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## **Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant**

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# LEGAL MALPRACTICE, PROFESSIONAL DISCIPLINE, AND REPRESENTATION OF THE INDIGENT DEFENDANT

*Richard Klein\**

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## I. INTRODUCTION

The main problem confronting the attorney working as a public defender in a large urban office is an excessive caseload. The situation is not a new one, but rather continues to exist despite widespread acknowledgement of the problem.<sup>1</sup>

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1. In 1973, for example, the National Legal Aid and Defender Association conducted a sixteen month study that was financed by the Law Enforcement Assistance to evaluate the quality of representation provided indigent defendants in 3,000 counties throughout the country. The resulting report concluded that defenders were suffering from excessive caseloads. NATIONAL LEGAL AID AND DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 79* (1973). The National Advisory Commission on Criminal Justice Standards and Goals concluded in its *Task Force Report on the Courts* that the insufficient staffing of defender offices was preventing truly effective representation. L. BRENNER & B. NEARY, *THE OTHER FACE OF JUSTICE 77* (National Legal Aid and Defender Ass'n 1973). A 1982 report based on hearings conducted by

The American Bar Association ("ABA") in its *Standards for Criminal Justice*<sup>2</sup> expressed the concern:

One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. All too often in defender organizations attorneys are asked to provide representation in too many cases. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.<sup>3</sup>

Field evaluations of public defender systems have substantiated the conditions described in the *Standards*. The Standing Committee on Legal Aid and Indigent Defendants of the ABA financed a study to develop statistics and assess the quality of indigent criminal representation provided by state and local governments.<sup>4</sup> The study was completed in 1982 and concluded that more funds were desperately needed to reduce the excessive caseloads of defenders,<sup>5</sup> that due to the inadequate funding, attorneys were commonly failing to take all the necessary steps to protect their client's constitutional rights,<sup>6</sup> and that, as a consequence, there was "considerable risk of wrongful conviction of the innocent."<sup>7</sup> The report issued as a result of the evaluation of the representation provided to indigent defendants concluded that the problems were approaching "crisis proportions."<sup>8</sup>

Courts, when reviewing as part of an appeal or habeas corpus petition<sup>9</sup> the quality of representation provided at trials, have frequently commented on the

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the American Bar Association Criminal Justice Section, the Standing Committee on Legal Aid and Indigent Defendants of the ABA, the National Legal Aid and Defender Association, and the American Bar Association General Practice Section concluded once again that public defenders were burdened with an excessive caseload. AMERICAN BAR ASS'N & NATIONAL LEGAL AID AND DEFENDER ASS'N, GIDEON UNDONE, THE CRISIS IN INDIGENT DEFENSE FUNDING 1 (1982). A survey conducted in 1984 by the National Institute of Justice concluded that heavy caseloads of defenders were the most significant obstacle to obtaining a high quality of representation. Gettinger, *Assessing Criminal Justice Needs*, 1984 NAT'L INST. OF JUST.: RES. IN BRIEF 4. See also Mounts and Wilson, *Systems for Providing Indigent Defense: An Introduction* 14 N.Y.U. REV. L. & SOC. CHANGE 193, 195 (1986) (inadequate funding has restrained effective representation by creating excessive caseloads that preclude counsel from being able to handle each case competently).

2. STANDARDS FOR CRIMINAL JUSTICE (1982).

3. *Id.* 5-4.3 commentary at 48.

4. AMERICAN BAR ASS'N COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (1982).

5. *Id.* at 15-16.

6. *Id.* at 56.

7. *Id.*

8. *Id.* at 57.

9. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), concluded that the fundamental fairness standard, which forms the basis of the direct appeal of ineffective assistance claims, is also the central concern of collateral review through the writ of habeas corpus. *Id.* at 697.

widespread inadequacies of public defender representation,<sup>10</sup> and have proceeded to instruct counsel on the obligations of a competent defense attorney.<sup>11</sup> The opinion of the United States Supreme Court Justice Blackmun in *Polk County v. Dodson*<sup>12</sup> acknowledged the inequities which may exist between the representation provided by private counsel and that of the public defender:

The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed to an extent not experienced by privately-retained attorneys.<sup>13</sup>

What is most bizarre, perhaps, is the acknowledgement and even acceptance by the *providers* of the defense services of the substandard assistance given the indigent.<sup>14</sup> An example of this can be noted in the reaction of the president of the New York City Legal Aid Society to criticism of the society. The criticism came in the form of a draft report prepared for the Committee on Criminal Advocacy of the Association of the Bar of the City of New York.<sup>15</sup>

What passes for 'representation' in this system is the presence of a body, any body, next to the defendant. It is not simply a question of incompetence, though that exists. It is not a question of poor quality or ineffective representation. In operational and structural terms, it is a system of *non-representation* under which the defendant is disoriented and the judge may eventually lose patience and relieve the attorney (especially so with Legal Aid).<sup>16</sup>

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10. See, e.g., *United States v. Brown*, 663 F.2d 229 (D.C. Cir. 1981) ("much of the problem of attorney error grows from large caseloads of public agencies").

11. The Fourth Circuit, for example, in *Braxton v. Peyton*, 365 F.2d 563 (4th Cir.) *cert. denied*, 385 U.S. 939 (1966) informed: "[T]he assigned lawyer should confer with the client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial." *Id.* at 564. See also *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) (counsel must confer with client promptly, advise of rights, investigate, and prepare for trial), *cert. denied*, 393 U.S. 849 (1968); *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965) (appointed counsel may not stand still and do nothing); *Brubaker v. Dixon*, 310 F.2d 30 (9th Cir. 1962) (trial counsel's investigation and research essential to adequate representation), *cert. denied*, 372 U.S. 978 (1963).

12. 454 U.S. 312 (1981).

13. *Id.* at 332 (Blackmun, J., dissenting).

14. For a discussion of the specific deficiencies in representation that result from excessive caseloads of public defenders, see 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, 663-75 (1986).

15. Draft Report for the Committee on Criminal Advocacy of the Association of the Bar of the City of New York, *Defense of the Poor in New York City: An Evaluation* (1985).

16. *Id.* at 333 (emphasis in original). The report added: "Failings on the part of attorneys, whether from the 18-B panel [of appointed private counsel] or from the Legal Aid Society, to engage in basic undertakings were endemic, and impacted visibly at each substantive step of the process giving every appearance date a shell-like quality." *Id.* at 313.

The president of the Legal Aid Society, in responding to the report, seemed to have admitted the ineffective assistance: "If *Gideon* meant that someone should have a lawyer who can devote all the time *required* for a case, *we fall somewhat short*, but the system is working well considering our funding."<sup>17</sup>

*Gideon v. Wainwright*,<sup>18</sup> the Constitution, the *Model Code of Professional Responsibility* ("Code"),<sup>19</sup> the *Model Rules of Professional Conduct*,<sup>20</sup> and the American Bar Association *Standards for Criminal Justice*<sup>21</sup> indeed mandate that an attorney representing an indigent whose liberty might very well be at stake, *do all required* to provide effective assistance. But what of the staff attorney in a public defender office who, due to an excessive caseload, is not able to provide the required level of competent representation?

The risks, dilemmas, concerns and hardships that confront the staff public defender, caught in a system where incompetent representation almost may be accepted as the norm, is the focus of this article. The defender is subject to disciplinary proceedings for violating the ethical standards of the profession, and is vulnerable to a legal malpractice action for negligence.

## II. THE VULNERABILITY OF THE OVERBURDENED DEFENDER TO PROFESSIONAL DISCIPLINE

### A. The Professional Responsibility of the Defender

The Supreme Court of Arizona, in considering an appeal alleging ineffective assistance to counsel, warned lawyers representing indigents: "We remind counsel that accepting more cases than can be properly handled may result not only in reversals for failing to adequately represent clients, but in disciplinary action for violation of the Code of Professional Responsibility."<sup>22</sup>

Prior to the adoption by the ABA of the *Model Code of Professional Responsibility* in 1969, there had not been a history of significant regulation and enforcement of professional standards.<sup>23</sup> Nevertheless, passage of the Code led

17. *The Legal Aid Society on the Defensive*, N.Y. Times, Aug. 4, 1985 § 4, at 7, col. 1 (emphasis added).

18. 372 U.S. 335 (1963). *Gideon* held that the sixth amendment guarantee of counsel for indigent defendants applies to state prosecutions through incorporation in the fourteenth amendment due process clause. The Court in *McMann v. Richardson*, 397 U.S. 759 (1970), stated that "[t]he right to counsel is the right to *effective* assistance of counsel." *Id.* at 771 n.14 (emphasis added).

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(2)(2) (1982).

20. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1984).

21. STANDARDS FOR CRIMINAL JUSTICE 4-1.2(d), 5-4.3 (1982).

22. *Arizona v. Smith*, 140 Ariz. 355, 363, 681 P.2d 1374, 1382 (1984). See also STANDARDS FOR CRIMINAL JUSTICE § 4-1.2(d) (1982) ("A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation.").

23. The ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) in 1970 warned that the bar was failing to discipline unethical attorneys and that "[u]nless the profession as a whole is prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure imposed by those outside the profession, can be expected." ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT ON RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 9 (1970).

to calls for vigorous enforcement of procedures for disciplining errant attorneys<sup>24</sup> and the creation of state institutions to discipline lawyers.<sup>25</sup> Every state legislature, except California,<sup>26</sup> adopted the Code, and the Disciplinary Rules, therefore, took on the force and effect of a statute<sup>27</sup> with every state recognizing its inherent power to discipline attorneys.<sup>28</sup> There has been increased focus on the need to regulate attorney conduct as illustrated by the recent statement by bar leaders in California that "discipline is the bar's first priority."<sup>29</sup> In fact, disbarments and resignations with charges pending in 1986 in California increased eighty-one percent over 1985.<sup>30</sup> The business of investigating and disciplining lawyers in New York has been termed a "growth industry."<sup>31</sup> In 1984, New Jersey instituted a tough new disciplinary system, financed by an annual assessment levied against the state's 28,000 lawyers, which resulted in more lawyers being disciplined and disbarred than at any time in the past.<sup>32</sup> Complaints filed against lawyers in Arkansas increased forty-one percent in the years from 1981-1986, and as an indication of the tougher stance of the disciplinary committee, the percentage of complaints that resulted in disciplinary action in 1986 was twice that of 1981.<sup>33</sup>

Federal courts ordinarily will not review state court proceedings concerning

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24. Chief Justice Burger in 1971 reflected the mood: "[E]very state bar association should move now to establish means to make sure those standards are rigorously enforced. Without strict enforcement of ethical standards, the Bar will fail in its mission, and it will never have, and it will never deserve, the confidence of the public." Burger, *The State of the Federal Judiciary-1971*, 57 A.B.A. J. 855, 858 (1971).

25. COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, REPORT OF THE HOUSTON CONFERENCE, ENHANCING THE COMPETENCE OF LAWYERS ix (1981).

26. California adopted its own *Rules of Professional Conduct*: CAL. BUS. & PROF. CODE § 6076 (West 1974 & Supp. 1988).

27. See, e.g., *State v. Alvey*, 215 Kan. 460, 464, 524 P.2d 747, 751 (1974) (disciplinary rules have force and effect of statute).

28. See Dorf, *Disbarment in the United States: Who shall do the Noisome Work?*, 12 COLUM. J.L. & SOC. PROBS. 1, 8 (1975) (every state but Texas has power of disciplinary rules), and *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 n.1 (Tex. 1979) (highest court in Texas acknowledged authority to discipline). The Supreme Court in 1868, in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535 (1868), recognized that both the admission and removal of attorneys from practice are judicial acts requiring no specific legislation to so empower the courts.

29. Weber, "Still in Good Standing": *The Crisis in Attorney Discipline*, A.B.A. J., Nov. 1987, at 58,59. In 1987, 65% of the California bar's general budget was allocated for investigation and prosecution of complaints against attorneys. State bar dues were increased \$50 in 1987 with half of the increase designated for the disciplinary program and the remainder for the Client Security Fund to compensate malpractice victims. *Id.* at 62. Nationwide, bar associations spend more than \$30 million for attorney discipline in the 46 states that reported expenses. Austern, *How Lawyers Police Themselves*, TRIAL, Apr. 1986, at 17.

30. Weber, *supra* note 29, at 62.

31. *Complaints Real or False, Keeping Heat on Lawyers*, N.Y.L.J., Oct. 6, 1987, at 1, col. 3.

32. *New Jersey Journal*, N.Y. Times, July 21, 1985. The State Supreme Court used the funds to create the Office of Attorney Ethics which has investigative and prosecutorial powers. *Id.*

33. "Complaints Against Attorneys on the Rise," 21 ARK. LAW. 108, 108 (1987). Forty percent of the complaints which were actually filed in 1986 resulted in disciplinary action, a record high in Arkansas. *Id.*

the judicial discipline of lawyers.<sup>34</sup> The purpose of discipline is to protect the public,<sup>35</sup> to act as a deterrence,<sup>36</sup> to preserve confidence in the integrity of the legal system,<sup>37</sup> and to generally advance and further the goals of our legal system.<sup>38</sup> The victim of the alleged misconduct is not a party to the disciplinary proceedings and has no right to appeal if an investigation terminates in favor of the attorney.<sup>39</sup> There is no requirement that the client suffer any actual damages as in malpractice cases.<sup>40</sup> The *ABA Standards for Lawyer Discipline and Disability Proceedings* advise that, because of the need to discipline lawyers' mis-

34. *Doe v. State Bar of California*, 415 F. Supp. 308 (N.D. Cal. 1975), *aff'd* 582 F.2d 25 (9th Cir. 1978). *See also* *Gerzof v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd*, 424 U.S. 901 (1976) (federal courts ought to avoid interfering in procedures developed by state to police members of bar of that state).

35. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 1.1 (1983). *See also* *Ballard v. State Bar*, 35 Cal. 3d 274, 291, 197 Cal. Rptr. 556, 558, 673 P.2d 226, 238 (1983) (disciplinary proceeding is not punitive but rather to inquire into the fitness of counsel to continue in the role of advocate); *Carter v. Folcarelli*, 121 R.I. 667, 672, 402 A.2d 1175, 1178 (1979) (purpose of discipline is not punishment of lawyer but protection of public); *In re Rude*, 88 S.D. 416, 424, 221 N.W.2d 43, 48 (1974) (purpose of disciplinary proceedings is to remove lawyers whose misconduct has proved them to be unfit so that public can be protected); STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1 commentary at 17 (1986) (punishment is not purpose of sanctions).

