I was thinking yesterday that I am a public defender. That's who I am—that's who I want to be. I'm so lucky to have the job that I want to have. I don't want to do anything else but this work. And yesterday, as I looked around this room, I was just energized by the wonderful, talented, and dedicated people who are here.

You know, this work that we do—not that I would know—but I hear that people that run marathons say that at some point you kind of hit this wall and you feel like you can't go forward. And any of us who have done this work for any length of time, we know there's those points where you kind of hit a wall, and you think, I just don't know if I'm going to be able to bring this home. And then you come to a group like this, and you see giants in our field, and you guys really are giants in the field. Norm Lefstein knows more about this topic than probably anybody I know. And as I was looking around I saw Bob Boruchowitz. I see that Avis—Avis Buchanan—is here, the head of PDS. PDS, the mother ship of public defender offices is here for God's sake. And then there is Ed Burnette. I don't know if you know Ed's background, but you should talk to Ed about what happened to him in

Chicago. And let me tell you, if there's anybody in this room that has a bigger backbone than Ed Burnette, I want to—I want to meet you because that guy's got something.

And so I just want to start off the day by saying that I am proud to be in this room. I am proud to learn from the folks that are here, the people who have dedicated their lives and who are truly experts in this field. Before I go any further, I would like to ask my staff who is here to stand up. I would please ask the audience to recognize them for the wonderful work that they do.

Now it's time to get started. We've got a panel here of real experts. Max Bahner is going to kick things off. I'm going to introduce Max here in a minute. Max is with the firm of Chambliss, Bahner & Stophel, a law firm in Chattanooga, who agreed to take my caseload litigation. And then I'm going to speak a little bit about the effort in Knoxville of caseload litigation. Rory Stein is here. Rory is the Executive Assistant Public Defender and General Counsel of the Miami Public Defender's Office. And for those of us who have been in this business for any length of time, we all know Bennett Brummer and what a leader in this business Bennett has been. Carlos Martinez was Bennett's right-hand man forever. Now Carlos has assumed responsibility for running that office and has designated Rory as his right-hand person. And so Rory must be an outstanding individual, and I look forward to his remarks. Rory is going to talk a little bit about the Miami experience, which is similar to the Knox County experience, although Rory has had chapters that are different from what we've experienced, and I'm interested to hear what he has to say about that.

Professor Cara Drinan is going to talk to us as well. She is currently a professor at Catholic University in Washington, D.C. She's been teaching since 2004; she's done research that has focused on the death penalty and the public defense reform. I recommend to you an article, *The*

Third Generation of Indigent Defense Litigation,[2] a 2009 article that Jerry Black gave me about eight or nine months ago. It's a great read. I also understand that there will be an article coming out this summer called *The National Right to Counsel Act, A Congressional Solution to the Indigent Defense Crisis*.[3] And I recommend that to you when it comes out. Cara is going to be talking a little bit about her research in the area of public defender litigation generally. She's going to give us a little more insight into what's going on in Michigan and New York.

And then we're going to move to Adele Bernhard. I didn't realize until last night that I actually know Adele. I've been in her office.

ADELE BERNHARD: That's how old we all are.

MARK STEPHENS: Actually, I was in her husband's, Peter Neufeld's, office and that other guy that he works with. I can't remember what his name is. I was with Bob Spangenberg in New York, and we were doing a site study focusing on private lawyers who are appointed to do this kind of work and performance standards and appointment and all that process. Adele has been very involved in those sorts of things. She worked with and ultimately chaired the Indigent Defense Organizational Oversight Committee, which monitored and evaluated the provision of indigent defense services by organized providers in the Bronx and in Manhattan.

What she is going to do is give us her thoughts on the difficulties and practicality of litigation as a strategy to control caseloads in the public defender's office. She's also

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[2] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009).

[3] Cara H. Drinan, *The National Right to Counsel Act, A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARVARD J. ON LEGIS. 487 (2010).

going to talk a little bit about whether there are other strategies that we should be thinking about. And then any other things that Adele wants to talk about I'm sure will benefit us.

Let's get started. To kick off the program I'm going to talk to you a little bit about Max Bahner. For those of you who don't know the history, in 1987 Tennessee decided that we needed to look seriously at the possibility of a statewide public defender system. We were providing counsel just through local appointments to private counsel. Tennessee started a pilot program in 1987, and I don't know the exact number—Gerald might know—that there were eight, nine or ten, something like that, pilot programs. After a couple of years, they decided that it was a cost-effective way to provide services. In 1989, we went to a statewide system.

People in Knoxville, being smarter than everybody else in the rest of the state, decided that we didn't want to participate in that program. So we really had a statewide system except for Knox County. We had the law school, and judges didn't have problems finding lawyers to handle these cases, so Knox County opted out. A year later, we decided we wanted to opt in and the Knox County Public Defender's Office was born in 1990.

I don't know if this is true or not, but I think the legislature was mad at us, because it staffed us with seven lawyers in an office. While we're not the same size as Nashville—Nashville had about thirty public defenders—we had seven. Memphis, which is considerably larger than Knoxville—maybe four or five times larger—had an office of seventy lawyers. So from the very beginning, we've been chasing caseload issues; from the day we were born, so to speak. In fact, I was elected, I think, on August 2nd or 3rd of 1990, and the very next day in court a judge appointed me to a death penalty case. I wasn't even sworn in until September 1st. I didn't have an office. I didn't have

a phone, and I didn't have a staff. He thought it was funny.

And so, eighteen months in we found ourselves in a terrible predicament, and we filed a petition to suspend appointments. I asked for a ninety-day reprieve. That was going to solve my problem, and I got it. I walked out of that courtroom thinking my problems were over—my caseload issues were over—and I won't have to address this again. But that didn't prove to be the case. And by 2006 I was in big trouble. I was seeking counsel from some people that I respect, particularly a gentleman named Bill Redick, who's a lawyer in Nashville. Bill told me, "What you need to do is to get a lawyer, and you need to let them be the lawyer. Don't get you a lawyer and then tell the lawyer how this lawsuit is going to be handled." And I said, "Well, that sounds good. Do you have anybody in mind?" And he said, "Yeah, I'll tell you exactly who you need to get. You need to get Max Bahner." I said, "Well, who the hell is Max Bahner?" I didn't know who Max Bahner was.

I started talking to Bill a little bit about who Max was, and I wound up getting Max Bahner. Everything Bill said about him is true. I would like to read just briefly an e-mail that Bill sent to me the other day when I told Bill I had an opportunity to introduce Max. There is also a death penalty twist to this, because Max Bahner did some incredible work in the case of Michael McCormick, a man who was convicted of murder in Tennessee and who was given the death penalty. Max Bahner and his firm then represented McCormick on post-conviction and won a new trial for him. Then Mary Ann Green represented McCormick back at his re-trial and he was acquitted. The man is innocent, and—thanks to Max Bahner—is no longer on death row. Bill Redick sent me this e-mail about Max, and he said,

Because Max was on the Board of Directors of the Capital Case Resource Center, and a senior partner in a

major Tennessee firm, he was one of the first that we looked at in our attempts to recruit major Tennessee firms to take capital cases in Tennessee. Max responded to the request as enthusiastically and appropriately as anyone we recruited. He committed staff and firm resources to the case as needed and worked on the case as it should be worked. He had to deal with the fact that McCormick had already been convicted and sentenced to death in an innocence case that had never been investigated. And since the case had never been investigated, Max had no persuasive reason to know that McCormick was innocent. Yet he and his staff rolled up their sleeves. They started from scratch and they did the work. I had several conversations with him and his staff as they worked the case and approached this evidentiary hearing. On one occasion, as they worked the case in anticipation of the evidentiary hearing. Paul Morrell and I went to Chattanooga and met with Max and his paralegal. I'm sorry I can't remember her name but she did incredible work. She was extremely talented. They approached the case with a quote, "leave no stone unturned," attitude. If they had not approached the case this way, Michael McCormick would still be on death row. In my experience, I can't think of a more classic example of a case in collateral litigation in which the attorneys turned around a conviction and death sentence of an innocent person.

Max Bahner, Jerry, I'll quit this in just a minute. I don't want to take all of Max's time but—

MAX BAHNER: Take it.

MARK STEPHENS: Jerry Black tells a story—Jerry Black has the ability to articulate what I felt all my career—I don't know how he does this—but he tells a story about how important the process is to people, to poor people who are in our courts. It is extremely important that they believe

that they're being represented by a quality lawyer who is really fighting for them and who has their best interest at heart, and that the judge is giving them a fair hearing. The process is important. If they believe that the process is fair, then they'll buy into the result. Whether they like it or not, they'll buy it if they believe they were treated fairly.

Well, I have the privilege of experiencing that because when I walk into court I know I have got a great lawyer. I know that he's prepared, and I know that he's going to fight like hell. I hope we win. So far we're okay. We're still breathing. We don't have an order that I can walk away with, but I know that the process is being handled the way a professional lawyer is supposed to handle this process. So I'm able to experience in a very real way some of the concerns that we have about our clients. So, I've already taken too much time, but it's my great privilege to introduce to you Max Bahner, and I look forward to his remarks. Max?

MAX BAHNER: Within the world of the law there are several worlds, and the world of public defenders is a world of which I was never acquainted really until I learned from Mark Stephens and from Norm Lefstein, with whom I have had the great privilege of spending a lot of time. I feel like I am a pigmy among giants. Because the more I have gotten to know what you public defenders go through, the loads that you carry, the walls you climb, the fierce winds which are in your face constantly, the more I admire what you do. I salute you because in what you do. You do something for me and for every other citizen of this great country of ours because you stand for what constitutional rights have to be enforced,—case by case in the small corners of time—and I really do admire you.

My perspective is very different from yours, and I hope that what I have to say in these few minutes will spark some interest. I think you will probably disagree severely

with some of the things I say, but I hope you will think about them after we are through here. I've practiced now for a little over fifty years and am just beginning to learn. People keep asking me when I'm going to retire and I say, "Well, when I get it all right." And I have not ever gotten it all right. I hope that sometime, if I reach the age of my senior partner who is ninety-nine—will be 100 in October—and still comes to the office five days a week—although he's in the hospital right now and I'm very worried about that—but he has stood for what is right. Jack Chambliss has preached since I have known him, that we are all priests at the bar of justice. We have a calling far beyond what we articulate when we take the oath of office to become a licensed lawyer.

One of the things that we have emphasized in our firm, as long as I have been there, is that we represent clients and the cases on which we work. I am trial lawyer. The case is not my case. It is never my case. It is always the client's case. I must never forget that, and we don't let people in the office forget that. If somebody comes back from court and says, "I won," one of us is going to be in his face and say, "No, you didn't win. You were a part of a team that won." You may have tried it by yourself, but you had an assistant, and you had other people in the office you could call on for help. It is the client's case, and each client has to be treated differently.

