NOTES

I GOTTA GET OUT OF THIS CASE: WITHDRAWAL FROM REPRESENTATION AS A PUBLIC DEFENDER

INTRODUCTION

People become public defenders for various personal reasons. Many choose the profession out of a commitment to social change,[1] to fight injustice and to help the underprivileged.[2] They begin their representation of indigents with idealism and passion, struggling to legitimize the system and fueling their vision of civic virtue.[3] But the reality of a public defender's day-to-day challenges can be overwhelming and burdensome, and the respites between cases can be brief, if they exist at all.[4] Criminal defense work is neither glamorous nor heroic,[5] and the "hint of glory" disappears as quickly as a first court appearance arises.[6] Between the tribulations of being a public defender and lower court criminal practice in general, every case brings new complications and headaches.

The quality of justice encountered in the lower criminal courts often surprises new public defenders.[7] Even the physical squalor of many busy urban courtrooms[8]

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[1] *See* Abbe Smith, *Carrying on in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLINICAL. L. REV. 723, 730 (Spring 1995); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049 (1970).

[2] *See* LESLIE AMBRAMSON, THE DEFENSE IS READY: LIFE IN THE TRENCHES OF CRIMINAL LAW 62 (1997); Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240 (1993).

[3] *See* Randy Bellows, *Notes of a Public Defender*, *in* THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 69, 97 (Philip B. Heymann & Lance Liebman eds., 1988); JAMES S. KUNEN, "HOW CAN YOU DEFEND THESE PEOPLE?": THE MAKING OF A CRIMINAL TRIAL LAWYER 257 (1983).

[4] *See* David L. Wilson, *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System*, 22 WM. MITCHELL L. REV. 1117, 1137-38 (1996). In New Orleans, a public defender, who represented 418 clients in the first seven months of 1991, and had 70 cases pending trial, sought and obtained a court ruling that his excessive caseload precluded him from providing effective representation to individual clients. *See* Richard Klein & Robert Spangenberg, Ad Hoc Committee on the Indigent Defense Crisis, 1993 A.B.A. CRIM. JUST. 1, 3 (1993).

[5] *Cf.* Ogletree, *supra* note 2, at 1243.

[6] Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLIN. L.J. 299, 306 (1994).

[7] *See* Smith, *supra* note 1, at 741.

pales in comparison to what actually takes place inside those rooms.[9] Clerical concerns dominate courtrooms and judges' minds.[10] Due to a high case volume,[11] the pervasive "assembly line"[12] atmosphere of justice causes a lack of serious attention to parties' interests.[13] Instead, some judges become lost in the "quackery," disregarding rules of evidence, rules of procedure, and even case law.[14] Other judges create new rules,[15] inventing novel sanctions to control what they perceive as insolent public defenders.[16]

In particular, lower court judges do not sufficiently consider the rules governing mandatory and optional withdrawal from the representation of a client. A lawyer is not entitled to withdraw from a case based upon whim or even well reasoned choice.[17] Although judges often allow private attorneys to withdraw from client representation without cause (often to their clients' detriment), judges seldom afford public defenders[18] the same opportunity.[19] And, while private lawyers can

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[8] *See generally* PAUL B. WICE, CHAOS IN THE COURTHOUSE: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS (1985) (discussing the poor physical condition of urban courtrooms).

[9] *See generally* Gerald Caplan, *American Legal History: Criminal Justice in the Lower Courts*, 89 MICH. L. REV. 1694, 1694-1707 (1991).

[10] *See* Smith, *supra* note 1, at 742.

[11] *See* Jill Smolowe, *The Trials of the Public Defender*, TIME, Mar. 29, 1993, at 48.

[12] *See* Smith, *supra* note 1, at 743; Argersinger v. Hamlin, 407 U.S. 25, 28 (1972). *See also* SHELDON KRANTZ ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES 163 (1976). *See generally* ABRAHAM BLUMBERG, CRIMINAL JUSTICE (1967) (discussing criminal justice in America); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) (explaining assembly line justice).

[13] *See* Smith, *supra* note 1, at 743.

[14] *See id.* at 744; ABRAMSON, *supra* note 2, at 78-85.

[15] *See* Hamilton v. Alabama, 368 U.S. 52 (1961) (judge denied defendants counsel at arraignments). *See also* Dan Weikel, *Court's Policy Leaves Poor with No Defense Lawyer: O.C. Municipal Judge Routinely Excluded Public Defenders from Arraignments, Formal Complaint State*, L.A. TIMES, Jan. 17, 1993, at A1 (reporting that an Orange County, California judge who presided over arraignments routinely prevented indigents from exercising their right to an attorney, ordered incarcerated defendants who asked for counsel to return to jail, and excluded public defenders from his courtroom).

[16] *See* David Mergolick, *At the Bar: When Defense Counsel and the Judge Go to the Mat, Can Justice End up as the Victim?*, N.Y. TIMES, Sept. 14, 1990, at B18 (reporting that a defense lawyer's court-appointed counsel fee was reduced as a result of his court behavior). According to Richard L. Giampa, "Some of what these judges do is absolutely incredible . . . ." *Id.*

[17] *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2459 (1996).

[18] This Note focuses on public defenders, because public defender offices are the primary means of delivering defense services. *See* AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS 11 (1986). Concerns significantly overlap between attorneys in assigned counsel systems and legal aid offices. Unique systems may require separate inquiries; however, in this Note I

withdraw from representation far too easily,[20] public defenders find withdrawal extremely difficult or impossible.[21] Even in the instance of a clear conflict of interest, or the client's prior misuse of the attorney, some judges still force the public defender to remain on the case.[22]

Part I of this Note examines Rule 1.16 of the Model Rules of Professional Conduct, which prescribes the rule for declining or terminating client representation.[23] This section also examines Model Rule 1.7, which discusses conflict of interest[24] as it relates to Rule 1.16.[25]

Part II of this Note explores judges' denials of withdrawal motions. When ruling on a withdrawal motion, a judge weighs many factors, including economic, social, and political concerns.[26] However, when denying a public defender's withdrawal motion, a judge may unduly weigh subconscious factors, including a general lack of respect for public defenders, the public defender's inability to fight failed withdrawal motions, and judicial ethics.[27]

Part III of this Note focuses on how the inability to withdraw from a case affects the public defender. Part IV, in turn, focuses on how this inability affects the indigent client. Not only are defenders and clients affected, but cumulative misuse and distrust also cause the entire legal system to suffer.