36. *See State ex rel. Oklahoma Bar Ass'n v. Hall*, 567 P.2d 975, 978 (Okla. 1977) (discipline serves to deter others from similar acts). *See also* *Committee on Professional Ethics & Conduct v. Rogers*, 313 N.W.2d 535, 537 (Iowa 1981) (attorney disciplinary proceedings are designed in part to deter other lawyers from engaging in similar acts or practices).

37. *See In re Rosellini*, 97 Wash. 2d 373, 379-80, 646 P.2d 122, 125 (1982) (preservation of public trust in legal system important goal). *See also In re Kiley*, 22 A.D.2d 527, 529, 256 N.Y.S.2d 848, 850 (1965) (absent exceptional, mitigating circumstances, disbarment of counsel is justified in interest of maintaining integrity of profession); *Cleveland Bar Ass'n v. Stein*, 29 Ohio St. 2d 77, 81, 278 N.E.2d 670, 673 (suspension of attorney is warranted because integrity of profession will be maintained only if conduct of each counsel is beyond reproach), *cert. denied*, 409 U.S. 949 (1972).

38. *See In re Gross*, 33 Cal. 3d 561, 566, 659 P.2d 1137, 1140, 189 Cal. Rptr. 848, 851 (1983) (prime concern is to protect public, courts, and legal profession).

39. *See Binns v. Board of Bar Overseers*, 343 N.E.2d 868, 869 (1976), where the Massachusetts Supreme Judicial Court ruled that:

A citizen filing a complaint with the board is not a party to any action taken against the attorney, nor are the citizen's rights jeopardized. As in the case of a criminal prosecution, the complainant may be a witness, but he may not appeal or participate as a party to the litigation.

*Id.* The *ABA Standards for Imposing Lawyer Sanctions* informs that failure of the client to complain is not even to be considered a mitigating factor when determining the proper sanction after misconduct has been established. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.4 (1986). The commentary explains the rationale: "The disciplinary system is designed to protect all members of the public. The fact that one injured person is willing to forgive and forget should not relieve or excuse the lawyer, who then has the capability of injuring others." *Id.* § 9.4 commentary at 52.

40. It is the profession as a whole that is injured by a lawyer's misconduct, whether or not a client has been damaged as a result. *See Athearn v. State Bar*, 20 Cal. 3d 232, 236, 571 P.2d 628, 630, 142 Cal. Rptr. 171, 173 (1977). *See also In re Whitlock*, 441 A.2d 989, 991 (D.C. App. 1982) (no requirement that actual prejudice to the client occurred to find neglect, and therefore discipline was proper even though criminal appeals which attorney neglected ultimately were shown to be without merit). *But see* STANDARDS FOR IMPOSING SANCTIONS § 3.0(c) (1986) (in imposing a sanction after a finding of lawyer misconduct, one of the factors to be considered is potential or actual injury caused by lawyer's misconduct).

conduct, there should be no statute of limitations applicable to the proceedings.<sup>41</sup> Whereas the standard of proof required to sustain a finding requiring discipline varies from state to state, the burden generally is equal to or higher than is necessary in civil litigation.<sup>42</sup> Since the damage to the attorney's career can be so great upon a finding of misconduct, the standard of proof required in the disciplinary proceeding ought to be more than a mere preponderance of the evidence.<sup>43</sup>

Because of the import of their work, the public defenders who represent individuals whose liberty is at stake may be more vulnerable to professional discipline than other counsel. As the United States Court of Appeals for the Seventh Circuit stated in ordering the indefinite suspension of two attorneys: "The

41. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 4.6 commentary at 30 (1983).

42. See, e.g., *Nizinski v. State Bar*, 14 Cal. 3d 587, 595, 536 P.2d 72, 77, 121 Cal. Rptr. 824, 829 (1975) (standard is convincing proof to reasonable certainty); *Florida Bar v. Quick*, 279 So. 2d 4, 8 (Fla. 1973) (clear and convincing standard is burden of proof in disciplinary cases); *Carter v. Folcarelli*, 121 R.I. 667, 670, 402 A.2d 1175, 1177 (1979) (since disciplinary proceedings are neither civil nor criminal in nature, proof of unethical conduct in quasi-judicial administrative proceeding must be established by clear and convincing evidence); *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236, 241 (W. Va. 1975) (clear preponderance of evidence is required). But see *In re Mogel*, 18 A.D.2d 203, 204, 238 N.Y.S.2d 683, 684 (1963) (since proceeding is not criminal one, standard is preponderance of evidence).

43. The burden of proof does not reach the "beyond a reasonable doubt" standard of criminal cases. In *Ohio State Bar Ass'n v. Weaver*, 41 Ohio St. 2d 97, 322 N.E.2d 665 (1975), the attorney who was acquitted of the charge of conversion of his clients' funds nevertheless was subsequently disbarred. See also *Kissel v. Breskow*, 579 F.2d 425, 428 (7th Cir. 1978) (disciplinary proceeding can go forth even though counsel had been acquitted in trial charging him with substantially same facts). If counsel has been convicted of a crime and punished, the professional disciplinary sanction imposed may be mitigated. In *In re Battin* where the lawyer had been convicted of misuse of public funds, fined, jailed, and removed from public office, that was deemed sufficient punishment, and the professional discipline therefore was only a public reprimand. But see STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 6.5 commentary at 35 (1983) (lawyer should be placed on interim suspension upon being convicted of serious crime, even if appeal of that conviction is pending). The *Model Rules of Professional Conduct* seem to take a middle ground: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 commentary at 100 (1984). This reasoning was applied by the Arizona Supreme Court in *In re Johnson*, 106 Ariz. 73, 75, 471 P.2d 269, 271 (1970), where the counsel had been convicted of an assault charge: "[I]ncidents of this kind not involving a fixed pattern of misbehavior find ample redress in the criminal and civil laws. They have none of the elements of moral turpitude, arising more out of the infirmities of human nature. They are not the appropriate subject matter of solemn reprimand by this court." *Id.*

The *Code of Professional Responsibility* takes a lofty, highly moralistic view:

[The lawyer] should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1980). See also *Ex parte Wall*, 107 U.S. 265, 274 (1882) ("Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws . . . argues recreancy to his position and office. . . .").



criminal defense bar has a special responsibility to its clients and to this court."<sup>44</sup> Due to an overwhelming caseload, the public defender who cannot do what is necessary for his or her client's case,<sup>45</sup> is subject to being disciplined for neglecting his or her client.<sup>46</sup> Neglect of clients has traditionally been among the most common causes of complaints against attorneys.<sup>47</sup> The American Bar Association *Code of Professional Responsibility Disciplinary Rule 6-101: Failing to Act Competently*<sup>48</sup> provides as follows: "(A) A lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him."<sup>49</sup>

Similarly, the *Model Rules of Professional Conduct*, adopted by the House of Delegates of the American Bar Association in August, 1983 provides *Rule 1.1 Competence* as its first rule: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>50</sup> Rule

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44. *United States v. Gerrity*, 804 F.2d 1330, 1331 (7th Cir. 1986). The court added that defense lawyers who ignore their client's cases do so at their own peril and will be dealt with severely. *Id.* at 1332.

45. A report prepared for the National Institute of Justice estimated that some 500 public defender offices throughout the country may be confronted with the problem of excessive caseloads due to inadequate funding. R. Spangenberg & P. Smith, *Maximizing Public Defender Resources* (1983) (unpublished manuscript prepared for the National Institute of Justice, United States Department of Justice).

46. The Disciplinary Rule of the ABA *Code of Professional Responsibility* relating to the obligation of counsel to act competently was apparently included in the Code as a response to the prevalence of charges of neglect against attorneys. The only footnote to the Disciplinary Rule refers to a report of the Committee on Grievances of the Association of the Bar of the City of New York showing that more than half the complaints by clients against attorneys involved neglect. *Annual Report of the Committee of Grievances of the Association of the Bar of the City of New York*, N.Y.L.J., Sept. 12, 1968, at 4, col. 5, cited in MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 Note (1980).

47. See, e.g., *Complaints Against Attorneys on the Rise*, *supra* note 33, at 108 (primary reasons given by clients for filing complaints against lawyers in period from 1981 to 1986 were failure to perform and neglect).

48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1980). The Canons of Professional Ethics, adopted in 1908 and controlling until the Code was first adopted in 1970, did not contain a similar section dealing with competence. Canon 21 was most on point and provided merely that it "is the duty of the lawyer not only to his client but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of cases." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 21 (1967).

49. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1980). The Supreme Court of Iowa in *Committee on Professional Ethics v. Bitter*, 279 N.W.2d 521 (Iowa 1979), explained regarding DR 6-101(A)(3) that:

Application of the rule should require a lawyer to complete legal matters entrusted to him in a reasonably timely manner. If necessary, he should decline additional legal matters if accepting them would result in neglecting pending matters, seek assistance or disengage himself from these lingering matters and allow another lawyer to complete them.

*Bitter*, 279 N.W.2d at 524.

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). Chapter IV of the *American Lawyer's Code of Conduct* (Revised Draft May, 1982) is entitled *Competence* and provides that, "At a minimum, the lawyer should serve a client with skill and care commensurate with that generally afforded to clients by lawyers in similar matters." Rule 4.1. The comment to that Rule acknowl-

1.3 states that: "A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>51</sup> The comment to Rule 1.3 warns that: "A lawyer's workload should be controlled so that each matter can be handled adequately."<sup>52</sup>

The most common complaint of clients filing grievances with bar disciplinary committees is that the lawyer "hasn't done anything" on the client's case.<sup>53</sup> Formal Opinion 347 of the ABA Standing Committee on Ethics and Professional Responsibility<sup>54</sup> declared that the mandatory obligations of a lawyer to prepare adequately and to provide competent representation, apply to all lawyers including attorneys in legal services offices.<sup>55</sup> Courts have found that neglecting a client's case may also violate the Code's Disciplinary Rule 7-101: *Representing a Client Zealously*.<sup>56</sup>

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edged the vagueness of that definition: "It is generally agreed that the lack of competence is unprofessional and that a code of professional conduct should prescribe competence. Drafting rules to that end, however, has proved difficult." The *American Lawyer's Code of Conduct* was prepared by the Roscoe Pound-American Trial Lawyers Foundation and states in its preface that it "is quite frankly presented as an alternative to the old Code of Professional Responsibility previously promulgated by the American Bar Association and to the new Rules of Professional Conduct that the ABA is about to hawk as the latest thing in legal ethics." The Code of Conduct, promoted by the American Trial Lawyers Association, has yet to be adopted by any jurisdiction.

51. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1984).

52. *Id.* Rule 1.3 commentary at 19.

53. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND THE CENTER FOR PROFESSIONAL DISCIPLINE, PROFESSIONAL RESPONSIBILITY AND THE LAWYER: AVOIDING UNINTENTIONAL GRIEVANCES 7 (1975). It seems as though this is not strictly an American phenomenon. A study of complaints in Great Britain against both barristers and solicitors revealed that a high proportion of the complaints alleged lawyer neglect. See REPORT BY THE JUSTICE EDUCATIONAL AND RESEARCH TRUST, COMPLAINTS AGAINST LAWYERS 12 (1970), cited in Marks & Cathcart, *Discipline Within the Legal Profession*, in M. DAVIS & F. ELLISTON, ETHICS AND THE LEGAL PROFESSION 62, 100 n.37 (1986).

54. The ABA Standing Committee on Ethics and Professional Responsibility periodically issues opinions in response to questions presented to it by attorneys which apply the ABA *Standards* to real or hypothetical fact situations.

55. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981). See also *Espinoza v. Rogers*, 470 F.2d 1175, 1174 (10th Cir. 1972) (public defender's professional responsibilities to clients are same as those of any private attorney).

56. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980), *Representing a Client Zealously*, provides, in pertinent part, that:

(A) A lawyer shall not intentionally:

....

(2) Fail to carry out a contract of employment entered into with a client for professional services. ....

(3) Prejudice or damage his client during the course of the professional relationship. ....

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1979). See also *In re Neale*, 336 So. 2d 356, 357 (Fla. 1976) (lawyer's failure to file amended complaint on schedule and failing to notify client of dismissal of case violated DR 7-101(A)(2) (failure to carry out a contract of employment) as well as DR 7-101(A)(3)); *State v. Alvey*, 215 Kan. 460, 466, 524 P.2d 747, 752 (1974) (failing to perform agreed-upon services and failing to communicate with clients violated DR 7-101(A)(2) and DR 6-101(A)(3)); *Stark County Bar Ass'n v. Lukens*, 48 Ohio St. 2d 187, 199, 357 N.E.2d 1083,

### *B. Public Defender's Quality of Representation*

Neglect of a client's case and inadequate preparation are common problems of attorneys in public defender offices. A study prepared by the National Legal Aid and Defender Association of 399 defender agencies revealed that the problem of insufficient time for case preparation was especially significant in those agencies that serviced the greatest number of clients.<sup>57</sup> Evaluations of defender offices in Boston<sup>58</sup> and Maryland<sup>59</sup> also found that the lack of adequate time to prepare for court proceedings was a common complaint of staff attorneys. Poor preparation of defense counsel has been noted by the judiciary. A study of federal judges found that the failure to adequately prepare cases was cited by the judges as one of the two most frequent causes of inadequate trial performance by court appointed counsel.<sup>60</sup>

The disciplinary action taken against an attorney found to have neglected his or her client's case<sup>61</sup> often is suspension from the practice of law. The Amer-

1089 (1976) (both disciplinary committee of bar and Supreme Court of Ohio found that neglect violated DR6-101(A)(3) and DR7-101(A)(2).

The National Legal Aid and Defender Association has commented that the obligation to provide zealous representation applies particularly to public defenders and requires "a sensitivity to client needs which goes far beyond traditional efforts at case preparation and courtroom advocacy." R. ROVNER-PICZENIK, A. RAPPOPORT, & M. LANE, *EVALUATION DESIGN FOR PUBLIC DEFENDER OFFICES* III-64 (1977). The National Legal Aid and Defender Association elaborated:

Defender clients, unlike more affluent individuals represented by retained counsel, often have significant social and personal problems which may be contributing and/or mitigating facts in the matter for which the defender has been appointed. As a result, it is incumbent upon the defender to deal not only with the specific legal case at hand, but also the repercussions of that case upon the client of his social and cultural setting. The evaluation of zealousness requires an attempt to discover whether the attorney has put forth that extra effort on behalf of the client which rises above legal competence to human involvement. Zealousness for the defender means a deep commitment to the role of counselor as well as that of advocate.