One of the things that shocked me when I began to learn about the operation of Mark's office is that if you take the sheer numbers and divide the numbers by the number of lawyers he has, each lawyer has roughly thirty minutes to take care of the interview, the investigation, the thinking, the studying of the case, and the trial, if a trial is necessary, for each of those persons assigned to her. That's impossible. We couldn't do that. We would never do that. We would be guilty of malpractice if we tried to do that in our firm.

In Mark's case, we got some outstanding criminal defense lawyers to come and testify as witnesses, in addition to Jerry Black, who is outstanding for many reasons. But they said they would never take on such a caseload. And how you all do it is something beyond my imagining. My perspective on excessive caseloads is influenced by my experience as a young lawyer in my first twenty years of practice. Indigent defendants were assigned to lawyers on a rotating basis, and I kept doing this until about 1979 or 1980 when I went to the court and asked to be taken off the list for various reasons. But in each of those cases, I learned that I had to go to the jail, interview the person, and investigate the facts, because sometimes my client knew exactly what she or he was talking about. Most of them were men because they were in the jail there, and then I had to do some research—because I didn't know criminal law, although I had a great teacher in law school. Then I had to go try the case or bargain.

One of the things that I learned was that people I thought were guilty, if put to trial were not always found guilty whether or not they were guilty. Juries do interesting things. But if you challenge the prosecution's case, frequently you can find that there are weaknesses in it which result in a defendant's verdict. And those people walk. I have seen people I represented who walked who I was as sure as I am standing here today were guilty. I've also had some people who I was appointed to defend who said they weren't guilty, and I thought they were. But as I investigated the case, I learned that they were not guilty, in my mind. And we tried the cases, and mirabile dictu, in a lot of those cases there was a defendant's verdict. Juries are pretty savvy, if you get to the jury. If you have done your homework and try the case well, then those people get to walk. I think that is very, very important for the system. Now how you all do it with the caseloads that you have to

deal with is beyond me. But the point I am trying to make is that we have got to change the system, as I understand it, because we're talking about people's lives. When a person pleads to a felony—or any crime when they're not guilty—just because they want to get out of jail and want to go home, they don't realize the implications of what they're doing and how that is going to hang like a very heavy necklace around their lives as long as they live. I don't think we can do that to people. I think that we have to treat each person as a person. We have to get them to participate in the cases in which we are representing them, because it's their case. It's not our case no matter what our caseload is.

One of my doctors was talking to me about some surgery that he thought I ought to have. And I was grilling him, he was grilling me back, and we were having one of those rough exchanges you have sometimes when a doctor is telling you something that you don't want to hear. And he said, as we concluded our conversation, that he was glad I had challenged him. So many times, my doctor said in fact, most of his patients would say to him, "Whatever you say, doc, whatever you think." And he said that's not the way it's supposed to be. He said it's your body and your life. I think in the case of each of these people we're appointed to represent, it's their lives and we have to bring them into the process.

One of my perspectives on excessive caseloads is influenced by my having been fortunate to be a member of the ABA Ethics Committee which wrote the opinion with which you are all familiar. I pulled out—in preparing these remarks today—some of the correspondence I got from the public defender in Los Angeles and some other large cities. Norm and Mark have seen some of that correspondence. There were several pages devoted to why in the world we should not do this, but we did. I think, as things have played out, that every one of us on the ethics committee was proud of that opinion, and thought it might make a

difference. But I have decided that the heads of public defender offices decided that they were going to ignore that opinion until they were forced to acknowledge what is said in that opinion. I would like to encourage some of you to do what Mark has done and take this on. I realize that there are limited resources. The world is made up of limited resources. We're learning that even air quality and water quality are limited resources. There is a tension between funding and not funding the defense of indigent criminals and for the whole judicial system. But I think that we have to learn to do things differently, and we may need to go back to involving more of the private bar in defending indigent criminals even without paying them.

The place I went to law school had inscribed over the door a phrase which is indelibly a part of my soul, "That those alone may be servants of the law who labor with learning, courage and devotion to preserve liberty and promote justice." I think all lawyers, public defenders, prosecutors, and private practitioners have that duty. I think you will find—if you look—that there are resources yet to be tapped to help deal with the situation. As a lawyer—except when I have those lights going on in front of me, a yellow light and an orange light and a red light—sometimes I talk too long, and I'm going to skip a lot of what I would otherwise have said.

In closing, I want to say something that I hope may be helpful to you, in which I read for the first time just two or three weeks ago—some remarks Robert Kennedy made when he was talking to a law school class in Cape Town, South Africa. These are his words, "Each time a man stands for an ideal or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, these ripples build a current which can sweep down the mightiest walls of oppression and resistance." That is what I think all of you are involved

in, and my hat is off to you. Thank you.

MARK STEPHENS: Thank you, Max. I want to start off now telling you just a little bit about the Knoxville experience, and then we'll move to Rory who will take it from there with the Miami experience. In 2006, we had caseloads that were completely out of control in my office. And I decided, at that point, that I was going to approach the judges and tell them that I couldn't continue to take appointments. I started gathering data, because I knew that the judges were going to be asking questions, and I needed to be able to provide them with the material. I discovered in June 2006 that our data were not in the shape that they needed to be in. There is a state statute that defines what a case is in Tennessee. Our data processing capability didn't match the State's definition of a case. I don't count by their definition the work that we have in the office. That's because, in my view, I think that the statute is structured in such a way as to save the State the most amount of money when it comes to paying private lawyers. For instance, if a client walks into a Wal-Mart parking lot and breaks into cars and is charged with fifty different offenses—that's one case as far as the Supreme Court is concerned. As we know, in terms of workload, that's a heck of a lot more work than one case. Traditionally, what we had always done is that we would count charges instead of cases, and so I knew that there would be a problem there. So we had to start reassessing our ability to count our cases.

Unfortunately, I wound up spending almost a full calendar year converting our data into something that I felt was reliable, and I thought would be able to answer all the questions that they had. Then I went through the process of listening to Bill Redick and going to Max Bahner. I still remember that first day I walked into Max's office, and he came into the conference room. I introduced myself to him, and told him that I needed a lawyer to represent me in

caseload litigation that I want to file—and that I don't have any money. I thought that would be the end of the meeting. Two and a half hours later—I think Max was on his twenty-fifth page of notes that he was taking—and he said, "There are some associates that I want to talk to and get their counsel and we'll probably be calling you back for another session because I'm sure there are things that I've missed." And that happened. I later met Hugh Moore and Aaron Love, two of his lawyers that work with him. And then a month later he called me and said that he had taken this matter before his partners and they had agreed to represent us. We were off and running.

One of the first things we did was to contact the judges and ask them if they would sit down and talk with us. I think that was important. I think it's important to begin the process with a dialogue with the judges. But I think there are some things you need to know, and you probably already do know. That is that the judges—well, hope I don't offend too many people—but judges don't care about anything other than if you don't do the work who is, and who the hell is going to pay them, and how much trouble am I going to get in when I give you the relief that you ask for and I start authorizing private lawyers to handle these cases, and the AOC has to pay the bill. I don't think it is true that what the courts are really concerned about is the quality of representation we afford our clients. I'm not taking pot shots at them. If they were sitting in this room I would tell them this, and I probably already have told them this a time or two. I just don't think what matters to them matters to us. And I think that in some of these discussions we had with the judges I was just off because I assumed they had a context that was similar to mine about the discussion that they don't have.

Now, one of the things I've heard judges say at one point is if one lawyer has ten then that can be handled a lot quicker than ten lawyers handling ten cases. When I start

talking about how I can't do this work and we need to get private lawyers involved, their concerns are how much extra time is it going to mean that I'm going to have to sit on the bench and who is going pay for all of this. And so, the conversations that we had didn't go exactly how I had hoped they would go. Then, in the course of that conversation, they play so many games with you. They say, "Mark, you're a really good lawyer. In your office, you've got a great staff, and they are doing fantastic work. The results that they're getting are"—I don't necessarily believe that they think it's true, but that's a tactic that they start to use with you to try to get you to back off. They give you this false sense that you are providing quality representation. The other thing that I think is important to understand is judges don't know what quality representation is. At least in our jurisdiction, if you're not a prosecutor, you're not a judge. They've never been defense lawyers before; they don't understand what you do or what you believe you have to do or why you would have to do it for that matter. It's just not something that they comprehend or appreciate. They think that defense lawyers do the same things that prosecutors do. So, as hopeful as I was that we would be able to have a meaningful discussion about delivering quality services to clients just didn't happen.

I still would recommend to you that you have that discussion. If nothing else, it's an educational process that you could go through. In those discussions, the attorney general asked to participate, because there were grave financial consequences to what I was proposing, and so he wanted to come in as counsel for the Administrative Office of the Courts, or AOC. It is the arm of the judiciary that winds up handling a fairly large indigent defense fund that pays private lawyers to do this work. If I were given the relief that I asked for, private lawyers would be appointed, and it would cost the AOC more money. And so, the attorney general decided that gave him standing to appear

and take an adversarial position to what it is we were trying to do.

If you do this, you need to consider what your position is going to be relative to the attorney general, because I guarantee you, they're going to want to get involved. Ed is here and maybe he can correct me if I'm wrong. I think in Kentucky they decided to let the attorney general in. I think in Miami you guys decided to let the attorney general in, I think. Initially, we were able to dodge that bullet, Max. Our sessions court judges decided that this was not an adversarial proceeding, and so there was no question as to whether the attorney general was going to be deemed a party or not. And then the court really helped us. I guarantee you that it was accidental. They hadn't thought about actually helping us. What they told the attorney general is that you can do whatever you want to do. You can participate in the hearing, offer proof, cross-examine witnesses, argue, and do whatever you want but not as a party. If you have information that you want the court to know about, we want to hear it, but I'm not going to deem that you're a party. The attorney general was uncomfortable with that position, because he/she didn't know that if they got an unfavorable ruling what he/she would be able to do in terms of appealing an unfavorable ruling. When the meetings with the judges got us absolutely nowhere, we decided to go ahead, file our petition, and move forward with the hearing.

Some things that I think you'll have to do if you have a hearing is you're going to have to have good data. I mean, you have to be able to answer every single question they might present to you in terms of what your lawyers' caseloads are and how you're counting things. Each jurisdiction, I suspect, is going to have its own little unique things.