Part V of this Note explores options for public defender offices that seek to change the way lower courts function. For instance, new rules of professional conduct may be necessary to address issues specific to public defenders. In order to enforce current or proposed rules, public defender offices may have to aggressively take back their power to refuse service to clients. In addition, states

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have used information from different indigent defense systems when relevant and applicable to public defenders.

[19] *See* ROBERT HERMANN ET AL., COUNSEL FOR THE POOR 159 (1977) ("Only when a lawyer is appointed by the court . . . does a judge or prosecutor have the responsibility or the right to question defense counsel's performance.").

[20] *See* Kim Taylor, *Reading Between the Lines: Indigent Defense Issues and the Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 63, 68 (1993).

[21] *Cf.* Geoff Dougherty, *Judge Accepts Defender's Request to Drop Bolin's Case*, ST. PETERSBURG TIMES, June 27, 1999, at 6. Not all judges deny public defenders' withdrawal motions. Some judges correctly allow public defenders to withdraw without divulging the nature of the conflict for confidentiality reasons. *See id.*

[22] *See* Valle v. Florida, No. 99-3854, 2000 WL 60916, slip op. at *1-3 (Fla. 4th D.C.A. Jan. 26, 2000); Ross v. Florida, 730 S.2d 348, 348-49 (Fla. 1999).

[23] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1999).

[24] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1999).

[25] This Note focuses on conflict of interest and lawyer misuse as examples of "good cause" for withdrawing from representation. These examples illustrate a miscarriage of justice apparent in our system.

[26] *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 24 (1997). Goals include: "doing justice, maintaining cohesion, disposing of caseload[s], and reducing uncertainty." *Id.*

[27] *See* discussion *infra* Parts II.A.3, II.B-C.

should establish alternate defender offices in an effort to reroute clients whose best interests are not served by the public defender. In various jurisdictions, these tactics have proven successful, giving public defenders much needed support and even reinventing their roles as public defenders.[28]

I. CRIMINAL DEFENSE ETHICS

The American Bar Association ("ABA") assumed the primary responsibility for promulgating national ethical standards for the legal profession.[29] In 1908, the ABA enacted thirty-two Canons of Professional Ethics.[30] Because of the overly formalistic and general nature of the Canons, after considerable substantive analysis, the Model Code of Professional Responsibility replaced the Canons in 1969.[31] In 1983, the ABA replaced the Code with the Model Rules of Professional Conduct.[32] The ABA frequently amends the Model Rules; the most recent amendment took place in February 1999.[33] The ABA designed the Model Rules to serve as a model for the states to consider and adopt.[34]

A. *Mandatory and Permissive Withdrawal*

The ABA has clearly stated that public defenders are required to follow the same professional and ethical standards as other defense counsel.[35] In a jurisdiction following the Model Rules,[36] a public defender would look to Rule 1.16 for

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[28] *See* discussion *infra* Part V.

[29] *See* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES AND STATUES (John S. Dzienkowski ed., 1999) [hereinafter PROFESSIONAL RESPONSIBILITY STANDARDS]. The ABA "furnish[es] national leadership on matters such as professional ethics and discipline, access to justice, legal services for the poor, and independence of the judiciary." William G. Paul, President's Message, *ABA — A Home for All Lawyers*, A.B.A. J., Apr. 2000, at 8.

[30] *See* PROFESSIONAL RESPONSIBILITY STANDARDS, *supra* note 29, at 1.

[31] *See id.*

[32] *See id.*

[33] *See id.* at 3. In 1997, the ABA created a 13-member "Ethics 2000" commission to thoroughly review the Model Rules, and to report proposed revisions back to the House of Delegates at an Aug. 2000 meeting. *See* JOHN BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 1.3 (8th ed. 1999). Information on Ethics 2000 is available at the Internet site: http://www.abanet.org/cpr/ethics2k.html. *Id.* at n.9.1.

[34] *See* PROFESSIONAL RESPONSIBILITY STANDARDS, *supra* note 29, at 143.

[35] *See* David A. Sadoff, Note, *The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders*, 32 AM. CRIM. L. REV. 883, 888 (1995). In assessing criminal defense counsel's proper role, courts also rely upon the ABA Standards Relating to the Defense Function. *See* BURKOFF, *supra* note 33, § 1.5.

[36] Although many states adopted the Model Code without significant change, states have been less deferential to the Model Rules, modifying them to reflect particular concerns. *See* PROFESSIONAL RESPONSIBILITY STANDARDS, *supra* note 29, at 2. For consistency, I will use the Model Rules as the standard throughout this Note. The changes I advocate also should apply to each state's ethical rules. *See* discussion *infra* Part V.

guidance on withdrawal from client representation.[37] According to this rule, a lawyer shall withdraw from the representation of a client if "the representation will result in the violation of the rules of professional conduct or other law."[38] A lawyer must ordinarily withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or that violates rules of professional conduct or other law.[39] However, the Model Rules do not oblige the lawyer to withdraw upon mere suggestion of such a course of conduct, but only upon completion of that conduct.[40] Confidentiality requires the attorney to keep certain facts in confidence; therefore, "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."[41]

A lawyer also has the *option* to withdraw from representation of a client in particular circumstances, as long as the lawyer's withdrawal has no material adverse affect on the client or his interests.[42] A lawyer *may* withdraw if the client continues activity that "the lawyer reasonably believes is criminal or fraudulent,"[43] or if the client uses "the lawyer's services to perpetrate a crime or fraud."[44] Also, an attorney may withdraw if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[45] The Model Code similarly would permit withdrawal if a client insisted upon an action contrary to the attorney's "judgment and advice."[46] In addition, and perhaps most importantly, an attorney may withdraw upon the existence of any other good cause.[47]

"Good cause" is a broad term,[48] which leaves interpretation completely up to judges; however, the phrase is not limited to situations where the judge finds that "good cause" exists.[49] The comments to the Model Rules state that "[w]ithdrawal is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client,"[50] but provide no further

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[37] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1999).