*Id.*

57. S. SINGER, B. LYNCH, & R. SMITH, *INDIGENT DEFENSE SYSTEMS ANALYSIS* (1978), reprinted in N. LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR—METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* appendix F-1 (1984).

58. S. BING & S. ROSENFEID, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON* 31 (1970).

59. *REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE SERVICES IN PRINCE GEORGES COUNTY, MARYLAND* (1980) reprinted in N. LEFSTEIN, *supra* note 56, at 46.

60. A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* 93-109 (1978).

61. Informal Opinion 1273 of the ABA Committee on Ethics and Professional Responsibility elaborated on the meaning of "neglect": "Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973). In addition, the Code's Ethical Consideration related to the disciplinary rule regarding neglect offers guidance as to the definition: "[The attorney's] obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work." *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* EC 6-4 (1979).

ican Bar Association *Standards for Imposing Lawyer Sanctions* Standard 4.42 states that suspension is generally appropriate when "(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."<sup>62</sup> The Supreme Court of California has concluded that even when the neglect may have been due to carelessness, habitual disregard of clients' cases "is an act of moral turpitude and professional misconduct, justifying disbarment."<sup>63</sup>

The lack of time available for a defender to properly communicate with his or her client can also lead to disciplinary action. The ABA *Model Rules of Professional Conduct* state:

*Rule: 1.4 Communication*

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.<sup>64</sup>

Although there is no specific disciplinary rule in the Code dealing with a lawyer's failure to communicate with his or her client, the obligation to communicate is generally deemed to flow from the duty to act competently, diligently, and to not neglect the client. The Supreme Court of Nevada, in disciplining a lawyer for failing to adequately communicate with his client, focused on the overriding import of the communication process:

It cannot be over emphasized that communication with a client is, in many respects, at the center of all services. The failure to communicate creates the impression of 'neglectful' attorney and leads to client discontent, and even if the case is competently and expeditiously handled. This in turn brings disrepute upon the attorney and the legal profession as a whole.<sup>65</sup>

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62. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 4.42 (1986).

63. *Grove v. State Bar*, 66 Cal. 2d 680, 683-84, 427 P.2d 164, 166, 58 Cal. Rptr. 564, 566 (1967).

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1984). Courts have frequently instructed counsel of their obligation to communicate with their client. *See, e.g., Windom v. Cook*, 423 F.2d 721, 721 (5th Cir. 1970) (consultation with defendant may be especially important in cases where plea bargain is expected); *Braxton v. Peyton*, 365 F.2d 563, 564 (4th Cir.) (consultation with defendant to inform him of his rights and elicit information is imperative), *cert. denied*, 385 U.S. 939 (1966).

65. *State Bar v. Schreiber*, 653 P.2d 151, 151 (Nev. 1982). For other examples of courts imposing discipline on lawyers for failure to properly communicate with their clients, *see Martin v. State Bar*, 20 Cal. 3d 717, 718, 575 P.2d 757, 758, 144 Cal. Rptr. 214, 215 (1978) (by failing to communicate to her clients, petitioner breached her professional responsibility); *People v. Bugg*, 616 P.2d 133, 134 (Colo. 1980) (counsel's failure to communicate caused clients great inconvenience); *State v. Martindale*, 215 Kan. 667, 674, 527 P.2d 703, 707 (1974) (counsel's acts of misconduct warranted public censure); *In re Maloney*, 620 S.W.2d 362, 365 (Mo. 1981) (repeated failures to respond to client's letters constituted neglect and were inexcusable and discredit to profession); *In re Finn*, 54 A.D.2d 503, 504, 389 N.Y.S.2d 393, 394 (1976) (counsel's failure to communicate with and attend to client's trust fund warranted disbarment); *In re Disciplinary Proceedings Against Ratzel*, 321

The Code's Ethical Considerations<sup>66</sup> 7-8<sup>67</sup> and 9-2<sup>68</sup> exhort the lawyer to keep his client fully informed of developments in the case.

In some jurisdictions, disciplinary boards are composed of both attorneys and laypersons. The two groups may well have different perspectives and concerns especially concerning the manner in which counsel has treated the client. The nonlawyer member of the Washington Disciplinary Board has explained:

I react strongly to those cases in which a client has been damaged because of a lawyer's negligence or lack of communication. The majority of the cases coming before us deal with such minor infractions, which demonstrate lack of sensitivity and consideration toward clients, rather than actual wrongdoing.

It is in these cases that lawyer members manifest more empathy than I can muster. They identify with the attorney and are inclined to say, "this could happen to me. *Mea culpa*—I, too, have forgotten, neglected, been uncommunicative." Their emphasis is on "understanding" the lawyer, and mine is to consider the client's frustration, aggravation and predicament.<sup>69</sup>

The overloaded defender frequently is placed in the situation where there is insufficient time to properly communicate with clients. A study of the clients of the public defender office in Denver revealed that "the most widely shared grievance among defender clients is that defenders do not visit or contact them often enough."<sup>70</sup> The Denver defenders' response to the complaints that they failed to adequately communicate with their clients was that their excessive caseload demanded that they move on to other cases rather than spending time on client

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N.W.2d 543 (Wis. 1982) (counsel publicly reprimanded for failure to communicate with client after client's request for information).

66. The Ethical Considerations ("EC") of the Code are defined as being "aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement at 697 (1980). Formal Opinion 335 of the ABA Committee on Ethics and Professional Responsibility noted that: "A good lawyer is a conscientious lawyer who strives to fulfill not only the obligations imposed by the Code's Disciplinary Rules, but also the higher responsibilities contained in the Code's Ethical Considerations." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 335 (1974).

67. EC 7-8 states in pertinent part:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

68. EC 9-2 states in relevant part: "In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1980).

69. Lobe, *Confessions of a Non-Lawyer on a Discipline Board*, 1 BAR LEADER, Nov. 1975, at 17, 18.

70. Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 142 (1972).

visits.<sup>71</sup> The situation in New York City in 1987 was described by the president of the Association of Legal Aid Attorneys as follows: "Horror stories abound. Defendants do not see their lawyers for months because the lawyers are not physically able to get to all the courtrooms in which they have cases in a given morning."<sup>72</sup>

The heavy caseload requires public defenders to spend much of their time in court, and the lack of opportunity to research the law that might prove crucial to a resolution of the client's case can prompt disciplinary proceedings against these attorneys.<sup>73</sup> The Oklahoma Supreme Court in ordering an attorney disbarred, explained:

The minimal research which Respondent was required as an attorney of law to engage . . . relates to her competency as an attorney to engage in the practice of law in any field of the law. Her unexplained failure to ascertain what she knew to be basic and statutorily defined points of law readily ascertainable by any member of the bar constitutes the handling of a legal matter without preparation adequate in the circumstances, and a gross neglect of a legal matter entrusted to her.<sup>74</sup>

If the attorney's violations persisted over a period of years, the court may take a particularly strong stance.<sup>75</sup> Any prior discipline received by the lawyer will be considered in determining the sanction imposed,<sup>76</sup> and even though no

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71. *Id.* at 146.

72. Schneider, *You Can't Afford a Lawyer If You Don't Have a Dime*, Blind Justice, Feb. 1987, at 1, col. 4.

73. See, e.g., *State ex rel. Nebraska State Bar Ass'n v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975), where the Supreme Court of Nebraska found that:

Respondent was guilty of extreme negligence in his failure to familiarize himself with Section 77-1918 R.R.S. 1943, as amended. The fact that he was extremely busy with criminal prosecutions does not absolve him of his responsibility. . . He knew the statute had been amended and made no attempt to ascertain its provisions.

*Id.* at 734, 230 N.W.2d at 80. See also *People v. Yoakum*, 552 P.2d 291 (Colo. 1976) (lawyer's false financial statement to bank and failure to represent clients demanded his disbarment); *Florida Bar v. Terry*, 333 So. 2d 24 (Fla. 1976) (counsel's breach of fiduciary duty as guardian led to public reprimand and probation); *Holt v. Whelan*, 388 Mich. 50, 60, 199 N.W.2d 195, 201 (1972) (counsel's failure to conduct proper legal research required remand to Michigan State Bar Grievance Board for reconsideration).

74. *State ex rel. Oklahoma Bar Ass'n v. Hensley*, 661 P.2d 527, 530 (Okla. 1983).

75. See, e.g., *Disciplinary Proceeding Against Kelly*, 109 Wis. 2d 348, 325 N.W.2d 729 (1982), where the charges against the attorney included failing to proceed in a timely fashion to process his client's appeal of a criminal conviction, and the *per curiam* decision of the Wisconsin Supreme Court ordered revocation of the lawyer's license to practice law because of the "large number of serious violations of the professional responsibility rules and the nature of the unprofessional conduct in which the respondent was found to have engaged in over a four year period." *Id.* at 362, 325 N.W.2d at 736. See also *People v. Kendrick*, 646 P.2d 337, 340-41 (Colo. 1982) (counsel was disbarred because he had shown marked pattern of professional misconduct dating back to his admission to bar); *In re Fusciello*, 81 N.J. 307, 310, 406 A.2d 1316, 1318 (1979) (patterns of neglect warrant increased discipline).

76. *In re Kitts*, 294 S.E.2d 786 (S.C. 1982). See also *Lewis v. State Bar*, 9 Cal. 3d 704, 715, 108 Cal. Rptr. 821, 828, 511 P.2d 1173, 1180 (1973) (prior disciplinary record is to be considered in assessing proper punishment for new offense); *Attorney Grievance Commission of Maryland v. Sherman*, 454 A.2d 359, 365 (Md. 1983) (suspension of three years was warranted due to earlier discipli-

specific allegation may be sufficient to warrant discipline, the cumulative effect of dilatory representation may well merit sanctions.<sup>77</sup> Available sanctions typically include a letter of caution, private reprimand, public censure, suspension, or disbarment.<sup>78</sup> Lawyers will not ordinarily be able to "resign" from the bar to prevent the imposition of discipline.<sup>79</sup>

In large offices where senior attorneys are too busy managing their own caseloads to have time available to train the newly-hired defender, the defender who, through inexperience, acts incompetently will face disciplinary action since inexperience does not justify or significantly mitigate an attorney's violation of the requirements of the Code.<sup>80</sup> Defenders who fail to respond to formal complaints against them may be deemed to have admitted the charges and facts alleged in the complaints, and may be suspended from the practice of law as a result of their default.<sup>81</sup>

### C. Appellate Court Findings of Ineffective Assistance of Counsel

An ethical standard of competence must be at least equal to the constitutional requirement, so an appellate court's finding that there was ineffective assistance may lead to a proceeding to discipline the lawyer for neglect or incompetence.<sup>82</sup> In fact, a recently enacted provision of the California *Business*

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nary action taken against counsel for neglect of client's case); *In re Perelstein*, 71 A.D.2d 454, 423 N.Y.S.2d 192 (1979) (previous censure of counsel was one factor that led to subsequent determination of disbarment), *appeal denied*, 49 N.Y.2d 703, 426 N.Y.S.2d 1027, 403 N.E.2d 459 (1980). The ABA *Standards for Imposing Lawyer Sanctions*, Standard 8.1, calls for disbarment if a lawyer has previously been suspended for the same or similar misconduct. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 8.1 (1986).

77. See *Columbus Bar Ass'n v. Hammersmith*, 69 Ohio St. 2d 77, 430 N.E.2d 1329 (1982).

78. See, e.g., *In re Belser*, 277 S.C. 250, 251, 287 S.E.2d 139 (1982). The power to license and discipline lawyers belongs to the judicial branch of government. As the Supreme Court noted in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868): "Both the admission and removal of attorneys are judicial acts." *Id.* at 536. Courts are free to devise specific and particularized remedies. See, e.g., *In re Greene*, 276 Or. 1117, 1123, 557 P.2d 644, 647 (1976) (counsel placed on probation until he could show to court that he had obtained at least grade of B in law school course in professional responsibility). Sometimes the punishment imposed on the counsel may be vague and uncertain. For example, the Florida Supreme Court required that counsel "prove his rehabilitation" before he would be reinstated after the minimum suspension period of fifteen months had been completed. *Florida Bar v. Pincus*, 300 So. 2d 16, 18 (Fla. 1974).

79. See, e.g., *In re Atkins*, 253 Ga. 319, 320 S.E.2d 146 (1984), where the Georgia Supreme Court held there was no provision for counsel's attempt to resign. The court stated that "a lawyer may not circumvent the disciplinary functions of the Bar organization by a simple resignation." *Id.* at 320, 320 S.E.2d at 147.

80. *In re Deardorff*, 426 P.2d 689, 692 (Colo. 1981).

81. *People v. Richards*, 748 P.2d 341 (Colo. 1987). See also *In re Lince*, 200 N.W.2d 56, 58-59 (N.D. 1972) (counsel's failure to submit written responses or personally appear to answer questions constituted grounds for sanctions); *Stark County Bar Ass'n v. Ergazos*, 2 Ohio St. 3d 59, 61, 442 N.E.2d 1286, 1288 (1982) (indefinite suspension ordered in part because of counsel's failure to cooperate with Investigating Committee of Bar Association). But see *Committee on Legal Ethics of the West Virginia State Bar v. Mullins*, 226 S.E.2d 427, 431 (W. Va. 1976) (counsel's refusal to cooperate did not create independent grounds for discipline).

82. See, e.g., *Florida Bar v. Morales*, 366 So. 2d 431, 433 (Fla. 1978), where after a conviction was reversed due to ineffective assistance, a disciplinary hearing led to the Florida Supreme Court's

and Professions Code provides:

Whenever a reversal of judgment in a judicial proceeding is based on whole or in part upon misconduct, incompetent representation, or willful misrepresentation by counsel, the court that ordered the reversal of the judgment shall cause the matter to be reported to the State Bar of California for investigation with regard to the appropriateness of initiating disciplinary action against the attorney. The court shall also notify the attorney involved that the matter has been referred to the State Bar for investigation.<sup>83</sup>

In 1986, Philadelphia adopted a rule that requires a three-judge panel to conduct a review of any case in which an appellate court had found ineffective representation. The purpose of the review was to determine whether the lawyer should be referred to the disciplinary board of the Supreme Court of Pennsylvania for "possible action."<sup>84</sup> Appeals courts will not consider the excessive caseload of a defender to be an excuse for the inadequate representation. As the Fourth Circuit stated in overturning a conviction: "Perhaps the burden of representing so many persons accused of felonies explains the woefully inadequate services rendered to petitioner. Whatever the reason, the services of counsel was ineffective in at least several regards."<sup>85</sup>

It will not be a defense for a lawyer confronted with a disciplinary proceeding to claim that the reason for the neglect of clients was that the lawyer had too many cases demanding attention.<sup>86</sup> A psychiatrist's testimony that the excessive amount of work had led to "burned-out syndrome" has been found not to mitigate the attorney's neglect of his client.<sup>87</sup> The Supreme Court of New Mexico in *In re Martinez*,<sup>88</sup> ordering the suspension of an attorney for one year stated that:

As licensed professionals, attorneys are expected to develop procedures

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ordering the trial lawyer disbarred based upon his neglect of that defendant as well as upon other violations.