Here in Knox County, Tennessee, we have something called general sessions courts, which hear both

felony and misdemeanor cases. The judges only have misdemeanor jurisdiction, but the felony cases go through there as well. It's a little complicated. But every single case that starts by the issuance of an arrest warrant goes through sessions court. A good bit of things get filtered out of sessions court and only a small percentage of the cases actually go to criminal court. But because of our staffing we practiced horizontal representation. I had lawyers assigned to the felony division of sessions court. And when that case passed through and went to criminal court, I had new lawyers picking it upstairs— because we didn't have enough staff to do vertical representation—which is obviously the preferred method. There was a question about how I was counting my case. Was I counting a case in felony sessions court as one and then when that case went to criminal court was I counting it again? Was I double-dipping so to speak, in the counting process? So you have to be ready to handle that. There were issues about conflict cases. When I "conflicted off" a case did I count that as a case or did I discount it? There's going to be those things that you're going to have to think about in the process of assembling your data, so that you can make sure that you are able to answer all the questions that they'll have for you.

I think the other thing you have to do on these cases is to talk about the national caseload standards. I don't disagree with Norm when he says they don't mean anything, but judges don't know what you're talking about when you talk about caseload standards. You have to provide some context. If you think that the context is going to all be subjective, I just think you're making a mistake. The judge is not going to let me define for them what a public defender is in my office—they're just not going to do that. What is a reasonable caseload and what's not? I cannot give them any sort of external support for where I came up with these numbers. Consequently, I just don't

think you can avoid a conversation about national caseload standards. I agree that these standards don't mean anything to me. They don't mean anything to the judges. However it was helpful to hear that the national standards say you can handle X and my lawyers are handling four times X. That was helpful.

I think if you're going to do this, you have to have complete buy-in from your staff. I think sort of like a borderline personality disorder will do. Judges want to divide and conquer. So they'll be in the back halls grabbing their favorite public defender and trying to get them to admit that we really don't have the problem that Stephens says we're having, or he's trying to create some office that we don't really need to create. They're going to try to do that, so I think you need to make sure that your entire staff is on board with what it is you're doing. I don't mean just telling everybody that they're on board. I mean, you've to do a good bit of educating, I think, to make sure that they understand why you're doing it, and they have to buy in.

Then, when you get ready to file the pleadings, I think you have to offer individual concrete examples of what your lawyers can't do. Don't assume that the judges understand any of it. In our hearing, we painstakingly had to explain to them what a defense lawyer does and what they don't do in my office because of the caseload problems that are imposed on them. And so I think it's very important in my case. By the way, pdknox.org[4] is a website that will allow you to go and see all of our pleadings. We attached affidavits to our pleadings from every lawyer in our office that explained what their situation is.

I think you have to rely on national experts. Norm came in, and I still have a judge who every time he sees me kids me about Norm's credentials. They were so blown away when we went through all of things that Norm had

[4] Public Defender 6th Judicial District, Http://pdknox.org.

accomplished in his career and his expertise that they still kid me about "why don't you get your expert to go do" because he can do everything else. They still give me that little smart-ass remark of theirs. Then I think what was most important is that we went to the private bar, and Jerry was our expert from the law school. And I think it's really important to get that sort of—those two made a great pair in terms of the experts that we had. Then, finally, we had private lawyers to go and look at our caseload. We picked five of the more prominent lawyers here in Knoxville who reviewed our pleadings, reviewed the affidavits of the lawyers, and then gave their opinion about whether or not they could provide effective assistance of counsel with our caseload.

We had an absolutely fantastic hearing, and we waited about six years, it seems like, and received a three-page order. Actually, it's two and a half pages. It is so poorly written and thought out that I wanted to share with you just a couple of the highlights of this opinion. This opinion actually says, "The public defender constitutes professional standards require that attorneys representing those accused of crimes to meet certain performance measures." That's one of their great lines. And then they said, "We find that attorneys in the public defender's office carry caseloads that exceed national criminal justice standards and goals. The Court does not conclude, however, that the caseload is such a level as to violate the accused the right to have competent counsel under either the United States Constitution or the Constitution of the State of Tennessee." And here's why, "Because the courts—the actual caseload of the public defender's office—has been declining for the last two years, and the public defender has sought and received relief in the form of the suspension of appointments in two other courts." And then they say, "But now they're taking those cases again," so they don't explain why that is still a basis for

finding that we don't have a problem. And then they conclude their opinion with, "It is incumbent upon those of us in the criminal justice system to strive to reach the goals and standards wherever possible." I really think that's funny that they would say that. And then they say this, "It is the mission of this Court to continue to monitor caseload numbers and review them on a systemic calendar quarter to see that caseloads are manageable and that effective representation of all defendants is achieved." You lose. And so our three-year effort concluded with this piece of crap.

Then they took it a step further and a step beyond that. So let me pass it to Rory.

RORY STEIN: Well, I think Florida judges look amazingly brilliant compared to those judges. Just by way of background, obviously everyone knows that Gideon came from Florida. And as a response to the Gideon case, Florida actually created one of the first statewide public defender systems. It now has twenty elected public defenders, and they are all constitutional officers. However, proper funding of the public defender's office has been an issue since the creation of the system. I think one of the first workload related cases is thirty-two years old. So that gives you an idea about how long this battle has been going on in Florida.

During the four years leading up to 2008, we found that our caseload had increased about twenty-nine percent. And in the two years leading up to 2008, our budget was cut by 14 percent. Those two trends created a significant crisis in our office. Since 96 percent of our budget goes to salaries, we realized that the only way we were going to keep pace, at least from a budgetary perspective, was not to replace the people who were leaving the office. That just made the caseloads even worse.

For the six months leading up to June 2008, we did

what Mark had done. We got together with the judges and asked them for help. We realized that there were limited things that they could do. We spoke with our prosecutor and talked with them a lot about the things that Bob Boruchowitz mentioned yesterday about perhaps not prosecuting cases concerning driving with a suspended license and things of that nature. None of that worked. I mean the judges offered to conduct plea blitzes, which I don't know how that would be helpful to the clients we represented. It would just essentially give away the courthouse and have everyone plead guilty. So we knew we had a problem on our hands. That's when we approached the lawyers at Hogan & Hartson. I think this came up yesterday. We realized that while we probably knew more about our workload than anyone else did—and that we felt comfortable with our ability to advocate in court—we also realized that if we went in, there might be some people who would brand this as just more public defender whining.

So we approached Hogan & Hartson and Parker Thompson, who is the senior partner down in Miami. When you think of liberty's last champion or the defenders of liberty, these people have been amazing. We couldn't be where we are—which is still right now without any relief—without them. I just want to mention them quickly. Parker Thompson, Julie Nivens, Al Lindsey, and Matt Bray have given us hundreds and hundreds of hours of labor. In fact, we had a lengthy conference call last night talking more strategy.

In June of 2008, we went ahead and filed a motion to decline appointments in noncapital cases. We had the chief judge consolidate these cases. At the time, we were concerned about a Florida statute, which Norm mentioned yesterday, that the legislature has enacted that essentially says that excessive workload can never be a basis for a conflict. There we were saying that our workload was too

high, but the statute provides terms under which you can't withdraw from a case. We figured that the statute didn't apply to us, because we were not withdrawing from anything. We were keeping the cases we had. We just wanted to decline future appointments in those cases.

We had the hearing, and we actually won. The judge ruled in our favor, finding that our caseloads violated any standard that was known. Unfortunately, that order was stayed immediately, and it went up to the 3rd District Court of Appeals.[5] I know that a lot of people in this room have read that opinion. Essentially, it paved some new ground in a number of different areas. The first thing was that, at the time of the hearing, the judge had ruled that the state was not a party, meaning that the state attorney's office was not a party to this litigation. However, the judge allowed the state attorney to participate as a kind of friend of the court, and the participation really was on the same level as a party. We were all cross-examined. There was lots of discovery in the case. They were allowed to submit all the papers they wanted. The 3rd District essentially confirmed that the state attorney did actually have standing to litigate these workload issues, which I think presents an interesting question as to whether the prosecutor should have a hand in deciding the lawyer for the person that they're prosecuting. Nevertheless, the 3rd District ruled that they did have standing.

The 3rd District said that bar rules apply only to individual attorneys and not to the office as a whole. Even though we had litigated, the ABA opinion—which said that Bennett Brummer, who was the public defender at that time, had an obligation to do what he was doing—the 3rd District didn't say a word about it. They also said that there was no difference between withdrawal and declining appointments. I thought that was kind of interesting. It

[5] State v. Pub. Defender, Eleventh Judicial District, 12 So.3d 798 (Fla. 3d Dist. Ct. App. 2009).

made me think that it's pretty tough to get divorced without ever getting married first, but they didn't see that distinction.

Lastly, the court said that there really was no magic number above which lawyers could not be effective and below which they could be effective. They said essentially that if you were going to utilize numbers, you certainly couldn't utilize them in the aggregate. At the time that we filed the motion, we basically divided all of our noncapital felony cases by all the lawyers who ever actually touched or looked at the case, and the caseloads were somewhere between 400 and 500. By a couple of months after the litigation, it hit 500 and went over 500. The court basically said you can't do it as an office. You have to do it on an individual case-by-case basis, which frankly was of significant concern to us. One of the things that we realized going into this litigation—and it continues to this day—is that the amount of work that's necessary to put on workload litigation—particularly when the state attorney is a party in the case—is absolutely enormous. Since we had so many lawyers who had excessive caseloads handling these kinds of cases, we knew right then that when the 3rd District decided that there was just no way that we would have the ability to prosecute all of those workload litigation cases on a case-by-case basis.

So what we did was to pick one. We essentially found a felony lawyer who had one of the worst caseloads in the office, and I chose him because he was a lawyer with thirty-seven years of experience. I thought that if a lawyer of thirty-seven years couldn't handle this caseload, then nobody could. So, we went ahead and did a thorough analysis of his caseload. We found out a couple of things that were actually pretty startling. He was assigned to 778 new felony cases that year. He had 590 felonies and 180 new probation violation cases. So when those cases were coupled with the cases he had going into the year, he was

required to handle about 970 felony cases. These felony cases did have penalties that were as high as life imprisonment. I thought Bob's presentation yesterday was pretty helpful and significant when you think about what that work actually means.

When you're talking about the number of days people actually work, subtract weekends, holidays and things like that, that meant that he was responsible for four felony cases every day. He had 164 pending cases at the time we filed the motion. So what we did was to file the motion to withdraw in about fifty cases. The judge asked us if we would just proceed on one case, because he knew that if we had to demonstrate a prejudice—and we were planning on demonstrating prejudice—that this would be a very lengthy hearing if we had to do it in fifty cases. So he asked us to do it in one case. The state attorney again participated.