[38] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1999).

[39] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 2 (1999).

[40] *See id.*

[41] *Id.* at cmt. 3.

[42] *See id.* at cmt. 7.

[43] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(1) (1999).

[44] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(2) (1999).

[45] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1999).

[46] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(e) (1981). *See also* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1565 (1984) (noting that the Model Code also permitted withdrawal if the client insisted on action contrary to the lawyer's morals).

[47] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(6) (1999).

[48] *See* Taylor, *supra* note 20, at 68 (noting that the Model Code and Restatement contain more restrictive language than the Model Rules).

[49] *See* BURKOFF, *supra* note 33, § 5.2(c)(1).

[50] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 7 (1999). The legal profession criticizes this rule for permitting a lawyer to withdraw even where such withdrawal would have a material, prejudicial impact on the client's interests. *See* United

guidance on this issue.[51] While, in theory, attorneys may withdraw based upon abusive client relationships or conflict of interest, in practice, judges readily allow neither withdrawal nor dismissal.[52] Lawyers are left at the mercy of judges who want to keep the docket moving;[53] this leaves little regard for the negative impact on the client.

B. *Conflicts of Interest*

Conflict of interest problems can arise in numerous, diverse settings and, consequently, generate different ethical obligations.[54] Public defenders' simultaneous representation of divergent interests may raise ethical issues of rule compliance, and a breach of these rules could result in disciplinary measures.[55] A criminal defendant has a right to conflict-free representation, and the Model Rules intend to assure that each client receives absolute, undivided loyalty and independent judgment from counsel.[56]

In general, "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each consents after consultation."[57] The same rule applies "if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . ."[58] The Model Rules cover situations involving direct adversity, as well as those potentially involving less clear, indirect

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States v. Lopez, 4 F.3d 1455, 1465 (9th Cir. 1993) (Fletcher, J., concurring) (criticizing defense lawyers' refusal to represent cooperators); Monroe Freedman, *The Lawyer Who Hates Snitches*, LEGAL TIMES, May 3, 1993, at 28, 35.

[51] Many other uncertainties exist. The rule neglects to mention whether withdrawal may be allowed when a client's action conflicts with office policy and not just personal values. *See* Taylor-Thompson, *supra* note 17, at 246.

[52] *See* State *ex rel.* Burns v. Erickson, 129 N.W.2d 712, 714 (S.D. 1964).

[53] *See* Daisy Hurst Floyd, *Can the Judge Do That? — The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 85 (1994); Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 734-35 (1994).

[54] *See* BURKOFF, *supra* note 33, § 7.1.

[55] *See id.* However, it should be pointed out that less than five percent of disciplinary complaints in the jurisdictions studied appear to involve conflicts of interest, and even fewer result in discipline. *See, e.g.*, Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 970-75, 979. *But see, e.g.*, State v. Hilton, 538 P.2d 977 (Kan. 1975) (censure for simultaneous conflicts of interest); Comm. on Legal Ethics v. Frame, 433 S.E.2d 579 (W. Va. 1993) (public reprimand for simultaneous conflict of interest).

[56] *See* BURKOFF, *supra* note 33, § 7.2(a).

[57] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1999).

[58] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1999).

conflicts,[59] based upon the attorney's reasonable judgment.[60]

Possible conflicts of interest are inherent in the representation of multiple criminal defendants.[61] "The potential for conflict of interest . . . is so grave that *ordinarily defense counsel should decline to act for more than one of the several codefendants* except in unusual situations . . . ."[62]

Additionally, disqualifying one public defender due to such a simultaneous conflict of interest may vicariously disqualify other attorneys in the same office.[63] The vicarious disqualification requirement "prevents different members of a public defender office in the same city from representing codefendants in the same case."[64]

Conflicts of interest cause problems "in a wide variety of criminal settings: in plea bargaining, in deciding which witnesses to call, in examination of witnesses, in trial tactics, in argument, in closing, at sentencing, etc."[65] Litigation problems lead to problematic outcomes for clients whose liberty interests may be at stake. Allowing a conflict of interest to remain unresolved jeopardizes that client's liberty. Public defenders must recognize potential conflicts of interest, and judges must allow them to withdraw from a client's representation when conflicts arise.

II. DENIAL OF THE WITHDRAWAL MOTION

A. *Judicial Decision-making*

Local judges weigh competing interests in arriving at their decisions.[66] The low visibility of lower courts and the rare appeals from their verdicts maximize judges'

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[59] *See* BURKOFF, *supra* note 33, § 7.2(a).

[60] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1999). *See also* BURKOFF, *supra* note 33, § 7.2(a). By contrast, the Association of Trial Lawyers of America ("ATLA") Code uses the client's actual perception to define unethical conflicts. *See* AM. TRIAL LAW. ASS'N CODE Rule 2.1 (1988).

[61] *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). However, in *Cuyler*, "[the Supreme Court] did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm." Nix v. Whiteside, 475 U.S. 157, 176 (1986).

[62] STANDARDS RELATING TO THE DEFENSE FUNCTION § 4-3.5(c) (1986) (emphasis added).

[63] *See* Burkoff, *supra* note 33, § 7.2(c).

[64] *Id. See also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1418 (1978).

[65] BURKOFF, *supra* note 33, § 7.5(a).

[66] *See* Harry P. Stumpf & Robert J. Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058, 1061 (1969). The Massachusetts Bar Association has pushed for a proposal to establish evaluations for individual judges available for public use to encourage accountability. *See* Editorial, *Judging the Judges*, BOSTON GLOBE, Sept. 20, 2000, at A26.

discretionary power.[67] These judges feel pressure to rule on cases for reasons divorced from the law, and occasionally their jobs depend on it.