83. CAL. BUS. & PROF. CODE § 6086.7 (West 1982). See *People v. Shelley*, 156 Cal. App. 3d 521, 533 n.1, 202 Cal. Rptr. 874, 881 n.1 (1984), for an example of a court reporting the incompetent representation of an attorney in accord with this provision.

84. *Honest Defense Errors—or Subterfuge?*, NAT'L L.J., Mar. 31, 1986, at 3, col. 1.

85. *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

86. See *In re Fraser*, 83 Wash. 2d 884, 889, 523 P.2d 921, 924 (1974) (lawyer censured and his extremely heavy workload not accepted as justification for failure to attend to his cases); *In re Loomos*, 90 Wash. 2d 98, 103, 579 P.2d 350, 352 (1978) (lawyer's heavy workload no excuse for neglecting and delaying work required to be done for client); *In re Bartlett*, 283 Or. 487, 499, 584 P.2d 296, 302 (1978) (lawyer's claim that heavy caseload forced him to spread himself too thin no excuse for violating ethical considerations); *Martin v. State Bar*, 20 Cal. 3d 717, 575 P.2d 757, 144 Cal. Rptr. 214 (1978) (neglect of clients natural and probable consequence of counsel taking on more cases than she could handle); *In re Whitlock*, 441 A.2d 989, 990 (D.C. App. 1982) (heavy trial and appellate caseload of counsel does not condone his failure to file briefs within prescribed forty day period for criminal appeals).

87. *In re Conduct of Loew*, 292 Or. 806, 811, 642 P.2d 1171, 1173 (1982) (even though lawyer's record was unblemished for 22 years of practice, neglect of client led Oregon Supreme Court to suspend him from practice for 30 days). See also *In re Willcher*, 404 A.2d 185 (D.C. 1979) (counsel found to have violated disciplinary rule requiring zealous representation even though there was strong likelihood that he was suffering from severe form of depression at time of his misconduct).

88. 104 N.M. 152, 717 P.2d 1121 (1986).



which are adequate to assure that they that will handle their cases in a proficient fashion and that they will not accept more cases than they can manage effectively. When an attorney fails to do this, he or she may be disciplined even where there is no showing of malicious intent or dishonesty. The purpose of attorney discipline is not to punish the attorney but to insure that members of the public can safely assume that the attorney to whom they entrust their cases is worthy of that trust.<sup>89</sup>

The public defender will not be able to offer as an excuse that the lack of preparation and investigation, and the insufficient communication with the client was the customary practice among defenders.<sup>90</sup> Indeed the Supreme Court of Alaska, responding to a trial court's exasperation over the *chronic* lack of preparation of the public defenders, suggested that a proper judicial response would be to request the bar association to take disciplinary action against the individual attorneys on a case by case basis.<sup>91</sup> Whereas in civil cases, attorney restitution of client losses has been considered a mitigating factor,<sup>92</sup> there is, generally, no such option available to the criminal lawyer to rectify the damage resulting from his or her neglect.<sup>93</sup> Indeed, it is often the case that disciplinary

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89. *Id.* at 155, 717 P.2d at 1122.

90. *See Kentucky Bar Ass'n v. Hammond*, 619 S.W.2d 696, 699 (Ky. 1981) (lawyer's defense that his wrongful conduct was customary practice among attorneys held not to justify violation of ethical standards).

91. *McKinnon v. State*, 526 P.2d 18, 23 (Alaska 1974). The trial court had stated that "there's been a course of conduct on the part of the public defender's agency and the attorneys in that agency over a period of months, if not years, of not being prepared—not only for trial of cases, but in omnibus hearings and hearings on motions." *Id.* at 24 n.19.

92. *See, e.g., Ohio State Bar Ass'n v. Renshaw*, 49 Ohio St. 2d 192, 360 N.E.2d 703 (1977) (because lawyer had made full restitution before disciplinary proceedings, he was not disbarred); *In re Miller*, 56 A.D.2d 109, 391 N.Y.S.2d 596 (1977) (counsel's making full restitution mitigated discipline imposed). The ABA *Standards for Imposing Lawyer Sanctions* state that a good faith effort by counsel to make restitution is to be considered a mitigating factor. The commentary explains the rationale:

Such a policy will encourage lawyers to make restitution, reducing the degree of injury to the client and helping insure that the lawyer has recognized the wrongfulness of his conduct. Restitution which is made upon the lawyer's own initiative should be considered as mitigating; lawyers who make restitution prior to the initiation of disciplinary proceedings present the best case for mitigation, while lawyers who make restitution later in the proceedings present a weaker case.

STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.32 commentary at 50 (1986). *See also Standards for Lawyer Discipline* § 7.1 commentary at 44 (1983) (mitigating factors sometimes result in lesser discipline).

93. Courts have generally been reluctant to consider mitigating factors and have emphasized the public's need to be protected from lawyers' neglect. *See, e.g., Martin v. State Bar*, 20 Cal. 3d 717, 723, 575 P.2d 757, 759, 144 Cal. Rptr. 214, 216 (1978) (many years of volunteer legal work for public causes, although praiseworthy, neither bears on nor excuses counsel's neglect of her clients' cases); *People v. Yost*, 729 P.2d 348, 352 (Colo. 1986) (marital difficulties, computer problems, and partnership disputes did not mitigate violations of professional responsibility caused by counsel's negligence); *Attorney Grievance Comm'n v. Goldberg*, 441 A.2d 338, 342 (Md. 1982) (court rejected lawyer's claim that very busy practice required secretary to perform some legal work and that lawyer therefore should not be held responsible for secretary's negligence and malfeasance); *In re Maloney*, 620 S.W.2d 362 (Mo. 1981) (en banc) (Missouri Supreme Court rejected legislator's claim that legis-

agencies and courts will discount most of what the attorney pleads in attempting to mitigate the sanction to be imposed. As the Supreme Court of Illinois has emphasized: "Predictability and fairness require that there be a degree of consistency in the sanctions imposed for similar types of conduct,"<sup>94</sup> and "[s]anctions should be imposed consistent with those imposed in cases with factual situations substantially similar to the case under consideration."<sup>95</sup>

#### D. Disciplining the Defender

The obligations and responsibilities of public defenders to their clients are the same as those of any privately retained lawyer; there are no "allowances" made for the defender serving in a legal aid or defender program.<sup>96</sup> And the standards and rules of professional conduct which govern lawyers' conduct are as applicable to defenders as to any member of the bar.<sup>97</sup> Any person, not just the former client, can initiate a disciplinary investigation.<sup>98</sup>

##### 1. Professional Self-Regulation

It is a violation of a disciplinary rule for a lawyer *not* to report another lawyer's violation of a disciplinary rule in the Code.<sup>99</sup> Self-regulation of the

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lative duties excused his not having time to devote to clients); *Stark County Bar Ass'n v. Lukens*, 48 Ohio St. 2d 187, 198, 357 N.E.2d 1083, 1089 (1976) (even though lawyer had debilitating, persistent illness and had been hospitalized on occasion, discipline proper because lawyer should not have maintained posture of competency and availability to public); *State ex rel. Oklahoma Bar Ass'n v. Fore*, 562 P.2d 511, 514 (Okla. 1977) (attorney's drinking problem no excuse for neglecting client's claim).

94. *In re Hopper*, 85 Ill. 2d 318, 324-25, 423 N.E.2d 900, 903 (1981).

95. *In re Freel*, 89 Ill. 2d 263, 270, 433 N.E.2d 274, 277 (1982).

96. ABA *Standard for Criminal Justice* 4-3.9 states: "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed or serving in a legal aid or defender program." STANDARD FOR CRIMINAL JUSTICE 4-3.9 (1982). Justice Powell in *Polk County v. Dodson*, 454 U.S. 312 (1981), commented in regard to this standard: "This view of the public defender's obligations to his clients has been accepted by virtually every court that has considered the issue." *Id.* at 318 n.6.

97. *See Chaleff v. Superior Court*, 69 Cal. App. 3d 721, 724, 138 Cal. Rptr. 735, 737 (1977) (public defenders are subject to same rules of professional conduct as other members of state bar); *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972) (public defender's professional duties toward clients are identical to other attorneys whether private or court appointed); STANDARD FOR CRIMINAL JUSTICE 4-1.1(e) (1982) (every lawyer has duty to know standards of professional conduct as defined in codes and canons of legal profession). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980) ("the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities"); *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) (lawyers servicing indigents must meet same level of competency as those servicing fee paying clients); *Sanchez v. Murphy*, 385 F. Supp. 1362, 1364 (D. Nev. 1974) (professional obligations of public defender to client are identical to those of any other attorney); *Holt v. Whelan*, 388 Mich. 50, 60, 199 N.W.2d 195, 200 (1972) (application of Code is not dependent upon size of retainer attorney receives; professional misconduct will not be condoned due to fact that attorney's client was impoverished).

98. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 8.1 (1983).

99. Ethical Consideration 1-4 of the Code emphasizes the need for such reporting: "The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials." MODEL CODE OF PROFESSIONAL RESPON-

profession requires that attorneys initiate a disciplinary investigation when they become aware of violations of the rules regulating professional conduct.<sup>100</sup> Disciplinary Rule 1-103 requires any lawyer possessing unprivileged knowledge of a violation of DR1-102 to report such knowledge to a tribunal or disciplinary authority.<sup>101</sup> DR1-102 is a catch-all rule entitled "Misconduct," and is violated whenever a lawyer violates *any* disciplinary rule.<sup>102</sup> Therefore, a lawyer appealing a conviction on ineffective assistance grounds who becomes aware of the public defender's inadequate preparation, neglect, failure to communicate with the client or to conduct the necessary research, is obligated to report the defender. In *Maryland State Bar Association v. Hirsch*,<sup>103</sup> the disbarment of counsel resulted in part from the charge by the state bar association that counsel had failed to report his knowledge of violations of the Code's Disciplinary Rules.<sup>104</sup>

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SIBILITY EC 1-4 (1980). The *Model Rules*' requirement is not as strict as the Code's; Rule 8.3 requires reporting by a lawyer of another lawyer when the violation of the rules raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 8.3 (1984). The *Rules*' reliance therefore on a lawyer's discretion in determining what kind of violation to report, varies from the Code's mandate which requires reporting and leaves it up to the disciplinary body to determine whether to proceed. The *American Lawyer's Code of Conduct* provides the rationale for its requiring reporting of attorney misconduct in the comment to chapter VIII:

The role of lawyers is an essential element of the administration of justice, and rules of lawyers' conduct define that role. Thus, lawyers not only must comply with rules of professional conduct; they also must be seen as complying with them. For the profession to promulgate ethical rules, yet appear to wink at violations, can only result in disrespect for the profession and thereby in disrespect for the administration of justice.

100. Perhaps the most forceful statement of the obligation to report can be found in the ABA *Standards for Imposing Lawyer Sanctions*: "It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency. Failure to render such report is a disservice to the public and the legal profession." STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface at 2 (1986). The preamble to the ABA *Model Rules of Professional Conduct* states: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." MODEL RULES OF PROFESSIONAL RESPONSIBILITY Preamble (1984).

101. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980). The Code's requirement that an attorney's knowledge of the violation be "unprivileged" therefore would not require one lawyer defending another in a malpractice action to report a violation uncovered in the course of that attorney-client privileged relationship. *Id.* DR 1-103(B). For an example of a lawyer being disciplined for failure to reveal information concerning another lawyer's possible misconduct, see *Carter v. Folcarelli*, 121 R.I. 667, 402 A.2d 1175 (1979).

102. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980) provides:  
Misconduct.

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.

103. 335 A.2d 108 (1975), *cert. denied*, 422 U.S. 1012 (1975).

104. *Id.* at 109. See also *Attorney Grievance Comm'n v. Kahn*, 290 Md. 654, 655, 431 A.2d 1336, 1338 (1981) (Commission sought disbarment of attorney for violations of Disciplinary Rules of Code of Professional Conduct); *State ex rel. Nebraska State Bar Ass'n v. Michaelis*, 210 Neb. 545, 562, 316 N.W.2d 46, 51 (counsel disbarred after violating DR 8-102(B)), *cert. denied and appeal dismissed*, 459 U.S. 804 (1982).

In at least one jurisdiction in 1987, more lawyers than ever before were reporting other attorneys to the state disciplinary committee.<sup>105</sup>

Unable to properly comply with professional mandates for competent representation, the overburdened defender is vulnerable to opposing counsel—the prosecutor—reporting him or her for disciplinary action.<sup>106</sup> The prosecutor has the burden under the Code of reporting any defender who is neglecting his or her client's case.<sup>107</sup> In *Rodriguez v. State*,<sup>108</sup> the Supreme Court of Arizona specifically instructed the state prosecutors that they had the obligation to report, for possible disciplinary action, their belief that the Public Defenders Office was violating the Code.<sup>109</sup> In *United States ex rel. Hall v. Ragen*,<sup>110</sup> the prosecution sought disciplinary action against the defense counsel for alleged incompetence at trial. The prosecutor's action was successful and the attorney was disbarred.<sup>111</sup>

## 2. Judicial Regulation

The trial judge, upon becoming aware of the defender's incompetency, neglect or lack of diligence, also is obliged under DR 1-103(A) to report counsel.<sup>112</sup>

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105. *Complaints, Real v. False, Keeping Heat on Lawyers*, N.Y.L.J., Oct. 6, 1987, at 1, col. 3.

106. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980). Disciplinary Rule 1-103 requires *all* lawyers to report violations of the Code of which they become aware. *Id.* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1210 (1972), elaborated and perhaps expanded on counsel's obligation to report in a manner that might directly impact on the prosecutor confronting an incompetent attorney. The committee stated that it was the duty of a lawyer to report all "conduct prejudicial to the administration of justice, and other conduct that adversely reflects on the fitness of the lawyer to practice law." *Id.*

107. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980). Disciplinary agencies have had difficulty in deciding when it is proper to commence investigation of complaints alleging ineffective assistance received while the attorney is continuing his representation of the defendant. The District of Columbia Disciplinary Board had determined that a potential conflict of interest would exist if the attorney needs to defend himself from his client's complaints while continuing his representation. The Disciplinary Board, therefore, had deferred investigation of complaints as long as the representation continued. But as criticism of that deferral increased, as did concern with the enforcement of professional standards in the performance of attorneys for indigent defendants, the Board adopted a policy whereby after a preliminary inquiry has determined a *prima facie* basis for proceeding with the complaint, the attorney involved would be requested to withdraw from his representation. If the lawyer did not move for withdrawal, the Board's counsel would inform the judge of the complaint and that the lawyer has been advised to cease representation. And if a conviction occurs, the defendant is advised to appeal or file a habeas corpus writ. *Disciplinary Board on Complaints Against CJA Attorneys*, 2 DISTRICT LAW. 47, 48 (1977).

108. 129 Ariz. 67, 628 P.2d 950 (1981).

109. *Id.* at 70, 628 P.2d at 953.

110. 60 F. Supp. 820 (N.D. Ill. 1945).

111. *Id.* at 823.

112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980). The ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986) clearly anticipate including judges among those who might be disciplined for violating professional ethics:

[S]anctions for misconduct must apply to all licensed lawyers. . . Lawyers who are not actively practicing law . . . do not lose their association with the legal profession because of their primary occupation. The public quite properly expects that anyone who is admitted to the practice of law, regardless of daily occupational activities, will conform to the mini-

The requirements of the Code concerning the lawyers' duty to report Code violations apply to judges as well, since the preliminary statement indicates that the Disciplinary Rules apply to *all* lawyers regardless of professional capacity.<sup>113</sup> The American Bar Association's *Code of Judicial Conduct*<sup>114</sup> requires judges to initiate disciplinary proceedings against lawyers who engage in unprofessional conduct.<sup>115</sup> The Standing Committee of the ABA in its report entitled *The Judicial Response to Lawyer Misconduct*<sup>116</sup> states: "It is unequivocally the ethical duty of judges to discipline or report lawyer misconduct."<sup>117</sup> The Supreme Court of Indiana in *In re Terry*<sup>118</sup> has emphasized the duty of a judge who becomes aware of counsel's inadequate representation to comply with the Code and present the information to the appropriate disciplinary body to protect future defendants from similar ineffective assistance.<sup>119</sup>

### III. THE DEFENDER AND LEGAL MALPRACTICE

The lack of time available to a public defender for the preparation of each case<sup>120</sup> and the resulting failure to exercise the requisite diligence can subject the

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mal ethical standards of the legal profession. If the lawyer fails to meet these standards, appropriate sanctions should be imposed.

*Id.* § 1.1 commentary at 17. For an example of a trial court judge reporting defense counsel's negligence and incompetence in the representation of a robbery suspect, see *Florida Bar v. Morales*, 366 So. 2d 431 (Fla. 1978). The trial judge deemed it necessary to grant the defendant a new trial, and the Florida Supreme Court subsequently ordered the attorney disbarred. *Id.* at 433.

113. The preamble and preliminary statement to the *Code of Professional Responsibility* states that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1980). For a court opinion emphasizing inclusion of the judiciary in the obligations specified in the Code, see *In re Terry*, 262 Ind. 667, 671, 323 N.E.2d 192, 194 ("We expressly reject [the judge's] contention that he is subject neither to the Code of Judicial Conduct and Ethics nor the Code of Professional Responsibility. *He is subject to both.*") (emphasis in original), *cert. denied*, 423 U.S. 867 (1975).

114. CODE OF JUDICIAL CONDUCT (1972).

115. See *id.* Canon 3(B)(3) (judges should initiate disciplinary measures against a lawyer for any unprofessional conduct).

116. ABA STANDING COMM. ON PROFESSIONAL DISCIPLINE, CENTER FOR PROFESSIONAL RESPONSIBILITY THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT (1984).

117. *Id.* at iii. See also *Matter of Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (court has duty to discipline attorneys, who are officers of court, for unprofessional conduct).

118. 262 Ind. 667, 323 N.E.2d 192 (1975).

119. *Id.* at 680-81, 323 N.E.2d at 199. For an example of a court choosing to impose its own discipline upon counsel due to counsel's dereliction of duty on a potential death penalty case, see *Matter of Hunoval*, 294 N.C. 740, 247 S.E.2d 230 (1977). The summary judicial disciplinary action imposed was a one year suspension from the practice of law. *Id.* at 744, 247 S.E.2d at 233.

120. As the New York Court of Appeals noted: "[I]t is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense." *People v. Droz*, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882, 384 N.Y.S.2d 404, 407 (1976) (citing *People v. Bennett*, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972)). It is well established that counsel has a clear duty to investigate prior to trial. *House v. Balkcom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984); *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983).

attorney to civil liability in a malpractice action.<sup>121</sup> Even though the Code<sup>122</sup> and Model Rules<sup>123</sup> disclaim any setting of standards to be used in judging an attorney's conduct in a malpractice suit, a recent trend is indeed to use the Code as the proper standard.<sup>124</sup>

Evidence of a Code violation may be considered a deviation from the appropriate standard of care. In *Lipton v. Boesky*,<sup>125</sup> the Michigan Court of Appeals was confronted with a plaintiff in a malpractice action claiming that not only was a Code violation actionable, but also that proof of a breach of a Code provision was evidence of malpractice *per se*.<sup>126</sup> The defendant maintained that such violations were not actionable in a civil suit for damages. The court emphati-

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121. Extensive evaluations conducted for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants led to the conclusion that excessive caseloads demand that public defenders ignore approved standards for competent representation and therefore lead to exposure to malpractice actions. N. LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR* 57 (1984). A malpractice suit requires four elements: (1) existence of an attorney-client relationship, (2) an attorney's duty to act according to a particular standard of care, (3) the failure to live up to that standard, (4) damage to the client as a result of that failure. The first reported case this author was able to uncover concerning a successful malpractice suit against a lawyer in a criminal case was *Miller v. Ginsberg*, 134 Minn. 397, 159 N.W. 950 (1916). The Supreme Court of Minnesota held that the evidence presented to the jury did sustain the verdict wherein the jury found that counsel had failed to perform the duties required of him while representing his client who was accused of grand larceny. *Id.* at 134 Minn. 399-400, 159 N.W. 951.

122. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). The preliminary statement of the *Model Code of Professional Responsibility* notes that it does not "undertake to define standards for civil liability of lawyers for professional conduct." *Id.* Preliminary Statement at 698.

123. MODEL RULES OF PROFESSIONAL CONDUCT (1984). The section of the Model Rules entitled "Scope," states that the Rules "are not designed to be a basis for civil liability." *Id.* Scope. Furthermore, the "Scope" section states that, "[v]iolation of a rule should not give rise to cause of action nor should it create any presumption that a legal duty has been breached." *Id.*

124. Clay III, *Application of the Model Rules to Legal Malpractice*, 1 Complete Lawyer 37 (1984) (attorneys should now be on notice that violations of the Code of Rules may result in civil liability as well as professional discipline). See also Horan, Browne, & Spellmire, *Practical Tips in Handling a Legal Malpractice Case: Complaint Through Trial*, Am. J. Trial Advoc. 381, 395 (1986) (common practice in malpractice claims is to allege that counsel's conduct violated *Code of Professional Responsibility*); Wolfram, *Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. Rev. 281, 286-95 (1979) (Code does set appropriate standard of conduct for malpractice as well as disciplinary purposes); Nolan v. Foreman, 665 F.2d 738, 743 (5th Cir. 1982) (breach of Code constitutes cause of action for malpractice); Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.) (despite Code's disclaimer, it certainly constitutes evidence of standards required of attorneys), *cert. denied*, 449 U.S. 888 (1980); Carlson v. Morton, 745 P.2d 1133 (Mont. 1987) (proof of attorney's violation of some disciplinary rules may itself establish negligence); Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 111, 362 N.W.2d 118, 128 (1985) (noting that Code is beneficial in providing answers regarding ethical conduct of attorneys); Hansen v. Wightman, 14 Wash. App. 78, 95, 538 P.2d 1238, 1250 (1975) (disciplinary rules set out mandatory standards of conduct to be considered in malpractice action). But see Brainerd v. Brown, 91 A.D. 287, 488 N.Y.S.2d 735, 736 (1983) (violation of disciplinary rule does not by itself generate cause of action for malpractice); Greening v. Klamen, 652 S.W.2d 730, 734 (Mo. App. 1983) (common law obligations of competence and fiduciary obligation will not be enlarged by imposing liability for breach of Disciplinary Rules); Fishman v. Brooks, 396 Mass. 643, 649, 487 N.E.2d 1377, 1381 (1986) (violation of ethical standards does not in itself constitute actionable breach of duty to client).

125. 110 Mich. App. 589, 313 N.W.2d 163 (1981).

126. *Id.* at 595, 313 N.W.2d at 165.

cally concluded: "We hold that, as with statutes, a violation of the Code is rebuttable evidence of malpractice."<sup>127</sup> Any finding in a disciplinary proceeding that counsel had neglected his or her client's case in violation of the Code<sup>128</sup> can certainly be expected to carry weight in any subsequent civil action for damages. A claim that the Code defines the lawyer's fiduciary obligations gains support from language used in the preliminary statement to the Code which states that the Code's Canons express "the standards of professional conduct expected of lawyers in their relationship with the public."<sup>129</sup> Both the Code<sup>130</sup> and the Model Rules<sup>131</sup> highlight the import of the remedy of a malpractice action for the protection of the client.<sup>132</sup>

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127. *Id.* at 598, 313 N.W.2d at 167. The court explained that:

The Code of Professional Responsibility is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession. Holding a specific client unable to rely on the same standards in his professional relations with his own attorney would be patently unfair.

*Id.* at 597-98, 313 N.W.2d at 166-67.

128. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). See *supra* notes 120-25 and the accompanying text for a discussion of the *Model Code of Professional Responsibility* as a standard in a malpractice suit for judging attorney conduct.

129. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement at 2 (emphasis added) (1980).

130. *Id.* DR 6-102(A) of the Code warns: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." *Id.* EC 6-6 of the Code provides the explanation for the restriction: "A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so." *Id.* For an example of a lawyer being disciplined for violating DR 6-102(A) see *Commission on Professional Ethics and Conduct of the Iowa State Bar v. Karpan*, 316 N.W.2d 682 (1982) (lawyer had paid client \$1400 restitution in exchange for release from liability for malpractice because lawyer had failed to file a personal injury claim before the statute of limitations expired); *People v. Good*, 195 Colo. 177, 178, 576 P.2d 1020, 1021-22 (1978) (counsel violated DR 6-102(A) by writing on back of check for repayment of retainer: "Endorsement hereon constitutes payment in full for refund of fee and a complete release of [counsel] from any and all claims."); *Florida Bar, In re Neale*, 336 So. 2d 356, 358 (Fla. 1976) (lawyer had conditioned refund to client on client's relinquishing any claims client may have against him). The fact that the counsel may not have in actuality committed any malpractice is not relevant to a determination of whether counsel violated the disciplinary rule. *In re Preston*, 111 Ariz. 202, 523 P.2d 1303 (1974).

131. MODEL RULES OF PROFESSIONAL CONDUCT (1984). Model Rule 1.8(h) instructs in pertinent part that: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. . . ." *Id.* Rule 1.8(h). See also *American Lawyer's Code of Conduct* Rule 5.3: "A lawyer should not contract with a client to limit the lawyer's liability to the client for malpractice."

132. The responsibilities of the court-appointed lawyer to his or her client are the same as those of a privately retained counsel. As the district court stated in *Vance v. Robinson*, 292 F. Supp. 786, (1968), where the plaintiff was suing his court-appointed counsel for negligence in the handling of plaintiff's criminal defense and appeal:

[Court-appointed counsel] owed to the criminal defendant when he accepted employment the duties of diligence and faithful representation required by the Canons of Professional Ethics and by the ordinary duties of due care in the practice of his profession; and if he did the things alleged in the complaint he may be liable to the plaintiff for civil damages.

The frequency of legal malpractice claims is growing,<sup>133</sup> and the amounts paid out for both indemnity and defense have become larger in recent years.<sup>134</sup> Perhaps one-fourth or more of legal malpractice claims arise because of the negligent handling of the attorney-client relationship.<sup>135</sup> The public defender rarely has the time to devote to soothing his or her client's fears and concerns, especially if the defendant is in pre-trial custody in a jail a distance away from the defender's office.<sup>136</sup> Lack of time to conduct legal research into the substantive issues of the case<sup>137</sup> may lead to a successful malpractice claim,<sup>138</sup> and a public

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*Id.* at 788.

133. Many reasons have been given for the increase in malpractice litigation, but rarely is it acknowledged that incompetent counsel are the cause. The attorney-in-chief of the Legal Aid Society of New York City when asked about the three fold increase in malpractice suits against the society in a two year period responded that the convicted defendants just "have nothing else to do." *A Tale of Biting the Hand: Legal Aid Finds Itself Occasionally Sued by Clients*, N.Y.L.J., Jan. 18, 1979, at 1, col. 4. Legal aid societies are most assuredly not insulated from malpractice awards. A \$2.2 million verdict was awarded by a Los Angeles jury against the Los Angeles Center for Law and Justice, a federally-funded legal aid society. *A Loss for Legal Aid Unit*, Nat'l L.J., Apr. 16, 1984, at 2, col. 1. And in Michigan, a jury recently awarded a plaintiff \$2,000,000 against a legal aid society. *Insurance Crisis Hits Washington*, Wash. Law., Sept.-Oct. 1986, at 42, 46.

134. *Reducing Your Malpractice Risk*, 72 A.B.A. J., June 1986, at 52, 52. About eight percent of lawyers nationwide were, as of the Spring of 1986, facing malpractice claims. *Suing Lawyers: Malpractice Targets Profiled*, 72 A.B.A. J., Apr. 1986, at 25, 25. The rate in some states is far higher. The administrator of the State Bar Professional Liability Fund in Oregon reported that in 1987 approximately 20% of Oregon lawyers were facing a lawsuit. *Oregon Lawyers Face High Rate of Claims*, Nat'l L.J., Feb. 9, 1987, at 3, col. 1. Oregon is the only state that requires lawyers to carry malpractice insurance. *Id.* See also *The Legal Profession Confronts Its Own Malpractice Insurance Crisis*, N.Y. St. B.J., July 1987, at 55, 56-57 (special bar association task force found that frequency and severity of malpractice claims against lawyers had risen significantly from 1984-1986, malpractice insurance rates had increased up to 500% in same period, and only two insurers were continuing to write policies for smaller firms); Cook & Schaeffer, *Civil Legal Malpractice in Wisconsin: Helmbrecht and Beyond*, 69 MARQ. L. REV. 495, 534 (1986) (legal malpractice claims are ever-increasing problem in Wisconsin). An interesting response to the increase in malpractice litigation is the move by partners of law firms to institute a system of peer review in which partners monitor and evaluate the job performances of their colleagues. *Are Firms Ready for Peer Review?*, Nat'l L.J., Aug. 24, 1987, at 1, col. 2.