One of the things that became quite apparent was all of the negative connotations and experiences that come out of having a high caseload. In our justice system, it is completely common for judges to make plea offers at the time of arraignment. They do that, because the caseload is so high, and it's their caseload control mechanism. We found out that the lawyer involved pled 210 cases at arraignment, which was particularly dismaying for us. We have an office policy that says that you shouldn't plead cases at arraignment, but we have an ethical obligation to convey the plea to the client. At the time that those pleas are conveyed, the only thing that the lawyer knows about that case is an arrest warrant. And we all know that no one has ever seen an arrest warrant that says that I illegally searched the defendant and got some drugs, or here are all the witnesses who say that the defendant didn't do it. And so 210 cases were pled without any investigation being done whatsoever and without any ability by this lawyer to actually counsel this client.

Florida is rare also in that we have criminal depositions. We're one of the few states in the country that have criminal depositions, although they restrict the number of witnesses that you can depose. The lawyer involved deposed more than 400 witnesses during the year—which was a lot of depositions—but he was not able to depose almost 1,500 witnesses because of the caseload that he had.

The bottom line is that we focused in on the three ethical requirements that we thought were obviously key: competence, diligence, and communication. And in the case that we were dealing with—which was the sale of drugs within 1,000 feet of a school which bears a penalty of life imprisonment in Florida, or thirty years I should say—the record reflected that the lawyer was able to do essentially nothing for that client. He had not been able to talk to any of the witnesses or to interview the client. He filed no pre-trial motions. There was a confidential informant involved. He wasn't able to move to disclose the confidential informant. There was essentially nothing that he could do.

One of the battles in the hearing—which had occurred in the first case also—was exactly what level of prejudice did we have to prove. The state had taken the position—even though they don't nominally call it that—they didn't say they were saying that the *Strickland*[6] prejudice was required—but that's all they argued was that *Strickland* prejudice was required—in order to demonstrate that a conflict should be granted. We took the position that, because *Strickland's* prejudice stand is there to protect the finality of convictions, it was something less: a substantial risk of future harm.

The long and short of it is that we actually won again. The judge granted our motion and decided that because of this particular lawyer's workload, he was not

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

able to provide competent assistance to this particular client. The judge found that the statute—the one that said that excessive workload could not be the basis for a conflict—was constitutional, because he said that it could be a factor but not the sole reason. We had demonstrated prejudice, because the workload was such that he could not adequately represent that client. Now that case is up on appeal, too.

I think I mentioned yesterday, the first case—after it was sitting in the Supreme Court for ten months—the Supreme Court yesterday granted certiorari in the case. So we'll be litigating some of the issues that were in the first case. Going forward, I think there are a few things that are absolutely important to know if you're considering workload litigation.

I agree with Mark. Data integrity is probably the most important thing going forward. If you don't have a computer system that can help you analyze a person's caseload when you're thinking about whether the workload is excessive, you can't win these cases. We have our own database. We did a comparison of our database with the court's database in terms of the accuracy of the statistics. We found that there were hundreds of cases in the court's database which reflected that there was no counsel or record when in fact we were the lawyer on the case. Through this litigation, we established that our database was more accurate, and that helped us win.

The second thing is if you have a liberal public records law in your state, you are going to get lots of public records requests if you're going to be talking about workload. That takes a lot of time to respond to. In our case, we had to provide the state attorney's office with more than a million records in response to their public records request. It takes a lot of time; you've got to respond to it. There are going to be questions about your management. In Florida, there are some great cases that say that it's not

the job of the courts to interfere with the management of a public defender's office, yet Bennett in the first case and Carlos Martinez had to answer questions about how we use our resources. For example, why do we have lawyers in a particular place? Why do we have lawyers doing training instead of handling a larger caseload?

You're going to run across some resistance from staff. The lawyers who are working in your offices are underpaid, altruistic, public-spirited, motivated people who are trying to do the best they can for their clients. To suggest to them that despite all of those good efforts, they're not really doing what the Sixth Amendment[7] talks about is a pretty tough sell. We had some issues with a lawyer that we were going forward with. He was completely cooperative with us, but he had been a lawyer for thirty-seven years, and he had a lot of success in the courts and people respected him. For him to say that notwithstanding his best efforts he wasn't able to do the job that the Sixth Amendment[8] anticipates is a pretty tough thing for a lawyer to accept.

You also get some staff indifference, and it's very difficult to get them to buy in. We have been at this for two years, and we haven't had a drop of relief yet. Both orders were stayed by the appellate court. The lawyers in your office tend to think that this isn't about them; it's about the administration. And they may think that you're just grandstanding. The truth is, it reminds me of when I was in undergraduate school, and they raised our activity fee because they were going to build some building that wasn't going to be finished until after I graduated. Okay? And this is pretty much the same thing it's turning out. That you may not actually help the clients that the motions are directed at—or the lawyers who are representing those clients—but at some point in time you're working towards

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[7] U.S. CONST. amend. VI.
[8] *Id.*

the creation of more livable standards for the lawyers and the clients.

Finally, depending upon what your system is, you can expect some payback, and I mean in a negative way. We just went through the legislative session in Florida. It finished at the end of April. There was a proposal up there that was never actually introduced, but it came about probably as a direct consequence of the litigation. It said that because you can't handle these third-degree felony cases, a private firm attempted—through a political connection there—to introduce a provision for a low-bid/no-bid contract, which would have allowed them to handle these third-degree felony cases at about five times the cost of what the state was paying us. They insisted that the money come from our budget as opposed to a private source. It would have devastated the office. We would have had to lay off two-thirds of our employees. Fortunately, that provision did not pass. But this is not an issue that's going to go away anytime soon, and we expect next year we're going to have to fight the same battle.

Even though some of these things sound a little bit grim, I can tell you that most of the team in the office are pretty darn proud of the fact that we have stood up to fight for what we think is the most important thing—a client-centered practice, their Sixth Amendment[9] rights, and an effort to assure that our lawyers are able to meet their constitutional, ethical, and professional obligations. Thank you.

CARA DRINAN: Good morning. My name is Cara Drinan. I've had the pleasure of meeting many of you. But for those of you who I have not met, I'm a law professor at Catholic University in Washington, D.C. I'm really delighted to be here and to learn from so many folks who are in practice and others in the academy. Thank you to

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

Norm for including me. I have to say that the dialogue at this conference has been a little bit freer—shall we say, than most of the conferences that I attend—so that's been a refreshing change of pace.

I research and write primarily in the field of public defense reform. My task today is to talk about the use of systemic litigation to address excessive workloads. So what I want to do toward that end is three things. First, I'll talk a little bit about systemic litigation to address public defense reform generally—just to provide some context. Second, I'll give an assessment of this type of litigation. If we're thinking about using it to address excessive workloads, how effective is it? And I'll do that by talking about the pending suits in Michigan and New York. Third, I'll conclude with the notion that excessive workloads are a necessary but not sufficient condition for a successful systemic suit. So I'll come back to that idea at the end.

Before I jump into the substance of my topic, I just want to mention a caveat. In the interest of time today, I'll be abbreviating some issues that I think are really important including, for example, the history and trajectory of this type of litigation—some of the detailed issues that I'll allude to. Georgia has kindly made available on the flash drive the law review article that Mark mentioned. So, for those of you who are contemplating a systemic suit, that's available and, of course, I'm happy to talk about this endlessly with those who are interested.

So with that said, let me turn to providing some general information about public defense systemic litigation. One scholar has defined this type of litigation as a sustained pattern of cases against large power structures invoking the power of the courts to oversee detailed injunctive relief. Sometimes you hear it called institutional or public law litigation. As you know, impact attorneys have relied upon this litigation to address a number of social concerns: prison conditions, school segregation, and

employment discrimination. It's been effective in that regard. But historically, systemic challenges to public defense systems have not been common. A 2000 Harvard Law Review article estimated that there had been no more than ten of these suits between 1980 and 2000.[10] I actually think that number is too high if one thinks about what they truly call systemic litigation—something that's proactive, that seeks more than individualized relief. So there haven't been a lot of these suits. That's the first point.

In my scholarship, I talk about these suits. I divide them into what I call first- and second-generation suits. What are first-generation suits? Well, they came up essentially in the context of one suit, one individual defendant. Either the defendant or defense counsel sought individual relief on the basis of systemic flaws. For the most part, these first-generation suits were few in number, and they were not very effective at generating lasting reform. As I said, I talk about this in my scholarship. In the interest of time today, I'm going to focus on what I call second-generation suits. So what do I call second-generation suits?

In the last ten to fifteen years, impact attorneys, defender organizations, private counsel acting in a pro bono capacity, and many of the organizations that are represented here today have brought suits challenging state and county public defense systems across the country. What do these suits look like? Well, for the most part, they're state court class actions challenging objective criteria such as excessive caseloads, a lack of hiring and training criteria, rates of compensation, and particular administrative structures. The legal theory of these cases is that because of these systemic flaws—these structural factors—the public defense system regularly violates the

[10] *Note: Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2074, n. 93 (2000).

constitutional rights of its clients. That's the theory. They are not aggregated ineffective assistance of counsel claims, despite what defendants in these suits said.

The most recent suits of this kind, Michigan and New York included, have argued that the states have abdicated their constitutional responsibility by delegating the defense function and its funding, in many instances, to the counties. So we've seen successful suits of this kind now in Connecticut, Pennsylvania, Montana, Massachusetts, Washington, and as I said today, the suits are ongoing in Michigan and New York. As you know now, as Jim mentioned yesterday, both of these suits have recently survived motions to dismiss. I'll say more about those two suits later in my talk.

These more successful second-generation suits, if you will, share some common attributes that we can learn from, and there are five in particular. As I said, I don't have time today to talk about all five of these attributes, but I do want to mention them and say a few words about at least one or two of them.

The first common attribute that is now I think a familiar theme is the idea that litigation is a last resort. Right? So successful second-generation suits were brought in jurisdictions where other efforts had already been made and litigation truly was a last resort. In *Duncan v. State*,[11] for example, the plaintiffs complaint demonstrated/alleged that no less than five commissions and task forces since 1978 had examined and condemned public defense services across the state, and that defendants in that case knew of those reports and basically ignored them.

There are two reasons why the litigation as a last resort dynamic is important. The first one is obvious. Michigan and New York just survived motions to dismiss, and they're three years into the litigation process. So these

[11] Complaint, Duncan v. State, No. 07-000242-CZ (Mich. Cir. Ct. Ingham County, Feb. 22, 2007).

suits are time-consuming and expensive. It obviously behooves litigants to explore options before bringing a systemic claim in court. There's a second reason why litigation as a last resort is important and that is that it's much easier to ask a court that might be inclined to think of public defense reform as inherently a legislative task. It's easier to ask that court for relief if the litigants can show that the legislature has known about and basically ignored the public defense problem for a long time. So that's the first common attribute to these more successful suits. Litigation is a last resort.