Financial Constraints

In recent years, criminal caseloads have skyrocketed,[68] far exceeding increased funding.[69] Not only has the number of criminal cases risen, but so has the percentage of defendants declared indigent.[70] This increase has placed an economic strain on the court system and, consequently, public defender offices.[71] Whereas the government spent 20.8% of its budget on social security, 18.3% on defense, and 10.9% on the national debt,[72] less than three percent went to support the entire civil and criminal justice system in 1985.[73] Limited judicial resources force judges to conduct their courtroom cost-effectively[74] and allocate scarce resources efficiently.[75]

Some judges acknowledge financial constraints and are less likely to appoint private counsel to cases, realizing that budgets limit the ability to pay such attorneys.[76] Private counsel have the ability to ask for more compensation, and

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[67] *See* Stumpf & Janowitz, *supra* note 66, at 1061.

[68] *See* Klein & Spangenberg, *supra* note 4, at 3; Caitlin Francke & Scott Higham, *Active Role for Judges Is Urged; Some Suggest Courts Should Move More Quickly on Evidence Disclosure*, BALT. SUN, July 18, 1999, at 1B. Also, as caseloads skyrocket, judges impose more prison sentences, causing prisons to operate above capacity and increasing costs to the system. *See* CRIM. JUST. IN CRISIS, 1998 A.B.A. CRIM. JUST. 1, 4-5 (1988). In addition, rising client numbers increase the likelihood that conflicts of interests will arise.

[69] *See* Klein & Spangenberg, *supra* note 4, at 3.

[70] *See id.* at 4. A 1982 Justice Department Report indicated that judges appointed counsel to 48% of all defendants charged with felonies in state courts. *See* BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT 33 (Sept. 1986). However, recent studies now place that figure at over 80%. *See* Klein & Spangenberg, *supra* note 4, at 4.

[71] *See* MARJORIE GIRTH, POOR PEOPLE'S LAWYERS 76-77 (1976); WICE, *supra* note 8, at 21-24.

[72] *See* CRIM. JUST. IN CRISIS, 1998 A.B.A. CRIM. JUST. 1, 4-5 (1988). *See also* GIRTH, *supra* note 71, at 76-77.

[73] *See* CRIM. JUST. IN CRISIS, 1998 A.B.A. CRIM. JUST. 1, 4-5 (1988). *See also* WICE, *supra* note 8, at 21-24. Likewise, less than one percent of all government spending went into the nation's corrections system. *See id.*

[74] *See* RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 5 (3d ed. 1995).

[75] *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 199 (1983).

[76] Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 545 (1988). "In most states, when the court appoints counsel to represent an indigent defendant, the attorney must submit a voucher requesting payment for the time he has spent on a case." *Id.* However, the Public Defender is a civil service office, with salaries and fixed budgets. *See* HERMANN ET AL., *supra* note 19, at 33.

often require more hours to acquaint themselves with the applicable criminal law.[77] Instead, judges require public defenders to remain on cases, preferring to risk mediocrity rather than lose state funding.[78]

The idea that budgets should run courtrooms is both unattractive and unjust. Former Chief Justice William Burger wrote in 1971, "An affluent society ought not be miserly in support of justice, for economy is not an objective of the system . . . ."[79] "No one should challenge any expense to afford a defendant full due process and his full measure of days in court."[80] Moreover, the Supreme Court has stated, "the Constitution recognizes higher values than speed and efficiency."[81] "[Securing] greater speed, economy, and convenience in the administration of the law at the price of fundamental principles" is too high a price to pay.[82] "Congestion in the courts cannot justify a legal rule that produces unjust results,"[83] and "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law."[84] Although judges must acknowledge financial constraints, they must not base their decisions on factors outside the case before the bench.

Policy Considerations

Judges often attribute their failure to appoint new counsel to the public defender's familiarity with the case[85] and the months of delay that could result from reappointment.[86] A judge "must strike a reasonable compromise between the values encapsulated in the old adage, 'Justice delayed is justice denied,' and those that underlie the sixth amendment [sic] right to counsel."[87] Due process requirements wage constant battle with the need to process large numbers of cases.[88] Judges feel pressure to keep their courtrooms and dockets running smoothly and efficiently.[89] These concerns weigh heavily in judges' decisions,

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[77] *See supra* note 76, and accompanying text.

[78] *See* Francke & Higham, *supra* note 68, at 1B ("'[Judges] are accepting mediocrity at best.'").

[79] Mayer v. City of Chicago, 404 U.S. 189, 201 (1971) (Burger, C.J., concurring).

[80] William Burger, *"No Man Is an Island,"* 56 A.B.A. J. 325, 325 (1970).

[81] Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted).

[82] Bruton v. United States, 391 U.S. 123, 135 (1968) (quoting People v. Fisher, 164 N.E. 336, 341 (N.Y. 1928) (Lehman, J., dissenting)).

[83] United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975).

[84] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974) (footnote omitted).

[85] *See* Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1445 (1965).

[86] *See* Dougherty, *supra* note 21, at 6.

[87] M.B.E. Smith, *Do Appellate Courts Regularly Cheat?*, 16 CRIM. JUST. ETHICS 11, 16 (Summer/Fall 1997).

[88] *See* Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Co-optation of a Profession*, 1 L. & SOC'Y REV. 15, 15-39 (1967).

[89] *See* Smith, *supra* note 1, at 742.

making delays less desirable and withdrawal less likely.