135. R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* 46 (1977). See also D.N. STERN & J. FELIX-RETZKE, *A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE* 33 (1983) (data concerning malpractice suits show that many claims have their origin in faulty or ineffective relationships with client); Zilly, *Recent Developments in Legal Malpractice Litigation*, 6 LITIGATION 8, 12 (1979) (decision by client to sue often involves how well client was kept informed of progress of litigation).

136. Advisors counseling attorneys on measures to take to protect oneself from a malpractice suit emphasize the importance of communication with the client. See, e.g., *Malpractice: The Tactic is Prudence*, Nat'l L.J., May 23, 1988, at 17, col. 4, at 18, col. 4, which advises:

Constant oral and written communication with the client is very important. Ignoring clients or their complaints is a great cause of legal malpractice suits. Keeping as friendly a relationship as possible with one's client can even eliminate consideration of a malpractice suit in cases in which such malpractice has occurred.

*Id.* The failure of counsel to have fully inquired of his client concerning all relevant material can constitute negligence and provide the basis for a malpractice claim. See *Hansen v. Wightman*, 14 Wash. App. 78, 86, 538 P.2d 1238, 1245-46 (1975).

137. See, e.g., Amendment of Complaint of the Georgia Association of Criminal Defense Law-



defender may be viewed as a specialist in criminal law and expected to utilize corresponding expertise.<sup>139</sup>

#### A. Particular Vulnerability of the Criminal Defense Attorney

Attorneys in criminal cases may be more vulnerable to malpractice actions than are counsel in civil cases.<sup>140</sup> The task of the jury in a malpractice trial of assessing the adequacy of the defense counsel's standard of care may be facilitated by comparing the counsel's performance with that set forth in the idealized *ABA Standards for Criminal Justice*.<sup>141</sup> All attorneys are bound by the *Code of Professional Responsibility* or the *Model Rules of Professional Conduct*, but no field of attorney practice other than criminal law has additional, particularized

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yers, the National Legal Aid and Defender Association, and the American Civil Liberties Union of Georgia, *Cannon v. Harris*, Civil Action No. C86-297R (N.D. Ga. 1986), claiming that the system of delivery of defense services does not provide sufficient time for indigent defense attorneys to conduct research. *Id.* slip op. at 18. The American Trial Lawyers Association in their publication, *Trial*, recently contained a list of strategies for attorneys to utilize in order to protect themselves from malpractice suits. The import of conducting legal research was noted, and attorneys were warned to "keep abreast of developments in the law, attend seminars and legal programs, and track rules, judicial decisions, and legislation." *Legal Negligence: Strategies to Avoid Law-Practice Pitfalls*, 23 *Trial* 30, 32 (1987). See also *How Lawyers Can Reduce Their Malpractice Risk*, 21 BEVERLY HILLS B.A. J. 107, 107 (1987) (lawyers were advised that in order to avoid malpractice suits, it was most important to "make sure that you and your staff keep up your continuing professional education at all times to remain qualified to represent your clients' best interest"); *Preventing Malpractice Claims*, 9 L.A. LAW. 23, 24 (1986) (to avoid exposure to malpractice, it is imperative that lawyers remain current on legal matters and read advance sheets).

138. *E.g.*, *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), where the California Supreme Court, in upholding a \$100,000 verdict against the lawyer-defendant for failing to perform adequate research, stated: "[W]e believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." *Id.* at 355, 530 P.2d at 595, 118 Cal. Rptr. at 627. See also *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) 301:119 (1984) (failure to do adequate research to discover basic law and legal principles is actionable malpractice); *Smith v. Lewis*, 13 Cal. 3d at 360, 530 P.2d at 595-96, 118 Cal. Rptr. at 628 (1976) (failure to conduct adequate research can constitute legal negligence).

139. The *American Lawyer's Code of Conduct*, Preface explains a revision in the new Draft: "[A] new Rule 4.2 places a special burden of competence on the lawyer who is held out to a client as having special expertise. This follows the law that has developed in malpractice cases, holding people who call themselves specialists to the standard of care required of such specialists." See also *Rodriguez v. Horton*, 95 N.M. 356, 359, 622 P.2d 261, 264 (1980) (lawyer perceived of as specializing in certain area of law must exercise level of skill of other specialists in that field); *M. & S. Building Supplies, Inc. v. Keller*, 564 F. Supp. 1566, 1570 (D.D.C. 1983) (attorney who gave incorrect advice on labor law matter must be judged by standard of ordinarily competent and diligent labor law specialist), *rev'd on other grounds*, 738 F.2d 467 (D.C. Cir. 1984). But see *Olson v. North*, 276 Ill. App. 457, 461 (1934) (court attached no significance to lawyer-defendant's having represented himself as one "especially qualified in the defense of criminal cases").

140. See, e.g., D.N. STERN & J. RETERE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 40-41 (1983) (attorneys practicing criminal law are confronted with malpractice claims with greater than average frequency due primarily to complexity of criminal practice, and such claims incur considerable expenditures to defend).

141. STANDARDS FOR CRIMINAL JUSTICE (1982).

standards such as those found in the *Standards of Criminal Justice*.<sup>142</sup> Former Chief Justice Burger has described the Standards as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history."<sup>143</sup> The United States Supreme Court in *Strickland v. Washington*<sup>144</sup> stated that in assessing the quality of defense counsel's representation, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in the American Bar Association standards and the like, e.g. the *ABA Standards for Criminal Justice* . . . are guides to determining what is reasonable, but they are only guides."<sup>145</sup> The *Standards* were specifically designed to provide procedural guidelines for the practice of criminal law.<sup>146</sup>

For the public defender, burdened with a caseload which may inhibit allocation of sufficient time for all clients, several obligations in the *Standards for Criminal Justice* present particular concern:

*Standard 4-4.1 Duty to Investigate*

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.<sup>147</sup>

*Standard 4-3.8 Duty to Keep Client Informed*

The lawyer has a duty to keep the client informed of the develop-

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142. States as well may have standards for court-appointed counsel in criminal cases that can be interpreted as setting the appropriate duty of care with which to evaluate an attorney's quality of representation in a malpractice suit. See, e.g., standard 14 of the Michigan Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel (1986) ("counsel shall promptly conduct an independent investigation of all facts relevant to the prosecution case and relevant to any potentially viable defense theories").

143. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974).

144. 466 U.S. 668 (1984).

145. *Id.* at 688. The Court elaborated on the import of professional standards: "The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.*

146. Jameson, *The Beginning: Background and Development of the ABA Standards of Criminal Justice*, 12 AM. CRIM. L. REV. 255, 255 (1974).

147. STANDARDS RELATING TO THE CRIMINAL JUSTICE SYSTEM 4-41 (1982). An appellate court finding that trial counsel has not conducted as thorough an investigation as required may well criticize counsel in a manner that can pave the way for a malpractice action. For example, in *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963), the court found that counsel had a duty "to investigate carefully all defenses of fact and law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled." *Id.*, 386 P.2d at 490, 34 Cal. Rptr. at 866.

ments in the case and the progress of preparing the defense.<sup>148</sup>

*Standard 4-1.2 Delays; Punctuality*

(a) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attendance upon court and in the submission of all motions, briefs and other papers. . . .

(d) A lawyer shall not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation.<sup>149</sup>

Even if a malpractice action which is based in part on the claim that the defender's representation did not conform to these *Standards* is unsuccessful, the embarrassment to counsel of such a suit is severe. As the Michigan Appellate Court stated in *Berry v. Zisman*,<sup>150</sup> "[w]e can conceive of very little which would be more humiliating or degrading to an attorney than to have his clients sue him for malpractice."<sup>151</sup>

*B. Federal Immunity Under Section 1983 Actions*

The issue of whether public defenders would be liable under section 1983 of the Civil Rights Act,<sup>152</sup> as employees of the state acting under color of state law,<sup>153</sup> was not resolved until 1981 when the Supreme Court decided *Polk*

148. STANDARDS FOR CRIMINAL JUSTICE 4-3.8 (1982). Failing to communicate with the client has been found to be a major cause of legal malpractice claims. See *Economics and the Law: Legal Malpractice—A Growing Disaster*, N.Y.L.J., Oct. 8, 1985, at 1, col. 1, at 26, col. 1. Interviews with personnel screening complaints received by disciplinary agencies revealed that the greatest single cause of complaints was a breakdown in communications between the lawyer and the client. Marks & Cathart, *Discipline Within the Legal Profession*, in ETHICS AND THE LEGAL PROFESSION 62, 74 (1986). Lack of communication may cause the client to believe that his case is being neglected even though it may not be, since the client will be unaware of the work counsel is performing. See *Legal Negligence: Strategies to Avoid Law Practice Pitfalls*, TRIAL, Feb. 1987, at 30, 33 (grievance agencies across country report that poor communication between lawyers and clients breeds complaints and constitutes potential cause of malpractice claim); McCabe, *Legal Malpractice—The Lawyer As A Target*, 56 PA. B.A. Q. 209, 217 (1985) (after working ten years defending lawyers who were sued for malpractice, author commented that if he "could stress one avenue towards reducing attorney malpractice claims, it would be the improving of attorney-client communications").

149. STANDARDS FOR CRIMINAL JUSTICE 4-1.2 (1982). For a court decision holding that the demands of counsel's other cases which prevented him from being ready to proceed on the defendant's case within the statutory time requirements violated the defendant's right to a speedy trial, see *People v. Johnson*, 26 Cal. 3d 557, 562, 606 P.2d 738, 739, 749, 162 Cal. Rptr. 431, 443 (1980).

150. 70 Mich. App. 376, 245 N.W.2d 758 (1976).

151. *Id.* at 380, 245 N.W.2d at 760.

152. 42 U.S.C. § 1983 (1982) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

153. The Supreme Court has defined action taken "under color of state law" as "misuse of power, possessed by virtue of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). Courts have uniformly ruled that a private attorney does not act as a state functionary. See, e.g., *Steward v.*

*County v. Dodson*.<sup>154</sup> The plaintiffs, who were criminal defendants in the underlying action, had claimed that a section 1983 action would be proper when counsel's negligence had led to a denial of the defendants' sixth amendment right to effective assistance. The Supreme Court, however, held that a public defender, when engaged in the traditional defense functions as counsel for an indigent defendant, does not act under color of state law for purposes of suits under section 1983.<sup>155</sup> The Court emphasized that the professional relationship and obligations of the defender are the same as those of any private attorney and his client, and the form of payment to counsel does not constitute state action.<sup>156</sup>

The Court, however, carved out an exception to this immunity in *Tower v. Glover*,<sup>157</sup> decided three years after *Dodson*. In *Glover*, the Court held that public defenders were not immune from liability under section 1983 in a suit brought by a former defendant alleging that the defender conspired with other state officials to deprive him of his constitutional rights.<sup>158</sup> But courts interpreting *Glover* have made it clear that vague allegations of conspiracy will not suf-

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Meeker, 459 F.2d 669-70 (3d Cir. 1972) (privately retained counsel not acting under color of law); Kovacs v. Goodman, 383 F. Supp. 507, 509 (E.D. Pa. 1974) (lawyers who participate in private state court litigation not state functionaries) *aff'd*, 515 F.2d 507 (3d Cir. 1975); Fitzgerald v. DiGrazia, 354 F. Supp. 90, 93 (E.D. Mo. 1972) (no claim stated against County Counselor who acted as lawyer for and rendered opinion to defendants).

154. 454 U.S. 312 (1981). The circuit courts of appeals were in disagreement concerning the status of public defenders under section 1983. Circuits finding court-appointed counsel immune from a section 1983 suit did so under two theories. In *Espinoza v. Rogers*, 470 F.2d 1174 (10th Cir. 1972), and in *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973), the courts emphasized that the professional judgment of the public defenders was not influenced or controlled by the state and therefore the defenders were fulfilling a private function and did not act under color of state law. The Ninth Circuit in *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977), held that public defenders were entitled to absolute immunity under section 1983 because such immunity was necessary in order to recruit qualified attorneys to represent indigent defendants and to guarantee that counsel utilized his own discretion and judgment, unhampered by fears that a dissatisfied client would in turn bring a malpractice suit. *Id.* at 649. The Seventh Circuit, however, in *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978), emphasized the connection between "state action" under the fourteenth amendment and the concept of "under color of state law" and thereby became the first circuit to hold that the public defender *does* act under color of state law. *Id.* at 404 n.3.

155. 454 U.S. at 325. The holding in *Dodson* has been deemed to be applicable as well to the private court-appointed lawyer and to privately retained defense counsel. *Black v. Bayer*, 672 F.2d 309, 314 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982). *Dodson* was the first case in which the Court held that a state employee, sued under section 1983 for improper performance of his assigned tasks, was not acting under color of state law. For the Court's most recent decision regarding immunity from section 1983 litigation, see *West v. Atkins*, 108 S. Ct. 2250, 2258 (1988) (part-time physician employed by the state to care for prison inmates does act under color of state law, even though, like public defender in *Dodson*, he is professional who has ethical obligation to make independent medical judgments).

156. *Polk County v. Dodson*, 454 U.S. at 318. Justice Blackmun was the sole dissenter and criticized the holding as contrary to the Court's prior rulings on the meaning of "under color of state law." Justice Blackmun also believed the Court's decision would adversely affect the representation of indigent defendants. *Id.* at 445-59 (Blackmun, J., dissenting).

157. 467 U.S. 914 (1984).