The second common attribute—I won't say much about because others have alluded to it already—is that these suits are marked by system wide proof of actual harm to clients. As Rory was just saying, what you need is to be able to point to a client whose case actually would have or might have come out differently had that client had adequate representation. That sounds basic, but suits of this kind in Minnesota and Mississippi were rejected for exactly this reason because of their failure to empirically demonstrate systemic flaws as opposed to what a court might be tempted to view as idiosyncratic harms. There's a lot more we can say about this dynamic of the fact that proof is key. But I would just mention that one of the things that we know is that collaboration between the attorneys who are on the ground handling these cases and outside organizations who can put together these empirical data is really vital. So it's the second element idea that these suits share—this idea of systemic proof.

The third is the notion of strategic procedural decisions. Again, this could be a talk in its own right, so I'll be brief. Successful second-generation suits share the fact that they reflect strategic procedural decisions. What could I mean by that? Well, for example, they have carefully and thoughtfully selected the named plaintiffs. There was mention yesterday of the *New York Times*

article[12] on the *Hurrell-Harring*[13] named plaintiffs. The article was great, but, more importantly, the plaintiffs were great. They were run-of-the-mill people who were relatable to the average individual on the street, and it was obvious that if they had a lawyer they wouldn't have gone to jail for the crimes that they had committed or not committed. So careful selection of named plaintiffs is important. The trend is toward naming the state itself as a defendant for both symbolic and practical reasons. This involves a whole host of other procedural complications that need to be anticipated and thought about in advance. Most of these cases have faced issues of assertions of governmental immunity, separation of powers concerns and just a whole host of justiciability issues, and standing, ripeness, etc. That's the third attribute—sort of a savvy approach to handling procedural hurdles.

The fourth attribute is reference to accepted professional standards. Again, I don't need to say much about this to this audience, because you know what those accepted professional standards are. One of the reasons these more recent suits have been able to gain some traction is that the ABA and the Eight Principles and Ten Principles, the Standards of Criminal Justice, NLADA, and the defense community has begun to flesh out substantively what that Sixth Amendment[14] right looks like, and it makes it easier for litigants to argue this in court. The second-generation suits rely upon those standards to measure the shortcomings of the system and to craft the remedies they seek.

The last attribute these suits share is the notion of

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[12] William Glaberson, *The Right to Counsel: Woman Becomes a Test Case*, N.Y. TIMES, Mar. 19, 2010 *available at* http://www.nytimes.com/2010/03/21/nyregion/21lawyer.html?_r=1&ref=legal_aid_for_the_poor.

[13] Class Action Complaint, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Nov. 8, 2007).

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

alliances, and there has been some mention of this yesterday. Bob talked about finding allies in potentially unlikely places or just finding one person who can be an advocate for change in the jurisdiction. It's clear in these more recent successful suits that extensive networks of allies and alliances are critical to the success of these suits. Having said a little bit about what public defense reform and systemic litigation looks like in general, let me just turn to the question of where we are now.

As we think about how to use this litigation to address workloads, I want to focus on the Michigan and New York suits.[15] I should mention as an aside that I'll expand my discussion of New York and Michigan in the article that I'm submitting for the publication of these proceedings. So if folks are particularly interested in those suits, I'll say more on paper than I can in person. Both suits were filed in 2007. As I said, both made the claim that the states had abdicated their constitutional responsibility under *Gideon*[16] by delegating the public defense function to the counties.

They have both survived motions to dismiss and the cases before their respective state high courts presented slightly different questions. At bottom, the issues were the same—whether the systemic suits presented justiciable questions. Defendants made a whole host of arguments to support the dismissal of these suits, but chief among the arguments were two claims. The first was really a ripeness argument. That is to say that habeas or *Strickland*[17] was the exclusive avenue for relief. That's a familiar challenge. The second was a separation of powers argument: That it's a legislative function to reform public defense and the courts should stay out of this. As of May 6th both high

[15] Complaint, Duncan v. State, *supra* note 11; Class Action Complaint, *supra* note 13.
[16] Gideon v. Wainwright, 372 U.S. 335 (1963).
[17] *Strickland*, 466 U.S. at 668.

courts have allowed these cases to move forward. The Michigan order didn't say much so we don't have a lot to take from that, but it's still a big win.[18]

In the New York suit, there was actually a very useful opinion that came down saying that "The complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*."[19] So clearly, the New York Court of Appeals recognized that this is not a *Strickland* question. It's an absence of counsel altogether. The court went further, finding that the allegations of systemic harm were justiciable. I'm quoting here, "The allegations . . . cumulatively may be understood to raise the distinct possibly that merely nominal attorney-client pairings occur in subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing of indigent defense providers."[20]

Plaintiffs in these cases have a long road ahead of them, obviously, given that they're three years in and they just survived a motion to dismiss. The fact that these state high courts have allowed these cases to move forward rather than just sending these parties back to a historically apathetic legislature is in itself a mark of progress. That's

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[18] At the time of the Symposium, the Michigan Supreme Court had recently allowed the systemic suit to move forward. Less than three months later, the same Court reversed itself and put an end to the systemic suit. *Compare* Duncan v. State, Nos. 139345, 139346, 139347 (Mich. April 30, 2010), *available at* http://coa.courts.mi.gov/documents/sct/public/orders/20100430_s139345_106_139345_2010-04-30_or.pdf, *with* Duncan v. State, Nos. 139345, 139346, 139347 (Mich. July 16, 2010), *available at* http://www.courts.michigan.gov/supremecourt/Clerk/04-10/139345/139345-7-Order.pdf. Professor Drinan discusses this turn of events in a separate article published in this volume. *See* Cara H. Drinan, *Systemic Indigent Defense Litigation: A 2010 Update*, 7 TENN. J. L. & POL'Y (Special Edition) 8 (2010).

[19] Hurrell-Harring v. State, 15 N.Y.3d 8, 23 (N.Y. 2010).

[20] *Id.*

the good news that we can take from these suits. The bad news, if you will, is obvious. They're very time-consuming and expensive. Further, we know, from a case like *Quitman County v. Mississippi*[21] that there are no guarantees with systemic litigation. Even where experienced, committed attorneys are involved, failure is a possibility. Sorry.

So, I think in sum what we can say is that this kind of litigation, systemic public defense reform litigation, enjoys increasingly good prospects, but they're an expensive long-term endeavor. That brings me to my concluding point that I started with, which is—based on what I said already—you won't be surprised to hear me say that the answer to the question of whether systemic public defense reform litigation is an effective tool to deal with excessive workloads is maybe. Excessive workloads are clearly part of what you need to bring a successful systemic suit, but it's really only a small part of the picture. So I think I'm out of time, and I will end there. Thank you again for your time.

ADELE BERNHARD: Well, I took notes on what people said on my little computer so we'll see whether I can move it over here and read those notes. I can't tell you how pleased I am to try to pull together some of the themes from these wonderful presentations. I really feel that we should give these guys another round of applause. You guys were terrific. I learned so much.

My name is Adele Bernhard, and I have a mixed background. I started off as a public defender in the Bronx, so I handled all kinds of cases from felonies to misdemeanors. I, therefore, have some grounding in what it's like to be a public defender—what it's like to do this work and what the conditions are like in a big city criminal courthouse. After doing that for a while, I also had the

[21] Quitman County v. Mississippi, 910 So.2d 1032 (Miss. 2005).

opportunity to work for an assigned counsel plan in New York where private firm lawyers are assigned to cases. I had an opportunity to think about how we could manage an assigned counsel plan more effectively, how we could train lawyers, and how we could supervise lawyers who weren't in a public defender organization. Additionally, I had the opportunity to work for a court committee whose mission it was to evaluate public defender offices. In New York in 1994, the Legal Aid Society was the primary public defender in New York. In 1994, there was a strike. The lawyers went on strike over working conditions and caseload grievances.

The City of New York at that time decided that we don't like the lawyers being able to go on strike. It was a union office, and it was slowing the courts down. We don't like to be held hostage to what these public defenders want to do and what they want to say, so the city decided that it would create some alternate providers. The next time people had caseload complaints, they could send some of the cases someplace else. So the private bar, who is concerned with criminal issues in New York, was very worried about this plan. The city put out what they called a request for proposals. People put in proposals and said, "We'll take part of that money and set up our own shop."

Now, it turned out that for the most part those new shops—small boutique offices—have been very successful, and they've done a very good job. But we didn't know that's how the story would turn out at the time that the city was considering contracting for these alternative providers. So, the private bar said, "What can we do to make sure that the Legal Aid Society, the primary defender, wasn't undercut by these new offices?" What we ended up doing was suggesting to the appellate division, our intermediate court, that they create some rules which would authorize the creation of a committee that would take a look at all the providers. It was a way of monitoring and recording the

quality of representation provided by the Legal Aid Society and the new providers. It gave us an opportunity to start looking at what people are doing and how people are doing it.

I had the opportunity to think about how offices ensure that their lawyers have a chance to do a good job. What do offices do to make sure that their lawyers have training, supervision, and evaluation so that they can be all that they can be? How do offices make sure that the caseload numbers are kept at a manageable level, so that their lawyers can do what they've been hired to do? So that's my background in the field.

Then I went into teaching where I've been a clinical teacher for fifteen years. During that time, of course, I started thinking about teaching new lawyers, and what I could bring from my history of working in the public defender field. I started thinking about systemic litigation. I also have done some writing about when systemic litigation would be appropriate, what would make it appropriate, what would make it work, and how we can win these cases if we're going to bring them. I don't think that the article that I wrote on the subject is in the material, but I know that Cara does cite to it, so if you look and read her article you can find the cite to mine which is entitled, Take Courage: *What the Courts Can Do to Improve the Delivery of Criminal Defense Services.*[22] I wrote it really as an advocacy piece.

I wrote it to give the courts a sense of what they could do, because I took a look at the history of systemic litigation in different areas. The courts got into the prison systems. The prison systems were, and they still are, a mess. A federal court said that this is something we can do.

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22. Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002).

There are violations here of the Thirteenth Amendment[23] and the Eighth Amendment.[24] These prisons are cruel; the conditions are inhumane. This is unconstitutional; we can do something about that. So I thought why don't the courts see indigent criminal defense services in quite the same way? Why don't they grab the bull by the horns as it were and kind of wrestle it to the ground? Why haven't we been able to be as successful in this endeavor as people were in the past with school litigation, desegregation, and prison litigation?