Some judges' decisions face scrutiny at all levels, from the legal community and academia to the nightly news.[90] Elected judges face the pressures of re-election and the demands of their electorate.[91] Although bound by the Code of Judicial Conduct, judges are swayed by popular sentiment and spurred by their own ideas of justice.[92] And although prosecuting criminals is politically popular,[93] defending them is rarely the public's concern.[94] Likewise, judges seeking to placate voters sometimes neglect innocent defendants.[95] Public defenders complicate judges' political agendas by standing between prosecutors and convictions.[96]

Denying a public defender's withdrawal motion endangers the success of her client's case by entrusting it to an attorney unable or unwilling to represent the client effectively.[97] By striking the defender and her motion, the judge has instead handicapped the client, making a prosecutor's job easier and a conviction more likely. Although the United States prides itself on protecting the innocent,[98] the

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[90] A judge's discretionary power remains great, especially at the lower court level. *See* Stumpf & Janowitz, *supra* note 66, at 1061. However, judges do face scrutiny, most commonly in high profile cases or in election campaigns. While some judges have no one to watch over their shoulders, others wait as the world watches. Both extremes pose problems for indigent defendants and public defenders.

[91] *See* MAX BOOT, OUT OF ORDER 176, 180-97 (1998) ("If you build a brothel, you shouldn't be surprised when you come back to find it's inhabited by whores."); MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY — SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 7-10 (1987).

[92] *See* M.B.E. Smith, *supra* note 87, at 11. Smith has observed over the course of his legal career that courts regularly "cheat" in reaching their decisions, "ignor[ing] contrary facts or legal principles" and "com[ing] to legally incorrect conclusion[s]." *Id.* Sanford and Mortimer Kadish argue, "judges have the legal power (and the moral right) to disregard the law when this leads to a better or more just result." *Id.* at 18. However, judicial decisions should not be mere expressions of judges' political ideologies, and law should not only be "what the judge had for breakfast." *Id. Cf.* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 71-76 (David M. O'Brien ed., 1997).

[93] *See* Klein & Spangenberg, *supra* note 4, at 5, 25. "The acceptance by many state legislators of the need to appear to be strong supports of 'law and order' has led to a sharp increase in the severity of sentences, the creation of additional crimes, the building of more prisons and the imposition of mandatory minimum sentences." *Id.* at 5.

[94] *See* John H. Miller, *Remarks*, *in* GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 10 (A.B.A. ed., 1983); Sheldon Portman, *Summary and Overview*, *in* GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 1 (A.B.A. ed., 1983).

[95] For extensive collections of cases involving erroneous convictions of innocent persons, see EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932), and JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957).

[96] *See* BOOT, *supra* note 91, at 89-145, 201.

[97] *See* United States v. Mitchell, 137 F.2d 1006, 1012 (2d Cir. 1943) (Frank, J., dissenting).

[98] Public pride of justice arises from our Judeo-Christian ethics and democratic ideals.

public urges politicians to protect their community through jailing criminals. Intense pressure mounts for convictions not only in prosecutors' offices, but also in judges' chambers.

Prejudice Against the Public Defender

The criminal justice system shows little respect for public defenders.[99] Between clients who want "real lawyers"[100] and a general prosecutorial bias,[101] public defenders are seldom admired — sometimes not even by the judges before whom they stand in court daily.[102] Court rules and procedures often demonstrate mistrust of appointed counsel,[103] presuming that public defenders either do not advocate zealously for their clients[104] or lack the expertise necessary to be zealous advocates.[105] Judges are quick to reprimand public defenders[106] and are less likely

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See Deuteronomy 18:20 ("Justice, and Justice alone, shall be your aim...."); THE FEDERALIST NO. 80 (Alexander Hamilton); Letter from George Washington to Edmund Randolph (Sept. 27, 1789) ("The administration of justice is the firmest pillar of government.").

[99] *See* GIRTH, *supra* note 71, at 81.

[100] *Id.* at 79. In addition, this was the majority opinion of clients I encountered over the three-month period that I worked at the Public Defender's Office, First Judicial District of Florida. When judges asked defendants in court whether they wished the judge to appoint the public defender to their case, defendants routinely stated that they wanted a "real lawyer."

[101] *See* John A. Lentine, Letter, *Smearing the Defense Bar*, A.B.A. J., Dec. 1999, at 12, 12 ("To insinuate that criminal defense lawyers routinely engage in unethical conduct to secure acquittals smacks of prosecutorial bias...."); Timothy B. Rountree, Letter, *Law the DA Way*, A.B.A. J., Apr. 2000, at 11, 11 ("[T]he Manhattan DA's office is one of the most influential, respected and powerful offices in the country and, therefore, its assistants almost always have the upper hand in court.").

[102] *See* GIRTH, *supra* note 71, at 75-76, 78. Criminal lawyers generally agreed that the top 25% of private attorneys were "clearly superior to the best public defenders...." PAUL B. WICE, CRIMINAL LAWYERS: AN ENDANGERED SPECIES 201 (1978). Perhaps because judges come from this upper-echelon of attorneys, they feel more confident about the competence of private attorneys. *Cf.* HERMANN ET AL., *supra* note 19, at 38 (explaining the judicial respect for the Los Angeles Public Defender's Office).

[103] *See* Steve France, *Strange Advocacy: Court to Say Whether No-merits Briefs Violate Defendant's Right to Counsel*, A.B.A. J., Nov. 1999, at 40, 40. The requirement of appointed counsel to file no-merits briefs removes control from the public defender and may force her to pursue frivolous appeals. *See id.*

[104] For example, New York Legal Aid lawyers are harshly criticized as "non-fighters" and as "do-nothing legal representative[s]" in Donald Wallace, *An Indictment by an Inmate*, *in* PRISONERS' RIGHTS SOURCEBOOK 52, 55 (Michelle Hermann & Marilyn B. Haft eds., 1973). Also, in a 1968 interview, Eldridge Cleaver denounced public defenders as "penitentiary deliverers." *Interview*, PLAYBOY, Dec. 1968, at 96, 96.

[105] *See* WICE, *supra* note 102, at 201.

[106] *See Chief Judge's Ruling on Blom Case Is Expected This Week*, A.P. Newswires, Oct.

to see fault with their prosecutorial counterparts.[107] Likewise, judges often accommodate the private bar's requests, but rarely extend the same courtesies to defenders.[108]

An examination of judges' backgrounds reveals prejudicial foundations. The popular judgeship track seldom runs through the public defender's office.[109] Judges' career paths sometimes begin by sitting behind the prosecutor's table and end on the bench,[110] preparing judges early in their careers to battle public defenders. Favoritism lurks beneath the courtroom surface, behind a complex façade of virtue and propriety.