158. *Id.* at 923. In *Glover*, the criminal defendant-petitioner had alleged that his two public defenders had conspired with the trial and appellate court judges and the Oregon Attorney General in order to assure the defendant's conviction. *Id.* at 916, 923.

fice; specificity of the alleged actions by the conspirators has been required.<sup>159</sup> Judges, however, are deemed to have absolute immunity from section 1983 suits,<sup>160</sup> and the Supreme Court extended immunity to prosecutors in 1976.<sup>161</sup> Even though section 1983 enumerates no immunities and states that "Every person . . . shall be liable,"<sup>162</sup> the Court nevertheless found that the well-established common law and public policy concerns that had previously led courts to grant immunities were not nullified by the language used by Congress.<sup>163</sup> Because of the judicial and prosecutorial immunity, it has been held that an attorney could not be liable under 42 U.S.C. § 1985<sup>164</sup> for conspiring with immune persons.<sup>165</sup>

For the incarcerated indigent, a significant advantage to a section 1983 suit as contrasted to the civil malpractice action is that the criminal defendant/civil plaintiff is freed from the task of obtaining counsel, since section 1983 suits can be filed *pro se*. Since the defendant who was represented by the public defender had to have been found to be indigent in order to qualify for defender representation, that defendant is unlikely to be able to retain an attorney for a malpractice suit on any basis other than a contingent fee arrangement. Section 1983 actions, except when patently frivolous, can be filed *pro se* by an indigent even without the expense of a filing fee.<sup>166</sup> If the plaintiff does retain an attorney,

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159. See, e.g., *Foster v. Walsh*, No. 84-1703, (6th Cir. Nov. 15, 1984), *reported without published decision*, 754 F.2d 377 (1984).

160. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). The purpose of the immunity was to ensure that judges were free to exercise their obligations independently and without fear of the consequences. *Id.* But the Supreme Court held in *Pulliam v. Allen*, 466 U.S. 522 (1984), that judicial immunity does not bar injunctive relief nor the award of attorney's fees against judges arising from actions for such relief. And because of increasing numbers of complaints before inquiry boards and in civil suits, judges have begun to purchase professional liability insurance. *Wary Judges*, 72 A.B.A. J., June, 1986, at 28.

161. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Court relied on a well settled common law rule granting prosecutors immunity and also found it was in the public interest to provide prosecutors with unlimited discretion to enforce the criminal laws. *Id.* at 424-25. Justice White, while concurring that immunity for prosecutors was warranted, did not believe it should be extended to situations where the prosecutor was accused of unconstitutionally withholding evidence. *Id.* at 433 (White, J., concurring).

162. 42 U.S.C. § 1983 (emphasis added).

163. The Court in *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), first considered the effect of the broad language used in section 1983, and held that there was absolute immunity for legislators from suit under section 1983. *Id.*

164. 42 U.S.C. § 1985 (1982).

165. *Waits v. McGowan*, 516 F.2d 203, 205 (3d Cir. 1975); *Steward v. Meeker*, 459 F.2d 669 (3d Cir. 1972); *Jemzura v. Belden*, 281 F. Supp. 200, 206 (W.D. Tenn. 1968). 42 U.S.C. § 1985(2) provides that if two or more individuals conspire for the purpose of impeding, hindering, obstructing, or defeating the due course of justice with intent to deny any citizen equal protection of the laws, any injured party may have the right to recover damages. Neither a showing of state action nor a showing of class-based invidious discrimination is required. See *Kush v. Rutledge*, 460 U.S. 719 (1983) (no allegations of racial or class-based invidious discrimination necessary for § 1985(2) cause of action); *McCord v. Bailey*, 636 F.2d 606, 618 (D.C. Cir. 1980) (neither showing of state action nor showing of class-based invidious discrimination required by 42 U.S.C. § 1985(2)), *cert. denied*, 451 U.S. 983 (1981).

166. See *Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

attorney fees are recoverable, unlike in the traditional malpractice action.<sup>167</sup>

### C. Immunity from Legal Malpractice Liability in State Court

No immunity has been granted to public defenders from malpractice suits. The United States Supreme Court in *Ferri v. Ackerman*<sup>168</sup> unanimously held that a counsel appointed in the federal court to represent an indigent defendant is not entitled, by federal law, to immunity when the former client sues for malpractice in state court.<sup>169</sup> The Court, in reversing the decision of the Pennsylvania Supreme Court, concluded that:

Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.<sup>170</sup>

The holding in *Ferri v. Ackerman* does not prohibit a state from granting immunity if it should so desire,<sup>171</sup> but state courts consistently have held that there is no immunity for public defenders from malpractice claims.<sup>172</sup> In fact, in

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167. See 42 U.S.C. § 1988 (1976) (court may allow reasonable attorney's fees in civil action to enforce Civil Rights Act of 1964).

168. 444 U.S. 193, 195 (1979). Francis Ferri had been convicted in federal court for conspiracy to construct and use a bomb. He subsequently filed a "complaint in negligence" alleging 67 counts of malpractice on the part of his attorney, Daniel Ackerman. Ackerman responded to the complaint by filing a demurrer on the grounds, in part, that since he was a court-appointed counsel he was immune from civil liability. *Id.*

169. *Id.* at 205. The Supreme Court holding was counter to that of several federal appellate courts that had considered the issue. See *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976) (public defender has absolute immunity from civil rights suit brought by client), *cert. denied*, 429 U.S. 1102 (1977); *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973) (public defender immune as a matter of law from liability under § 1983, unless conduct intentionally harmful); *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972) (public defender immune from liability under Civil Rights Act even if acting under color of state law as state employee) *cert. denied*, 412 U.S. 950 (1973); *Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971) (court-appointed defense counsel in federal criminal cases immune from suit).

170. 444 U.S. at 205.

171. The Court noted that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless of course, the state rule is in conflict with the federal law." *Id.* at 406 (citing U.S. CONST. art. VI, cl. 2).

172. See, e.g., *Donigan v. Finn*, 290 N.W.2d 80, 81 n.1 (Mich. App. 1980) (citing *Ferri v. Ackerman* as a "strong indication of a trend away from immunity"); *Spring v. Constantino*, 168 Conn. 563, 567, 362 A.2d 871, 875 (1975) (public defender like any attorney whose duties are to court and to his individual client). See also *Robinson v. Bergstrom*, 579 F.2d 401, 411 (7th Cir.

Pennsylvania, the state in which *Ackerman* took place, the state supreme court, while *Ackerman* was pending before the United States Supreme Court, decided not to extend malpractice immunity to court-appointed counsel.<sup>173</sup> The court rejected the claim that public defenders were immune as "public officials" under Pennsylvania law, concluding instead that the defender situation was analogous to that of the physician, independent contractor, or private attorney paid for by public funds.<sup>174</sup>

The impact of the *Ackerman* decision on one level was immediate: because of the increased vulnerability of counsel for the indigent to malpractice claims, there were attempts in one-third of the states to increase fees paid to court-appointed counsel to compensate for the increased exposure to malpractice suits.<sup>175</sup> And indeed, the largest liability insurance broker for public defenders<sup>176</sup> emphasizes in its material designed to attract and enroll public defenders that: "You are not merely acting as a 'public', 'county', 'state', or 'federal' official or employee. . . . You require special protection for your professional exposure and not one where you or your duties are 'included' under a county or state liability coverage as an 'employee.'" <sup>177</sup>

#### IV. THE RIGHT OF THE DEFENDANT TO A LEGAL MALPRACTICE CLAIM AGAINST THE DEFENDER

To hold that public defenders would not be liable for malpractice would be to distinguish among groups of plaintiffs based on their economic class. The indigent defendants would be denied the tort relief that would be available to those who had been able to pay for private counsel, even though the damage each group might suffer from counsel's malpractice may be comparable.<sup>178</sup> Poor defendants would be doubly discriminated against; they would not be able to choose their own counsel,<sup>179</sup> nor would they be able to obtain compensation if

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1978) (defendants have same state tort action for malpractice against public defender as they would against retained attorney).

173. *Reese v. Danforth*, 486 Pa. 479, 406 A.2d 735 (1979).

174. *Id.* at 485-86, 406 A.2d at 738-39. The court also placed great significance on its finding that the public defender was not, under Pennsylvania law, a public official since the defender did not exercise a policy-making role. *Id.* at 484-85, 406 A.2d at 738. And whereas the district attorney was considered a public official who represented the interests of the county, a public defender represents only his client. *Id.* In *Spring v. Constantino*, 168 Conn. at 574-75, 362 A.2d at 878, the court similarly concluded that even though the public defender was a salaried employee of the state, he functioned as an independent contractor in his representation of a client.

175. *See Fee Changes for Assigned Counsel*, 67 A.B.A. J., Jan. 1981, at 32, 32 (increased liability flowing from decision in *Ackerman* should result in increased fees to assigned counsel).

176. Complete Equity Markets, Inc. of Wheeling, Illinois is the insurance representative for the National Legal Aid and Defender Association.

177. N.L.A.D.A. Insurance Services, Complete Equity Markets, Inc., Public Defenders: Lawyers Professional Liability Insurance (1985) (advertising brochure).

178. The level of competency required of a public defender is the same as that of any privately retained counsel. *See Brown v. Joseph*, 463 F.2d 1046, 1047 (3d Cir. 1972) (public defenders' level of representation must comport with that of all counsel, whether privately retained, volunteered or publicly paid).

179. Whereas individuals with funds have the right to select counsel of their own choosing,

the court-appointed lawyer was negligent in his or her representation. To the extent that concern about a malpractice suit is an incentive for the lawyer to provide diligent representation, that incentive should apply to public defenders as well as to private attorneys. Vulnerability to malpractice litigation is one way of promoting not only the accountability of attorneys, but standards of professional conduct as well.<sup>180</sup>

#### *A. Ineffective Assistance Claim as a Basis for Legal Malpractice Action*

The work of a defender is often scrutinized far more than that of most attorneys, since a lawyer assigned to represent a convicted defendant on appeal will explore any likelihood of winning a reversal on the grounds of ineffective assistance of counsel.<sup>181</sup> Even though "the issue in ineffectiveness cases is not a lawyer's culpability, but rather his client's constitutional rights,"<sup>182</sup> a court determination ordering a reversal on ineffectiveness grounds is some reflection that the trial attorney had failed to use the skill, diligence and degree of care that would have been exercised by a reasonably competent attorney in similar circumstances.<sup>183</sup> For example, in *Kimmelman v. Morrison*<sup>184</sup> the United States Supreme Court recently considered a case where counsel's failure to investigate meant that he had not become aware of inculpatory physical evidence in the possession of the prosecutor, and, therefore, failed to file a motion to sup-

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Powell v. Alabama, 287 U.S. 45, 53 (1932), the Supreme Court in *Morris v. Slappy*, 461 U.S. 1, 11-14 (1983), held not only that indigents have no such right, but even rejected the notion that an accused has the right to a meaningful attorney-client relationship. For an analysis of the impact of the *Slappy* decision, see 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, 647-49 (1986).

180. Lawyer concern and fear of a malpractice claim most certainly exists. One attorney who had been a claims examiner in the Lawyers and Accountants Professional Liability Malpractice Unit of an insurance company commented:

What is it about the threat of a legal malpractice lawsuit or claim that strikes fear in the hearts of the best of lawyers? The attorney's reaction . . . is universal . . . . Our professional reputation is at stake. The notice of a claim or lawsuit is a direct challenge to all those years of paying our dues in order to achieve our objectives in the practice of law. Any indication that we as attorneys mishandled a matter creates extreme anxiety.

*How to Survive Claim: Legal Malpractice, An Insider's Perspective*, N.J.L.J., Nov. 27, 1987, at 1 col. 1.

181. Counsel on appeal must raise a meritorious claim of ineffective assistance of trial counsel irrespective of how distasteful counsel may find it to pursue a stance critical of another attorney. *Finger v. State*, 260 Ind. 524, 527, 297 N.E.2d 819, 821 (1973).

182. *United States v. DeCoster*, 487 F.2d 1197, 1202 n.21 (D.C. Cir. 1973).

183. Indeed some courts when finding ineffective assistance may specifically compare what the trial counsel did with what ought to have been done. One court in reversing a first degree murder conviction found that there was "a breakdown in a legal representation." *People v. Williams*, 22 Cal. App. 3d 34, 50, 99 Cal. Rptr. 103, 116 (1971). The California Supreme Court in *People v. Pope*, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979), enumerated specific duties of defense counsel which included: 1) counsel must carefully investigate all defenses of fact and law that may be available to the defendant; 2) counsel should confer with his client as often as necessary; 3) counsel should take all actions necessary to protect his clients rights, including, where appropriate, pre-trial motions for suppression of evidence or for a pre-trial psychiatric examination.

184. 477 U.S. 365 (1986).



press.<sup>185</sup> The strong critical language used by the Court upon finding counsel's performance to be constitutionally deficient would certainly seem to provide the basis for a malpractice action: "[The] lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a *complete lack of pre-trial preparation* puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution' . . . and the reliability of the adversarial testing process."<sup>186</sup> State courts may be even more critical. Upon reversing a conviction on ineffective assistance of counsel grounds, a California appeals court described counsel's "inexcusable carelessness" which led to "crucially inadequate representation."<sup>187</sup> The court continued: "A half hour of rudimentary research—resort to a digest, an annotated code—would have revealed a crucial defense to petitioner's cause. . . . Only the smallest lawyer is too big to use law books."<sup>188</sup>

The standard used by some courts leads to a finding of ineffective assistance when counsel has not exhibited the "*normal and customary degree of skill* possessed by attorneys who are reasonably knowledgeable of criminal law."<sup>189</sup> The "ineffective assistance" of counsel most certainly is closely tied to "negligence."<sup>190</sup> The relationship between a finding of ineffective assistance and a lawyer's liability for malpractice was strengthened by the Supreme Court decision of *Strickland v. Washington*<sup>191</sup> in 1984. That decision set up a two prong requirement for any reversal of a conviction based on a sixth amendment claim of ineffective assistance: first, there must have been unprofessional, deficient performance by the trial attorney; and second, the deficient performance must have resulted in prejudice to the defendant.<sup>192</sup> Thus, the required element of a successful malpractice action—*injury to the plaintiff*—as well as the substandard performance of counsel generally will have to be found by any court ordering the reversal of a conviction upon ineffective assistance of counsel grounds. The United States Court of Appeals for the Seventh Circuit in *Walker v. Kruse*,<sup>193</sup> in

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185. *Id.* at 368-69.

186. *Id.* at 385 (citations omitted) (emphasis added).

187. *In re Greenfield*, 11 Cal. App. 3d 536, 543, 89 Cal. Rptr. 847, 851 (1970).

188. *Id.* at 544, 89 Cal. Rptr. at 851. The court added: "The vigor of the Sixth Amendment and the vitality of the adversary system depend upon the competence of the adversaries. Both are emasculated when attorneys fall short of acceptable competence." *Id.*

189. *State v. Thomas*, 203 S.E.2d 445, 461 (1974) (emphasis added). Similar language has been used by the federal courts. *See, e.g., United States v. Hood*, 593 F.2d 293, 297 (8th Cir. 1979) ("In order to prevail on a claim on ineffective assistance of counsel, a defendant must show that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." (citations omitted)).