Well, of course, there are lots of reasons why. The times are different. The judges are different. The feeling in the country is different. There are lots of major differences, but some of the reasons I think we can deal with and use to make this litigation more successful. So here is what I take from some of the themes that I have heard the panelists talking about concerning individual caseload litigation and what Cara was talking about in terms of systemic prospective litigation.

We're all here in this room, not just the panelists, but all of us are here because we care about these issues and we want to make a difference. We understand the real importance of providing decent legal services to people who are accused of a crime. We understand what a good lawyer does. I'd like to comment on when Max was talking about: getting into cases, investigating, finding out that somebody he thought was guilty wasn't guilty—and he only knew that because he had the time to interview them—to go out and talk to the witnesses, and to undercut the evidence. We all know that that's what's important to do. We want to do it, and we want to help our young public defenders who, frankly, are the young idealistic future of this country who have taken these jobs because they wanted to. They have choices. We owe it to them to

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[23] U.S. CONST. amend. XIII.
[24] U.S. CONST. amend. VIII.

provide them with a better environment in which to practice law, not just because of the people they're representing today but because of the people they will be representing in the future and the difference they will make for all of us. What do I take from that?

We all know what to do and how to do it, but providing these services is difficult. Salaries aren't the greatest. There's not a lot of gratitude from clients, from judges or from the public who don't understand the significance of this job. How do we make these cases work? How do we make the caseload litigation work? How do we make the systemic litigation work? Well, I see two major things. We need to make people want to make a change. So we need to make the courts want to make a difference. We need to motivate them, and we need to show them that it's not so hard. They're worried about these kinds of cases, and they're worried about making a decision. It's going to make more work for them. It's going to cost more money, and they don't want to tell the legislature what to do. Right? They don't want to get involved in this. This is something new. There isn't precedent out there that they can rely on. They're out on their own, and they're going to get into trouble somehow. This isn't going to be popular—they might not get re-elected or re-appointed. So we have to motivate people and show them that this isn't so hard. This is within a legal framework. It's no different from other kinds of cases that they have decided or their colleagues have decided across the country. So, of course, one reason to write a law review article is to provide a little support for the judges. So how to make them want to do it.

Another theme that I have heard from today's speakers is that we tell stories. We talk about the plaintiffs and why cases are important to decide. Here is what's really happening to individual people who are not being adequately represented. They're losing their jobs. They're

losing their kids. They're losing their licenses. There are collateral consequences that they didn't understand when they entered the plea. Let's make it real. How do we tell those stories? We tell them in court by choosing the clients, by choosing the lawyers, by being very careful about which plaintiffs we select to front the litigation. But we also have to do more.

We have got to build a foundation for these stories. There are going to be newspaper articles and studies about what the system is like, e.g., how many people are being arrested. We have to create the foundation of stories so that these issues are familiar and motivating to the court and to the people who care about them. Then the other thing I think we have to do in terms of helping people understand that these decisions are not outliers, and that the framework for deciding these cases is to refer to standards. That's why standards are so important. If you don't have standards in your jurisdiction that you can refer to and that the courts can rely on in rendering these decisions, then they're out there on their own. What's effective? What's ineffective? We can't just say that these people had a bad outcome and that's because the lawyers are ineffective. We've got to be able to refer to standards that say here's what lawyers are supposed to do in cases. We've got ABA Standards. We've enacted them here in Tennessee, in Florida, and in New York. We use these standards. Our office has standards. Here's what our office says that lawyers are supposed to do. In each and every case, they're supposed to communicate, to counsel, to interview, to investigate, and to file motions. If they haven't done that then they're not in compliance with the standards. As a result, there's ineffective assistance of counsel. Ineffective can't just be defined in relation to the post-conviction *Strickland*[25] standard. We have to be able to move away from that analysis into a front-loaded way of looking at cases. The only way we can

[25] *Strickland*, 466 U.S. at 668.

do that is by having standards that we refer to. They can be caseload standards, of course, as well as performance standards. That gives the court some mechanism for deciding whether something has gone wrong. Therefore, this kind of representation is unconstitutional. Those are the sort of themes I've heard.

Let's make it real. Let's talk about the people. Let's talk about why it's important. Let's talk about what a difference your decision could make to all these lives out there, and let's give the court a framework for making those decisions. The New York court, which decided this clarified what was a justiciable issue. We were all worried that they were going to say that the courts have no business telling defenders how to run their offices and telling the states how much money they have to give to the counties—that we're going to just throw this back to the legislature. The New York court didn't do that and decided it was a justiciable issue, that it was within their purview and that it was something that they cared about. They did not really use standards in the way that I thought they might, because what they really said is that there was no representation. The quality of lawyering given to these plaintiffs in the upstate counties in New York was so poor that it was really like having no lawyer at all. There was no conversation, no investigation. It was like what you were discussing about your lawyer. He had to plead people guilty at arraignments just to limit the number of cases so that he could work on some of them. As a result, it was almost like having no lawyer at all. But I think having standards out there that state what lawyers are supposed to do, allowed the court of appeals to say that they had fallen so far from the standards that it was like having no lawyer. So I still think—even though they didn't refer to ABA standards or NLADA standards to say that there was ineffective assistance of counsel—that having those things in place and being able to show how far the deviation was from those standards

helped them render that decision.

So I think in order to make change through litigation, we've got to have standards. We've got to have stories. Obviously, we have to have support—support from the private bar, from your own lawyers, and from the public. I had thought that getting support from the public was almost really impossible, but there are people in this audience who have been able to achieve that.

We look at the campaign in Michigan, and Laura Sager over here has been instrumental in organizing the public to really care in her state about these issues. They go out and talk to community groups and make the case as to why having a public defender and being able to represent people at the best of your ability makes a difference to all of us. This isn't something that you can just isolate and say, "Oh, it's over there in criminal court. It has nothing to do with me. My kid is not getting arrested; I'm not getting arrested. That's not my issue." Well, that's not true. It's all of our issues, and we have to make that case to people so they understand why that is significant. Those are the things that I heard. Of course, those are the things that I think about, so maybe that's part of the reason why I heard that. Let's now open this up for questions and comments from our wonderful panelists.

BARBARA HURST: I have a procedural question. If you decide to bring this on a one-example basis—a one-client basis—isn't the first question really a public relations issue? I mean if you spend 100 or 200 or 400 hours preparing this litigation, and then the court or somebody says that you could have effectively represented 40 clients in that period with systemic litigation you couldn't have represented 700 clients in that period. Isn't that a PR issue at least?

ADELE BERNHARD: Does somebody want to take that question?

RORY STEIN: It definitely is. That's one of the reasons why we were willing to go along with the judge's suggestion that just one case would be handled by individual lawyers, because that was the first thing the prosecutor said. You mean to tell me that you couldn't take a deposition in this case and couldn't go interview? The one case was really, I think, symbolic of a larger problem that this lawyer had. So that's one reason why I think it's helpful to be insulated in having lawyers represent you. And that you're not representing yourself or bringing this motion yourself. Because, at least, you can say that they're doing the work. We support the people running the computers that generate this information—and the public defender and the executive assistant who aren't assigned to this court, and aren't doing this work on these cases, but are handling these kinds of things. But it is an issue that you have to deal with, and I think it's kind of ironic when the 3rd District told us we had to do it on a case-by-case basis. We're up there saying we don't have adequate resources to handle the whole felony division, and now they're telling us to expend more resources to try to prove this case.

BARBARA HURST: You have to have a buy-in at least in this—on the court's part that is essentially a mimicking of systemic litigation. That it is symbolic—that it's system wide. You have to essentially set that premise.

RORY STEIN: Well, I know that in our situation, the chief judge initially asked us to consolidate the systemic cases into one case, and the administrative judge for the criminal division actually heard the case. When the 3rd District decided the case, saying we had to do it on a case-by-case basis, we got a call immediately from the chief judge saying you're going to be doing this in all twenty-one courts. It wasn't our goal to wreak havoc in the criminal

justice system and take the system down. We wanted to do it in an orderly fashion where the courts could handle it, and we could handle it and even the prosecutor who was involved could handle it. And so we went to one judge. Of course, we had to deal with the fact that we were judge shopping. But it just so happened that this particular judge had this lawyer who had one of the worst caseloads in the system.

DENNIS KEEFE: There is one governmental entity that seems to know how to run a good public defender system—i.e., keeping the caseloads under control, adequately staffing and providing funding, and providing all of the resources that are needed. That one governmental entity is the federal government. I was just wondering if in any of the litigation, anybody has turned to the administrative office that operates the federal public defender's office to bring in the expertise and ask why do you limit your caseload, provide research attorneys, and adequately compensate. I'm just wondering.

ADELE BERNHARD: I think that's a great question, and I think Norman wants to respond to it.

NORMAN LEFSTEIN: In none of the litigation has an effort been made to pull in what the administrative office and the U.S. courts do as far as the federal courts are concerned. Let me just give you a figure, which I discussed with the folks who run the Criminal Justice Act and federal defenders during a DOJ conference in February in Washington D.C. I indicated, I think, in a talk in D.C. that the amount of money—as best as we can determine—being spent in U.S. state and local courts on indigent defense is somewhere around $4.2 billion. In the federal courts, they're spending about $1 billion. That's a staggering way of putting this whole thing in perspective. I

have those numbers roughly correct I think. Because they don't have anything in the federal courts that compares to the state and local governments.

I mentioned these figures to Steve Aison, who is the deputy in Washington D.C. involved with the federal public defenders all over the country, and some of you may know Steve. Steve was absolutely blown away by those numbers. He's always known that there's a seat change between the state and federal courts, but that does really put it in some perspective. The State of California, I believe, is up around $800 million, and many of the counties in the State of California, but not all, are spending large amounts of money on public defense. So if you take out California from the $4.2 billion nationwide, then you reduce that number substantially and split it for the rest of the forty-nine states.

The other comment I would make as I think about your question, Barbara, does raise the issue about public relations when you litigate these kinds of cases. I think Rory Stein from Dade County is correct. There is a PR issue—significantly many data when you have pro bono counsel. Even though I know the management of Dade County, and in Mark's office they have spent enormous amounts of time preparing these kinds of cases that the presence of both pro bono counsel—I thought gave you some support for the proposition—but the burden was really on pro bono counsel and much less so on the office. But it really comes back to something I talked about yesterday. That is, I think it could be done with far less preparation. Individual lawyers, if not every lawyer in an office, some group of lawyers in an office should have large numbers of cases, filing fairly simple motions and asking for a hearing. And if necessary, if that evidence is granted, the hearing is granted, putting on a fairly simple presentation of what it is they are unable to do on behalf of their pending clients. As I think I mentioned yesterday, I

saw it done very effectively in New Orleans. They developed a terrific record—not to say that terrific records weren't developed in Dade County and in Mark's case. In fact, in both of those cases, their records were terrific, and abated the order of the general sessions court that Mark read from: a marvelous literary piece. I'm really curious to see whether or not the journal proceedings of this conference are edited after what you had to say about that. But let me just stop at there.