B. *Inability to Fight Failed Motions*

Lack of Resources to Appeal

Although defendants in criminal cases generally have the constitutional right to appeal failed withdrawal motions, public defenders usually lack the resources to exercise this right. High caseloads and backlogs impede defenders' abilities to pursue these claims.[111] Inadequate preparation by overworked attorneys makes potential appellate arguments a waste of time, and a frustration to judges, attorneys, and clients.[112]

Ineffectiveness of Remedies

Although public defenders can appeal convictions based upon the denial of

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12, 1999, *available in* APWIRES, File No. 12:24:00 (describing public defenders on *Blom* case as "unethical cowards" and "a disgrace to the legal profession").

[107] *See* Francke & Higham, *supra* note 68, at 1B. The authors refer to a case in which defense attorneys asked the prosecutor 13 times for evidence in a case, and eight months after the arrest, the evidence still had not been received. *See id.* "The prosecutor went unsanctioned and four months later still had not turned over the evidence." *Id.*

[108] *See* GIRTH, *supra* note 71, at 78.

[109] *See* JEROME CORSI, JUDICIAL POLITICS 114-16 (1984). In a 1975 study of sitting judges and practicing attorneys in Dade County, Florida, almost half of the sitting judges came from general practice, whereas almost three-quarters of all criminal defense attorneys aspired to become judges. *See* Mary Volcansek-Clark, *Why Lawyers Become Judges*, JUDICATURE, 62, 166-75 (1978).

[110] *See* JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES 124-25 (1980). Whereas 10.1% of trial judges came from the district attorney's office, only 2.5% came from other government lawyer positions, including public defender offices. *See id.* Bradley Canon studied judges on the state *supreme courts* between 1961 and 1968. *See* Bradley Canon, *Characteristics and Career Patterns of State Supreme Court Justices*, STATE GOV'T, Winter 1972, at 34, 34-41. Over this time period, the state supreme court judges tended to come from one of five previous positions: prosecutor, legislator, trial judge, appellate judge, and state attorney general or assistant attorney general. *See id.*

[111] *See* GIRTH, *supra* note 71, at 52.

[112] *See id.*

withdrawal motions, the effort generally proves futile. "[A]ppellate courts frequently recognize that criminal convictions [are] infected by fundamental constitutional errors but yet refuse to reverse them."[113] As long as the appellate court believes that the constitutional error did not affect the trial's outcome, the appeal fails due to harmless error.[114] However, there are two exceptions to the harmless error rule: the right to counsel and the right to an impartial tribunal.[115] According to Chief Justice William Rehnquist, the deprivation of right to counsel "requires automatic reversal of the conviction because [this infects] the entire trial process."[116] In theory, this exception should apply to denials of withdrawal motions. But in application, judges rarely overturn convictions — it is very difficult to show the deprivation of right to counsel.

C. *Judicial Ethics*

The trial judge has obligations and duties relating to his responsibility and conduct in the courtroom.[117] The legal profession subjects judges to discipline for misconduct; these standards are similar to those for attorneys.[118] The Code of Judicial Conduct is the ethical standard for judges, and the Model Rules for Judicial Disciplinary Enforcement establish enforcement procedures for that Code as well as the Model Rules.[119] The Commission on Judicial Conduct ("Commission"), composed of judges, lawyers, and public members, has jurisdiction over judges' alleged violations.[120] However, the Commission rarely enforces these rules or takes disciplinary action for judges' violations.[121]

III. THE EFFECT ON THE PUBLIC DEFENDER

A. *Professional Responsibility Standards*

The decision to withdraw from client representation is not always an easy one. Lawyers sometimes become emotionally attached to their clients, making

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[113] M.B.E. Smith, *supra* note 87, at 14.

[114] *See* Chapman v. California, 386 U.S. 18, 23 (1967).

[115] *See id.*

[116] Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993).

[117] *See generally* STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE (1972).

[118] *See id.* § 9.1. *See generally* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT Rule 6 (1994).

[119] *See id.*

[120] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT Rule 2 cmt. (1994).

[121] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT Rule 6 cmt. (1994) ("Under these Rules it is not within the commission's authority to impose public discipline . . . . The commission's function is to determine facts, make conclusions of law and recommend sanctions, or dismiss cases when conduct was not proven.").

withdrawal an agonizing decision.[122] Caught between their sense of client loyalty and their commitment to justice, attorneys must make decisions in accordance with state professional responsibility standards.[123] Public defenders must examine not only state withdrawal rules, but also general rules of professional responsibility for lawyers. Lawyers' oaths bind them to these rules; however, judges can effectively force their violation.

Although a state would not likely discipline an attorney who remained on a case, to the detriment of her client, due to judicial mandate, she still risks disciplinary action. On the other hand, the same attorney would be subject to discipline for withdrawing from client representation without judicial approval. The Model Rules do not adequately address the "catch 22"[124] that lawyers face. Even if this is a rare ethical problem, it remains an inconsistency at odds with the goals of ethical standards in the legal community.

B. *Defender Morale*

Attorneys often know when it is time to "dump" their clients;[125] their behaviors can be so grating that lawyers may wonder if the aggravation is worth the fee.[126] "Bad clients can damage a lawyer's practice, staff, finances and personal life."[127] Emotional self-preservation often pressures lawyers to "terminat[e] deteriorating client relationships before they become professionally or personally destructive."[128]

But money does not factor into public defenders' decisions, and they do not have the luxury of dropping clients at will.[129] They must defend indigent clients, even the belligerent, the abusive, and the dishonest.[130] Public defenders willingly

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[122] *See* Thomas D. Williams, *Lawyer Out; Knew of Escape Plan the Attorney for a Death Row Inmate Is Allowed to Withdraw from His Client's Case After Plans for a Prison Escape Came into His Hands*, HARTFORD COURANT, Mar. 25, 1999, at A3. The judge allowed attorney Pattis to withdraw after he "'came into possession of an escape plan' that raised the possibility that he could be a witness against [his client]." *Id.* Pattis described his decision as "the toughest choice he has ever made as a lawyer." *Id.*

[123] *See* PROFESSIONAL RESPONSIBILITY STANDARDS, *supra* note 29, at 143.