None of you commented on the notion, by the way, of some lawyers filing individual motions, and I'm going lay it out in the book I'm writing as to what I think ought to go into that motion. And I don't think it would take an enormous amount of work to do it.

ADELE BERNARD: Well, there are some more questions in the back if you want to pass the mic back to Jim. I do think that there needs to be preparation even for those cases, in the sense that you want people to be receptive to them, and you want to make the most out of those motions. So you really need to get people ready to listen to them.

NORMAN LEFSTEIN: Well, that's what I meant yesterday when I talked about changing the culture.
ADELE BERNARD: Exactly. Jim?

JAMES NEUHARD: In my day job, I'm a public defender. I will make the case here for protecting the record of each case. That's what you're seeing develop here when you have lawyers who cannot prepare and are meet and greeting and pleading with their clients. They're not doing what a growing body of federal case law is suggesting is absolutely required pretrial. I have a list of the issues where they're now finding the use of stand-in counsel who are not prepared to cover the workload, investigation, discovery, and research, and fail to timely file motions and

make an early appearance. These are structural denials of counsel, who do not have a lawyer. The federal courts are beginning to grant writs of habeas corpus on this. We're all thinking systemic, but if you start building in methodically and professionally, I cannot do these things. I have not done these and yet I'm prepared to plead for my client. It's a frightening thing to think that they're running a caseload through—cases that literally go to federal court and get a writ granted—that quickly. There's no need to show prejudice. It is structural denial of counsel; it's absolute and irreversible.

So all I'm saying is that everybody who is in this situation should start having their lawyers protect the record. I mean this is a plea from a public lawyer.

ADELE BERNHARD: Right. To the extent that the judge will accept a plea when you're putting on the record that you're taking the plea although you haven't done these things though.

JAMES NEUHARD: I mean, if you're in that situation—

ADELE BERNHARD: Right.

JAMES NEUHARD: It's the same as a group of lawyers walking in and filing a motion to withdraw. When that motion is denied you say, "Well, Your Honor, this is the next step. My office, structurally, cannot do these things. I could not do the investigation. I could not have a private conversation with my client, and on it goes. That's how I'm here. Let's go forward." The judge orders you go forward and then—

ADELE BERNHARD: Maybe in the context of forcing you to trial when you're not ready to make that record. Right.

JAMES NEUHARD: Which is protect the record is all I'm saying.

ADELE BERNHARD: Yeah.

JAMES NEUHARD: Whatever the reality is, indefinite flow into federal court—

ADELE BERNHARD: And then that's going to be something that the office as a whole has to discuss, and everybody has to be on board. We can't be expecting individual people to be outliers, by themselves, making those records. We need that to be something that people agree to do across the boards.

JAMES NEUHARD: Of course, it would be ideal to be permanently prayed for—

ADELE BERNHARD: Right.

JAMES NEUHARD: But as Norm said, each lawyer who feels this way and finds themselves in that situation for whatever reason—could be because of an illness—has a duty to protect the record of what they've done in a particular case.

ADELE BERNHARD: Right. Right. I think that's right.

CARA DRINAN: Can I just add, Adele?

ADELE BERNHARD: Sure.

CARA DRINAN: On that point, I think it's important to not view individual motions that you're talking about and the systemic litigation option as mutually exclusive.

NORMAN LEFSTEIN: I don't.

CARA DRINAN: In fact, I mean, it goes to the point of litigation as the last resort. If you're building that record, that's great. Not just because you have a duty to do so in that case, for your client, but because even if you think you're headed toward systemic litigation, that's precisely what you need.

ADELE BERNHARD: Exactly. So these things are mutually beneficial and work towards the same end. Bob?

ROBERT BORUCHOWITZ: I want to make three comments. One is I don't know that I've heard the full answer to Dennis's question from Norm. I really think it's a tremendous idea to use the federal defender model when we're talking about what's wrong with the state practice. Secondly, I have all the respect in the world for the people that are bringing these motions, but it's difficult from the outside to offer opinions. I wonder what would happen in Miami or Knoxville if every public defender in every single case who felt unprepared were to make the kind of record that Jim was saying, whether they're moving for a continuance or simply saying, "Judge, I'm not prepared and can't go forward with this plea. I can't go forward with this trial." Obviously, there's the individual immediate client whose needs are at risk, but it may be that in many out-of-custody cases it would be less of an issue. One way to get the most action would be for every out-of-custody client to ask for a continuance—for every out-of-custody client to say I can't go forward, and I have to have a continuance. In the *State v. Jury*[26] case that I mentioned, in Washington, is I think some precedent for that.

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

The other benefit of that is that it gets the attention of the court if you make the kind of record that Jim is talking about. Certainly, if a lawyer is pleading for 200 people at arraignment without seeing a police report, that's just not acceptable. And so, the lawyer says, "Your Honor, my client wants to plead guilty to get out of jail today. And the prosecutor is making an offer, but I have no idea whether it's a good offer. I have no idea whether my client even committed this crime. I have no idea whether they even got the right guy in jail. I have no idea whether anything the police did is legal. I have no information at all. But here I am, and I have 900 cases. And that's all I can do, and so here it is, judge." If the judge doesn't want to take the plea then that will put pressure on the system,—which is going to be backed up—and they're going to want to help. You talk about motivating the court; that's one way to motivate the court.

ADELE BERNHARD: I agree. I think there's lots of ways to motivate the court, and I also think there's lots of ways to tell those stories. I mean, we were introduced to a public defender who runs a blog and gets some of those stories out there. Oh, great, she's got her hand up so good transition.

CARA DRINAN: I'm sorry.

ADELE BERNHARD: Oh.

CARA DRINAN: I didn't want to cut you off, but I think that Bob is right that we haven't really addressed Dennis's question.

ADELE BERNHARD: Yes, that's true.

CARA DRINAN: Can I say something on that point?

ADELE BERNHARD: Well, hold that thought back there and let's go back to the contrast.

CARA DRINAN: Yeah.

ADELE BERNHARD: The contrast.

CARA DRINAN: I agree with Norm. I haven't seen use of that federal model in reference to the caseloads control, etc. I think it's a great idea that certainly merits exploration. Off the top of my head, I can think of two reasons why the suits may not have done that. One is that the use of expert witnesses—or just putting someone on and say this is how it's done elsewhere and therefore should be done in this jurisdiction has been less successful. For example, in *Quitman County*[27]—in the Mississippi litigation—where the county sued the state basically saying that we can't provide public defense and it's your job under *Gideon*.[28] There was the use of expert witnesses. That was not as effective as putting on the faces of clients of the system. Not to say that those two things are mutually exclusive, but that may be one reason.

The other, and I think the more pressing issue is there seems—in my conversations with attorneys who are litigating these kinds of systemic suits—to be a real sense that because the court said nothing in *Gideon* about the method of delivering public defender services. States have a sense of, well, it's our right to figure out what we think is the best method for the delivery of public defense services. While we may agree that that's simply pretext for not delivering public defense services, I do think that there's a sense that, well, the federal government may do it that way, but that's the beauty of federalism. Right? We can each pick our own method and—

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[27] Quitman County v. Mississippi, 910 So.2d 1032 (Miss. 2005).
[28] Gideon v. Wainwright, 372 U.S. 335 (1963).

DENNIS KEEFE: Well, we can pick our own method, but the federal government has the federal public defender's office. And they have panel attorneys that are supervised by the public defenders in many instances. I mean they don't have anything that the states don't have.

CARA DRINAN: Right.

NORMAN LEFSTEIN: Yeah, but different caseloads.

CARA DRINAN: Yeah.

ADELE BERNHARD: Right, and his point. And I think Rory wants to speak to it as well—that we have an example.

CARA DRINAN: Yeah.

ADELE BERNHARD: If we feel like spending more money on it, we have an example of somebody who does it right, and there's nobody complaining in the federal system of their caseloads, or their salaries for that matter or the quality of representation provided to the clients. Of course, they get to limit the cases that they pick to prosecute, and the states would say, "We are not in a position to do that." That would at least open up the discussion about why we don't all talk together about how many people are prosecuted and what categories or crimes are going to the prosecutors. There are ways to solve these problems. You don't have to haul everybody into criminal court, overloading our lawyers. That's what the feds do. They decide which are the most important cases and why, and they go from there.

I'm sorry, Rory. You wanted to speak.

RORY STEIN: Yeah, actually, I guess two things. One of the things I can tell you, since we're a state-funded agency, we've gone to the legislature numerous times and addressed with them certain ideas about a more careful control of workload and looking at funding models. We got nowhere. That's why we thought it was kind of interesting in the first case when one of the prosecutors was actually a lobbyist for the legislature and said, "Well, why don't you just go with the legislature and talk to us about this problem." I mean, we've been talking for thirty years. We wouldn't have filed a motion if we were able to get anywhere with that.

The second thing is—I think Bob's point raises an interesting question which we've discussed for a day and a half now about culture. We filed notices for uncounseled plea in every one of those pleas at arraignment—every single one. Some judges won't accept the pleas, if we file the notice.

ADELE BERNHARD: Right.

RORY STEIN: Unfortunately, what happens is you've got a guy sitting in the box who's saying, "I'm offered credit for time served."

ADELE BERNHARD: And you're not going to—

RORY STEIN: You're not going to stand in the way of me getting out of jail.

ADELE BERNHARD: Right.

RORY STEIN: Frequently, those judges find a way to get around that. The more interesting cultural thing that we found was, we asked our lawyers. Actually we didn't ask them. We told our lawyers that they needed to file a notice

of inadequate resources in the court, because they needed to get the clients advised that they weren't going to be able to handle their cases in the same diligent fashion that we were able to do in the past. There was some blow back from our lawyers—"You're setting me up for bar complaints." That's what we heard. "You're putting out there that I'm not doing my job." We thought it was appropriate to let the clients know that they weren't going to get the same service that they typically got from the public defender's office, because we didn't have the ability to do that.