[124] JOSEPH HELLER, CATCH-22 (1961). The "catch" in Heller's novel refers to the paradox of trapped members of the U.S. military; anyone who applied to get out of military service on the grounds of insanity was behaving rationally and thus could not be insane. *See id.* The phrase is now often applied to any problematic or unwelcome situation, including the one now faced by public defenders.

[125] *See* Jill Schachner Chanen, *Don't Take Their Guff: Sever Ties with Abusive Clients Before They Ruin Your Practice or Your Life*, A.B.A. J., Nov. 1999, at 94, 94.

[126] *See id.*

[127] *Id.*

[128] *Id.*

[129] *See* Taylor-Thompson, *supra* note 17, at 2459.

[130] *See* M.B.E. Smith, *supra* note 86, at 87 (after client became increasingly agitated, yelled at his public defender, and then threw something at him, judge still denied defender's withdrawal motion).

assume this burden; nonetheless, daily insults and insolence can cause irreparable damage to a public defender's professional and mental well-being.[131] Although public defenders have agreed to represent the indigent, they have not agreed to emotional torture or intentional humiliation. These behaviors should constitute "good cause" under Model Rule 1.16(b),[132] and judges should allow withdrawal.

The public defender's morale is essential to effective client representation. If a judge does not allow withdrawal from the representation of an emotionally abusive client, the judge diminishes and dampens the attorney's spirit. A disillusioned public defender is a detriment to her present and future clients, jeopardizing her success in advocacy and her clients' lives and livelihoods.

Low attorney morale stems not only from client abuse, but also from a feeling of lack of accomplishment.[133] Public defenders feel achievement through success in the courtroom, and when they feel helpless or subject to the bench's whims, they sometimes do not see the difference they make to their clients or the criminal justice system.[134] Judicial hostility, overwhelming caseloads, and poor pay lead to a high turnover rate among public defenders.[135] When everyone and everything seems stacked against effective defense, many attorneys lose faith in their own advocacy abilities and doubt justice's chance of vanquishing courtroom foes.

IV. THE EFFECT ON THE INDIGENT

A. *Ineffective Assistance of Counsel*

Appellate courts have reversed convictions upon finding that the trial court was directly responsible for inhibiting the defendant's representation.[136] "In these cases, the denial of due process under the Fourteenth Amendment is paramount, and the defendant is not required to show that the *outcome* of the trial was affected by the trial court's improper action."[137]

A public defender's conflict of interest may result in the trial court's denial of effective assistance of counsel.[138] Under some circumstances, representation impaired by a conflict of interest may give rise to a Sixth or Fourteenth

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[131] *See, e.g.*, REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR 42 (The Washington Council of Lawyers ed., 1983) [hereinafter "REPORT"] (explaining the intangible, psychological effects of cutbacks in legal aid programs).

[132] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1999).

[133] *See* GIRTH, *supra* note 71, at 75.

[134] *See id.*

[135] *See id.* at 71.

[136] *See* Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 638 (1986).

[137] *Id.* Denial of effective assistance of counsel cannot be affirmed as harmless error. *See id.*

[138] *See* BURKOFF, *supra* note 33, § 7.1.

Amendment violation, and ultimately a conviction reversal.[139] Since the 1942 United States Supreme Court decision, *Glasser v. United States*,[140] courts have held that a criminal defense attorney's conflict of interest may rise to the level of constitutional ineffectiveness.[141]

This ineffectiveness can be illustrated by hypothesizing that you are a public defender. Further, another public defender in your office represents a codefendant in the case against your client. Your client claims that the codefendant committed the crime, and the codefendant points his finger back at your client. A conflict of interest arises by implicating the codefendant in your client's defense.

The judge has full discretion to decide what to do in such instances.[142] Suppose she does not allow you to withdraw from representing your client, stating that she believes you can ignore your colleague's interests in representing the codefendant and remain committed to your client. In this situation, you may not share the judge's optimism, and you may doubt your own ability to represent your client to the best of your ability. You may feel that your client's interests would be represented best by an attorney unaffiliated with your office. Unfortunately, your personal feelings do not matter in this case; the judge has full discretion to order you to continue to represent your client, and you must do so if she so orders.

This hypothetical illustrates how the trial court may inhibit the defendant's right to effective representation by refusing to appoint new counsel. The court can force an attorney into rendering ineffective assistance to her client, by refusing to dismiss an attorney incapable of effective representation.

Every day indigent defendants stand before judges in positions where the tables are turned, the cards already stacked against them. In fact, they may have little or no actual chance of success. Judges who bet against the odds that a public defender will always be able to place her client first when the attorney faces a conflict of interest, even on the most subconscious level, make an unreasonable gamble with a defendant's liberty.

B. *Client Morale*

Disillusioned attorneys are not the only ones who experience frustration and despair. Forcing attorneys to remain on cases affects their clients as well. "'Client morale among the "new poor" in particular is extremely bad.'"[143] For people who have never encountered federal, state, or local bureaucracies that are unresponsive

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[139] *See id.*

[140] 315 U.S. 60, 76 (1942).

[141] *See, e.g.*, Bonin v. California, 494 U.S. 1039, 1044 (1990); United States v. Swartz, 975 F.2d 1042, 1048 (4th Cir. 1992); Gov't of Virgin Islands v. Zepp, 748 F.2d 125, 139 (3d Cir. 1984).

[142] *See generally* MAX BAER ET AL., THE JUDGE'S BOOK 269-75 (Alfred J. DiBona, Jr. ed., 2d ed. 1994).

[143] REPORT, *supra* note 131, at 40 (citing anonymous quotes). The term "new poor" refers to people who have recently fallen below the poverty line for the first time. *See id.*

to their needs, their experiences with these organizations inspire "deep resentments, cynicism and a sense of total resignation . . . ."[144] "The 'new poor' often are dumbfounded at the way they are treated . . . because they are now unable to pay for services."[145]

For clients who have been through the criminal justice system and the public defender's office before, ineffective representation increases their disillusionment with our justice system. The indigent begin to feel that "their access to justice is illusory"[146] and attribute their financial status to substandard defense. "The effect[] of [the] denial of justice [is] far reaching."[147] The feeling of injustice "produces a sense of helplessness, then bitterness."[148] "It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy."[149] "A persuasion spreads that there is one law for the rich and another for the poor."[150]

C. *Abuse of the Poor*

Equality of justice is a fundamental concept in American jurisprudence.[151] However, "[t]he administration of American justice is not impartial; the rich and the poor are not equal before the law . . . ."[152] A majority of judges and lawyers view this reality with indifference and fail to acknowledge the suffering it causes among the poor.[153] Equality of justice for the poor depends upon an impartial substantive law and an even-handed administration of that law.[154]

The rules regarding attorney withdrawal from client defense are facially neutral, but judges apply them differently to private attorneys and public defenders. Although judges may not intend to do so,[155] they factor various concerns into their rulings.[156] These concerns contribute to different rulings with respect to different attorneys, and public defenders more often than not are forced to remain on cases while private attorneys are excused. Thus, indigency places the defendant in a worse position to obtain a fair defense and trial than a wealthy client.

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[144] *Id.*

[145] *Id.*

[146] *Id.* at 42 (emphasis omitted).

[147] REGINALD HEBER SMITH, JUSTICE AND THE POOR 10 (1972).

[148] *Id. Cf.* BUREAU OF LABOR, U.S. DEP'T OF LABOR, Bulletin No. 98, 289 (1912).

[149] *See* R.H. SMITH, *supra* note 147, at 10.

[150] WELLS, THE MAN IN COURT 30 (1917).

[151] *See* R.H. SMITH, *supra* note 147, at 3.

[152] *Id.* at 8.

[153] *See id.* at 9. "The essentially conservative bench and bar will vehemently deny any suggestion that there is no law for the poor . . . ." *Id.* at 11.

[154] *See id.* at 5.

[155] *See id.* at 15.

[156] *See* BAUM, *supra* note 26, at 24.

V. CONCLUSION AND RECOMMENDATIONS

Judges must allow public defenders to withdraw from the representation of clients for good cause, including conflict of interest, and client abuse or misuse of their attorneys. The integrity of our justice system and the liberty of indigent defendants depend on it. Judges and the ABA can take steps to reduce the impingements of justice taking place through judicial under-enforcement of this ethical rule.

A. *Public Defender-Specific Rules*

Public defenders face unique ethical dilemmas, which deserve unique attention. The ABA should tailor ethical rules to foster "a public-spirited view of lawyering to relevant differences in legal practice."[157] The ABA designed the Model Rules to bring more determinacy to legal ethics and to eliminate the more pervasive ambiguities.[158] But the Model Rules still do not address the unique problems that public defenders face.

Different legal practice areas have distinct core policy goals. States created public defender agencies to help provide justice to the poor. To ensure justice, indigent defendants require "every available resource to combat the government's overwhelming [prosecutorial] power".[159] This goal should not be forgotten, nor equated with corporate battles. A potential loss of liberty creates different responsibilities for attorneys and judges for which the ABA must provide appropriate ethical rules. "When the attorney-client relationship is formed not by client choice, but by judicial appointment, dilemmas arise beyond those traditionally recognized in ethics codes."[160]

The ABA must change the ethical rules to reflect these peculiarities distinct to public defenders. For example, a flat prohibition on multiple representation by public defenders would clarify attorneys' responsibilities and remove discretion from judges, thereby eliminating the inherent conflict of interest. Also, the ABA should clarify the term "good cause" within the Rules, articulating causes specific to public defenders. The ABA must establish a set of rules and practices that can be predictably understood and enforced. The comments to the rules should identify specific "concerns to be addressed by, rather than obligations to be imposed on, the lawyer."[161] Lawyers and judges must be able to determine which rules apply to specific conduct and how they govern that conduct.

B. *Greater Enforcement of the Rules*

Even if new ethical rules are created specifically for public defenders, no

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[157] David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470 (1990).
[158] *See id.* at 481.
[159] *See id.* at 518.
[160] Taylor, *supra* note 20, at 63.
[161] Taylor-Thompson, *supra* note 17, at 2465.

changes in indigent criminal defense will take place until judges enforce these rules. "[P]rofessional standards may be ideals that are not often achieved in the face of the realities of an extraordinarily overburdened criminal system."[162] Additionally, courts must enforce rules consistently. Clarity in ethical rules will promote consistent judicial enforcement, by removing some judicial discretion.

Any retained judicial discretion must be monitored by the Commission on Judicial Conduct, which should have the power to take necessary disciplinary action when judges do not enforce ethical rules. If judges know that their actions are not only being observed by appellate courts, but also by the Commission, they may be more mindful of the rules and their decisions. States must give the Commission more power to sanction judges who refuse to follow ethical guidelines.

C. *Alternate Defender Offices*

Finally, states must create alternate defender offices to manage the conflict of interest problems inherent in a public defender system. Judges will be more willing to allow attorneys to withdraw from representation, when judges can appoint another public defender from a different office in the same geographic area. Judges will not have to reappoint private attorneys and will save valuable time and money.

Alternate defender offices would also minimize the likelihood that conflicts will arise, by allowing judges to appoint non-conflicted attorneys immediately. These offices would allow public defenders to withdraw for good cause and avoid vicarious disqualification problems.

The benefits of alternate defender offices outweigh the resources necessary to create and maintain them. The government would likely pay more money on outside private counsel. Moreover, conflict-free representation is the only just representation for the indigent client.

Jessica R. John

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[162] Klein, *supra* note 76, at 541.