Of course, one of the things that the state did in the litigation was that we invited the clients to ask the judge for another lawyer, because I don't want wait that long. I think one or two clients did that. That's what the state did with us. How many bar complaints have you guys received as an example that you're actually really doing a very good job? Of course, our clients don't know what we're not doing for them. In fact, the state doesn't know what we're not doing for them. That's one of the reasons why we had this hearing, to explore all of those things that have been mentioned already—that we are doing them. We're cognizant of it, and we litigated it in the motion saying this is what a real lawyer does, and this is what we're able to do with the resources that you gave us. They're frequently two different things.

ADELE BERNHARD: Yes?

UNIDENTIFIED SPEAKER: There's a gentleman with a hand up here.

ADELE BERNHARD: Okay. Thank you for alerting me. I'm sorry. I've forgotten your name already.

CAROL HUNEKE: Carol Huneke.

ADELE BERNHARD: Carol, right.

CAROL HUNEKE: I first wanted to comment on Dennis's comment about the federal system because—

ADELE BERNHARD: Does she need to speak up? Closer to the microphone.

CAROL HUNEKE: I'm sorry. I'm married to the federal defender in my district, and so it's been interesting to be able to see some of the ways that the federal defenders do things while I'm in state practice. I noticed that some of my friends that work in the office have different cases like illegal re-entry, but there are also cases that are very similar, like drug and gun cases. I noticed that some of the things that they were able to do on their drug cases, for example, that I had not been able to do or not thought of, and I thought I want to do that, too. I also know through seeing things that my husband has done—they do have timekeeper records on those cases, and there is some review by the office of the courts. Whatever you call it, there are in control of their cases and they can take into account what type of cases. So I think there are some statistics that could be usable for state courts. Not every statistic is useful, but the ones on cases that are similar I think could be used to our advantage.

ADELE BERNHARD: I think that's a great idea.

CAROL HUNEKE: The other—

ADELE BERNHARD: And we have to keep the records too, then, in order to be able to show that what we do on our cases and how many fewer hours we have in the state courts. I mean, because they do the hours and they can back it up.

NORMAN LEFSTEIN: Very sketchy data.

ADELE BERNHARD: Okay.

CAROL HUNEKE: I admire you, Mr. Stein and Mr. Stephens, so much for challenging the caseloads in court. I get messages from public defenders all over the country, though, and it seems that not every defender works in an office where the director has that courage. I don't know what all the causes are, but what my question is, what can individual lawyers who are overburdened in the system do as to a systemic challenge, if anything? Are there any resources that the ABA or another organization can offer to support that?

ADELE BERNHARD: I'm sure that Norman wants to respond to that, because really that's been the motivation for a lot of his work over the last few years in writing this book on excessive caseloads. What can the individual lawyer who finds him or herself in this situation do? But before he gets the microphone again, I know there was another question over here somewhere.

UNIDENTIFIED SPEAKER: This almost follows up in respect to that last question. It's directed to Rory Stein and Mark Stephens. I heard both of you talk about both the importance and difficulty of getting buy-in from the members of your office, both the attorneys and the staff. I know as a post-conviction attorney I often bring claims of ineffective assistance of counsel and have noticed—much to my dismay over the years—how defense lawyers don't often have the concept of what it means to effectively represent a client. I remember having a conversation with the public defender in Davidson County, Tennessee, who said that a lot of lawyers in this office don't realize the full

situation. It's like a frog in a pot when the water temperature is gradually raised, and they don't realize that it's gotten too hot.

I'd like to ask you how do you deal with that issue? I think it is a question of culture within your office and within the defense bar. But how in your litigation did you deal with it, and what suggestions do you have to offer on how to deal with that position there?

MARK STEPHENS: We've spent a lot of time in our office talking about caseloads and what we were going to do about it. I do think part of the problem—particularly in an office where the caseloads are just out of control—is that lawyers, in order to survive, get so focused on the individual clients and the pressures that they're having to respond to that it's difficult for them to even start to give any consideration to the bigger picture. So when the manager comes and says, "What I'd really like for you to slow down a minute and come spend some time with me to talk about your caseloads and what's going on," then that's the last thing in the world the lawyer can afford to do at that moment. The lawyer needs to ratchet up his or her commitments to their client. And so, there's real tension. What you are saying to the lawyer is you're not doing a good job. I don't care how you phrase it or how many times you qualify it. What you're essentially telling a lawyer is that you're not fighting a very good fight. Here's all the things that you're not doing, or here's all the things that you should be doing. The mentality of a public defender lawyer—that's going to get you hit in lots of discussions. And so, it's a very difficult thing. You just need to meet with them on a regular basis through staff meetings and try to hold those staff meetings to the smallest possible amount of time to explain to them why you're doing it and how important it is, and why it's important and why they need to buy in. I don't have 100 percent buy-in in

my office on this issue. I think I have some lawyers who tolerate it, but I don't know that they're really committed to it. So it's a hard thing to do.

ADELE BERNHARD: Max?

MAX BAHNER: I think one of things, from my standpoint looking in, that you're not able to do in a public defender office is something we do routinely in our practice, and that is we have critiques all through the process. The lawyers know before they try a case, or before they do a contract, how we think they're doing, and they know afterwards how we thought they had done. We all learn from this. Apparently, I don't wonder why you can't do that in a public defender office, but I think that if that were done, this problem would not be so significant.

ADELE BERNHARD: So we've got a couple of ideas on the table. One is how can management motivate their lawyers to do a good job, some of which could be done by talking about cases, critiquing, training, supervision, and evaluation. If that's all part of the office, it will help motivate the lawyers. We also have the question of the motivated lawyer and the less-than-motivated management. How does the lawyer handle that? There's a question there I think.

UNIDENTIFIED SPEAKER: Yeah, I'm curious to hear about the situation in which—

ADELE BERNHARD: Speak into that mic.

UNIDENTIFIED SPEAKER: —the situation in which you have the lawyers, and you have management aligned. We've heard over the past two days about motions to withdraw, motions to recuse, and systemic litigation. And

for those of you who are either providers or litigators on behalf of providers, if you were at time zero in deciding how to litigate this case—just about excessive caseloads—what would you do?

ADELE BERNHARD: Why don't you give two seconds about who you are and where you come into this whole thing.

UNIDENTIFIED SPEAKER: I work for Davis, Polk & Waldwell, which is a law firm based in New York City, and over time we have been representing the Legal Aid Society, who has been struggling with excessive caseloads and has in the past year had successful legislation. They've been helped in that way, but we're in a situation where their funding is being pulled out by the city and (inaudible response from audience) how to move forward.

ADELE BERNHARD: Does somebody want to take that before Norman makes us stop?

CARA DRINAN: Can I just ask for a clarification? Are you asking if they had it to do over again what would they have done differently?

UNIDENTIFIED SPEAKER: Yes.

CARA DRINAN: What you were asking?

UNIDENTIFIED SPEAKER: Essentially lessons learned. So we've seen, for instance, where individuals have moved to withdraw, where individuals have or the office has moved to refuse cases, wholesale, or where strategic systemic litigation has been employed. And presumably certain things out there that appear to be more difficult to others, and just—I wonder which way would you have

chosen if you had that—the actual ability to go back in time and start at time zero?

RORY STEIN: Well, I think it's a mixed bag, because it's easier to prove one lawyer's caseload problems for prejudice purposes. But generally speaking that problem recurs all across your office, so that's not going to solve the problem. I don't really know too many public defenders' offices that have the resources, time, or ability to litigate it everywhere—particularly if you're in a large urban jurisdiction like we are. So it almost forces you—if you're going to try to get the relief that your office really needs—to do it in an office-wide systemic way. I think that is one of the big issues that is going to be resolved by the Supreme Court in the first case.

ADELE BERNHARD: Well, Norm has pulled the clock on me and said that we've got to keep on schedule. I said we're doing great here. Everybody's involved in conversation, so let's keep talking. Barbara, we'll get talking.

BARBARA HURST: Just to put something else out to you.

ADELE BERNHARD: Okay.

BARBARA HURST: Rory has been the only one really that's talked about client perception.

ADELE BERNHARD: Un-huh (affirmative).

BARBARA HURST: I'm really going to be stuck on this individual motion versus systemic issue. I'm just picturing the clients in the next courtroom. Somebody is putting on the record what they can't do in that case, and the next

lawyer has got to plead that client. May be the only answer is what Jim was talking about. Some other people have said you have to do it in every case, because what in the world do you say to those other forty-two clients who are about to plead that day, who know their situations are no different from the lawyer on whose behalf you are bringing this example motion. How do you deal with the perception? You want to—

ADELE BERNHARD: All right. So we'll keep talking about those things, and we'll keep talking about your book and caseload issues, but hold on. Ed, did you have an announcement that you wanted to make?

EDWIN BURNETTE: Yeah, I just got off the phone about half an hour ago with Dan Swanson from Senator Durbin's office, and they're expecting that the solicitation for John R. Justice is going to come by the end of next week. There could be some play in that. They're really expecting that that's going to happen.

ADELE BERNHARD: Do we all know what that means because I don't?

EDWIN BURNETTE: John R. Justice is a loan repayment forgiveness for prosecutors and defense counsel. We—NACDL, NLADA, MDAA, which is the prosecutors, and the ABA—have been in a working group for the last six months or so to try to work with the DOJ for this solicitation. It's a mandated 50/50 split between prosecutors and defense counsel. The fear is that there are only seven states involved. The letters have gone out to the Governor's Reform Agencies to handle these requests through solicitation. Letters went out about a month ago. Up until now only seven states have responded. So if you know anyone in the governor's office or a liaison that you

can talk to and get them to form these agencies, please do so. The DOJ has stated that it's staying away from the SAAs, because most of them aren't set up to doing this type of thing, which is a positive, because we don't have positive experience from our SAA's in the (inaudible response from audience.) So if you know anyone in your state—and the state having committed to this point—please do what you can to try to get them to form that agency, because this money has to be committed by the end of September. We're a little worried that the longer that it takes to form these agencies, the less chance we will have all this money committed.

ADELE BERNHARD: If you have more questions, please talk to Ed outside.

ED BURNETTE: One other thing, NLADA's director of research, David Carroll, has been publishing over the last several months blurbs that he calls *Gideon Alerts*.[29] Some of you may already receive those. They are blurbs, bites that discuss, highlight reform efforts, concerns and invariably link you to a site that will give you an article or something like that. If you want to receive those, please see me. Give me your business card or sign up, and you can use those however you see fit. You can put them on your blog—whatever you want to do—but if you're interested in that, please see me at the break.

NORMAN LEFSTEIN: Thank you very much, Ed. We're going to take a break till about two minutes after eleven. Before we leave, join me in giving a round of applause to our excellent panel.

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[29] David Carroll, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL DEFENDER LEADERSHIP INSTITUTE, *Gideon Alerts*, http://www.nlada.net/ndli/view6.