190. Indeed, the D.C. Court of Appeals has stated when considering one malpractice suit, "the legal standards for ineffective assistance of counsel in [defendant's] criminal proceedings and for legal malpractice in this action are equivalent." *McCord v. Bailey*, 636 F.2d 606, 609 (D.C. Cir. 1980). *See also Ei bon ee baya ghananee v. Black*, 350 Pa. Super. 134, 141, 504 A.2d 281, 285 (1986) (claim of ineffective assistance of counsel that would be made post-conviction is tantamount to allegation of incompetency of counsel that would be basis of action pursuing civil remedies).

191. 466 U.S. 668 (1984).

192. *Id.* at 687.

193. 484 F.2d 802 (7th Cir. 1973).

fact observed that the standard of proof required by a court to find ineffective assistance may be greater than that needed in a malpractice action.<sup>194</sup> The court suggested that a valid malpractice claim may lie in any case in which a court has found that the conviction of the defendant had to be overturned due to the inadequate performance of counsel.<sup>195</sup>

The defendant whose conviction was overturned will not, however, be able to claim *res judicata*. *Res judicata* applies only when the second lawsuit is between the same parties and when there is identity of relief sought. The relief desired in a criminal appeal or a habeas corpus petition is to obtain either the freedom of the defendant or a retrial. In any malpractice action, the relief sought is money damages, and therefore *res judicata* would not be applicable.

### *B. The Role of Appellate Counsel*

The lawyer representing the convicted defendant on appeal, who becomes aware of incompetent, negligent representation by the trial counsel, may have the ethical obligation to inform the defendant of the right to a malpractice action against the defender. The Committee on Ethics and Professional Responsibility of the American Bar Association, addressing the issue, concluded that:

[I]t would be proper for appellate counsel to advise the client of a right or possible right to assert a claim, when the matter comes to the attention of appellate counsel, and when the claim arises from the same facts with which appellate counsel is dealing even though outside the particular representation.<sup>196</sup>

The committee proceeded to cite Ethical Consideration 2-2 of the Code which urges attorneys to assist laypersons to recognize legal problems which are not self-revealing and which may not be timely noticed.<sup>197</sup>

If the appeal or habeas corpus proceeding which raised a claim of ineffective assistance of counsel is not successful, the defendant may be precluded from pursuing a subsequent malpractice action. Collateral estoppel precludes relitigating issues which already have been determined in a previous case, even if both suits do not involve the same cause of action. The *Restatement (Second) of*

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194. *Id.* at 803-04.

195. *Id.* at 804.

196. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1465 (1981) (obligation of appellate counsel to inform client of right to malpractice suit against trial counsel). The Ethics Committee of the Los Angeles County Bar Association also considered the issue and concluded that the state Public Defender Office is indeed most likely to be obligated to inform clients of a possible malpractice action since those clients are "those very persons who may be uninformed of their legal rights." Los Angeles County Bar Ass'n Ethics Comm. Formal Op. No. 390 (1981). The opinion warns that, "Once the appellate attorney determines that the client should be advised of a possible malpractice claim, the advisement should be promptly made in order to give the client a meaningful opportunity for further action." *Id.* at 3.

197. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1465 (1981). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-3 (1980) ("The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems.").

*Judgments* section 85(2)(a)<sup>198</sup> has recognized the increased acceptance of collateral estoppel in criminal-to-civil matters.<sup>199</sup> The Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*<sup>200</sup> noted the rationale for collateral estoppel:

'[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.'<sup>201</sup>

Even though there is no identity-of-parties, since the lawyer was not a party to the defendant-plaintiff's claim of ineffective assistance,<sup>202</sup> courts nevertheless have held that a lawyer may assert collateral estoppel as a defense to a malpractice action based on the same issues that were litigated fully, but unsuccessfully, in a previous ineffective assistance of counsel proceeding.<sup>203</sup> There even may be no need for a hearing if the facts are undisputed, and a court may order disposition by summary judgment. For example, the United States Court of Appeals for the District of Columbia in *McCord v. Bailey*,<sup>204</sup> considered the malpractice suit by convicted Watergate burglar James McCord against his lawyers, including F. Lee Bailey, and explained the rationale:

[The defendant] had every incentive in his criminal proceedings to argue aggressively for his claim of ineffective assistance of counsel. . . . He had a full and fair opportunity to prove his case. Precluding reconsideration of a litigated claim saves valuable judicial time and resources, while reaffirming the certainty and stability of judicial decisions.<sup>205</sup>

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198. RESTATEMENT (SECOND) OF JUDGMENTS § 85(2) (1980).

199. *Id.* (judgment in favor of prosecuting authority preclusive against criminal defendant in favor of third party in civil action). See also *Willard v. United States*, 422 F.2d 810, 812 (5th Cir.) (collateral estoppel applies when civil action brought by someone convicted in prior criminal action), *cert. denied*, 398 U.S. 913 (1970).

200. 402 U.S. 313 (1971).

201. *Id.* at 324-25 (quoting *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950)). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (purpose of collateral estoppel to conserve judicial resources and to protect individuals from burden of relitigation).

202. The party in an appeal or habeas corpus petition is the state or warden of the correctional facility where the defendant may be incarcerated.

203. See, e.g., *Knoblauch v. Kenyon*, 163 Mich. App. 712, 415 N.W.2d 286 (1987) (attorney may defensively assert collateral estoppel in civil malpractice case if determination of effective assistance of counsel had been made in previous criminal action).

204. 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

205. *Id.* at 610. See also *Walker v. Kruse*, 484 F.2d 802 (7th Cir. 1973) (criminal conviction cannot support malpractice claim unless plaintiff can establish actual innocence); *Bledstein v. Superior Court*, 162 Cal. App. 3d 152, 172, 208 Cal. Rptr. 428, 442 (1984) (criminal defendant unable to obtain reversal of conviction on competency of counsel grounds has seemingly insurmountable obstacle to overcome for successful malpractice action); *Johnson v. Raban*, 702 S.W.2d 134 (Mo. App. 1985) (collateral estoppel effect of denial of ineffective assistance of counsel motion precludes relitigation of issue of counsel's negligence).

The court added that collateral estoppel relieves the lawyers of the burden of defending a lawsuit on an issue that has been fully adjudicated.<sup>206</sup>

### C. *Defender's Admission of Negligence*

Defense counsel called to testify in a habeas proceeding is faced with a serious dilemma when counsel indeed believes that he or she was negligent in representing the defendant. The ethical course of conduct is to admit prior malfeasance, and the defense counsel may be readily inclined to do so especially when his or her negligence was brought about by an excessive caseload. But affording proper representation at this post-conviction proceeding may amount to making out a claim for a future malpractice action. A desire by counsel to protect himself or herself may be strengthened by an awareness that perhaps counsel's malpractice insurer may attempt to claim that an acknowledgement of prior negligence has violated the standard cooperation clause of his or her legal malpractice policy. It would be in the interest of fairness and of encouraging proper representation in post-conviction proceedings that any "admission" by counsel of ineffective assistance be excluded from evidence in any subsequent malpractice litigation.

Counsel's admission of neglect or mistake can occur as well during the trial<sup>207</sup> or immediately after trial in the form of a motion for a new trial.<sup>208</sup> There is support for excluding such admissions by counsel, whether made as part of a habeas proceeding or during trial itself, from evidence in a subsequent malpractice suit. In *Smith v. Lewis*<sup>209</sup> counsel had filed a motion to amend a final divorce decree on the grounds that due to his mistakes, inadvertence, or neglect, he had failed to plead that his client's spouse's retirement benefits constituted community property.<sup>210</sup> In a subsequent malpractice action against the attorney, the trial court admitted counsel's declaration into evidence, but the California Supreme Court found that decision of the trial court to be error. The court ruled that "an attorney should be able to admit a mistake without subjecting himself to a malpractice suit."<sup>211</sup> The court emphasized the import of public

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206. *McCord v. Bailey*, 636 F.2d 606, 610. Some courts, reluctant to find collateral estoppel, have defined the issue that was determined in the prior proceeding very narrowly and then proceeded to conclude that the issue in the current litigation does vary. See, e.g., *Brubaker v. King*, 505 F.2d 534, 537-38 (7th Cir. 1974) (state court determination of probable cause to arrest in criminal prosecution not collateral estoppel in section 1983 action because court had not determined exact point in issue); *Williams v. Liberty*, 461 F.2d 325, 327 (7th Cir. 1972) (prior criminal conviction may work estoppel in later civil suit only if question put in issue and directly determined by civil prosecution).

207. See *Cross v. United States*, 392 F.2d 360 (8th Cir. 1968), where counsel moved for a mistrial, asserting: "I did not attempt to develop the case; I did not attempt to interrogate any witnesses or do anything else." *Id.* at 365.

208. See *Johnson v. United States*, 328 F.2d 605 (5th Cir. 1964), where counsel in a motion for a new trial enumerated three prejudicial failures on his part that occurred because he had not spent the time or did not have the "inclination to properly investigate and prepare" for the trial. *Id.* at 606.

209. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

210. *Id.* at 354, 530 P.2d at 599, 118 Cal. Rptr. at 631.

211. *Id.*

policy considerations, noting that if such statements by counsel were subsequently admitted into evidence, a tension would develop between counsel's obligation to zealously represent his client and the instinct of self protection, and "the quality of legal representation in the state might suffer accordingly."<sup>212</sup> The same rationale would be applicable to excluding any admissions that had been made in criminal court or in a habeas proceeding by counsel concerning ineffective representation of the client in a malpractice suit.

## V. THE PREDICAMENT OF THE CONSCIENTIOUS PUBLIC DEFENDER

A study conducted by the ABA's Committee on Lawyers' Professional Liability analyzed almost 30,000 insurance claims brought between 1981 and 1985.<sup>213</sup> The study found that of the 25 areas of law surveyed, criminal law was the seventh most common area of suit.<sup>214</sup> Data from the National Legal Malpractice Data Center, analyzing 18,486 malpractice claims from 1981-1983, revealed that the specific failings most common to an overburdened public defender were among the most frequent source of claims.<sup>215</sup>

For the plaintiff to get the issue of his or her trial lawyer's negligence before the jury, all that might be necessary is to have one other criminal defense lawyer appear as an expert, claiming the trial lawyer failed to properly present a defense.<sup>216</sup> If the proof of negligence is clear, there may be no need for the plaintiff to call any expert at all.<sup>217</sup> In *Wagenmann v. Adams*,<sup>218</sup> the United States Court of Appeals for the First Circuit, reviewed a case in which a jury had returned a verdict of \$500,000 against an attorney appointed by the court to provide repre-

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212. *Id.*

213. *Id.*

214. ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS 3 (1986).

215. See Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A. J., Apr. 1984, at 78, 80 (most common failing was failure to calendar properly; rest of top four were respectively: failure to inform client or obtain client's consent, failure to know or properly apply law, and inadequate discovery of facts or failure to conduct adequate investigation). See also Cook & Schaefer, *Legal Malpractice in Wisconsin: Helmsbrecht and Beyond*, 69 MARQ. L. REV. 515, 534 (1986) (state bar of Wisconsin Lawyer's Professional Liability Program Study cited inadequate investigation as fourth most common type of error alleged to have been made by attorney).

216. See, e.g., *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971).

217. See, e.g., *Collins v. Greenstein*, 61 Haw. 26, 36, 595 P.2d 275, 282-83 (1979) (trial court may not need expert testimony to determine standard of care); *Hill v. Okay Constr. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977) (jury may be able to evaluate questionable attorney conduct without expert testimony); *Webb v. Lungstrom*, 223 Kan. 487, 575 P.2d 22 (1978) (determination about need for jury to consider expert testimony must be made on case by case basis). But see *Hughes v. Malone*, 146 Ga. App. 341, 345, 247 S.E.2d 107, 111 (1978) (presumption that counsel acts with due care, skill and diligence can be overcome only by expert testimony). Some courts have held that even though in some cases no expert may be needed, when the malpractice action is brought against an attorney who holds himself out as a legal specialist, then only a person knowledgeable in the specialty can explain what the applicable standard of care was and whether the attorney met the standard. See, e.g., *Wright v. Williams*, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 200 (1975).

218. 829 F.2d 196 (1st Cir. 1987).

sentation in a criminal case, and concluded that the lawyer's malpractice was "so gross or obvious" that the trial court was correct in ruling that expert testimony was not required to prove the malpractice.<sup>219</sup>

When the malpractice is sufficiently egregious, nonlawyers may rely on their common sense and experience to determine negligence from the facts presented. This common-sense-exception to the rule requiring expert testimony may apply readily to the public defender since neglect caused by an excessive caseload can result in failure to perform the basic investigative or preparatory tasks that clearly needed to be done.

The predicament of the conscientious public defender who cannot possibly competently represent all the clients assigned to him or her is illustrated by what happened to a defender, Joe Warzycki, in St. Louis in 1983.<sup>220</sup> Warzycki was assigned to represent a defendant charged with robbery in 1974. A conviction resulted. On appeal, another lawyer successfully attained a reversal from the Eighth Circuit Court of Appeals on the grounds of ineffective assistance of counsel on the basis that Warzycki had failed to properly investigate the case and failed to interview crucial witnesses.<sup>221</sup> The defendant's attorney on the appeal then represented him in a malpractice suit against the public defender, resulting in a settlement eight years after the conviction, of \$75,000.<sup>222</sup> The insurer for the Public Defender's Office placed the blame not on Warzycki, who "was given a tremendous caseload and few resources with which to properly investigate the case," but rather declared:

A good portion of the blame in this case has to be attributed to the system itself. The State Public Defender's Office has far fewer resources than the prosecutor's office. As a result, it is simply not possible to explore defenses, interview all witnesses and properly prepare the case in accordance with federal court decisions and professional standards.<sup>223</sup>

Public defenders in Missouri are insured only up to \$100,000 per incident and government officials have indicated that staff public defenders themselves

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219. *Id.* at 219. See also *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979) (no expert testimony required where malpractice extremely obvious or simple).

220. *New Worry for Public Defenders*, St. Louis Post Dispatch, Jan. 9, 1983, at 1, col. 8.

221. *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir.), cert. denied, 456 U.S. 910 (1982). The Missouri Supreme Court and the federal district court had earlier upheld the conviction.

222. St. Louis Post Dispatch, *supra* note 212 at 1, col. 8. The plaintiff served 3 years and 3 months at the Missouri Penitentiary before being paroled. Compare this settlement with *Martin v. Hall*, 20 Cal. App. 2d 414, 97 Cal. Rptr. 730 (1971) (trial court awarded plaintiff \$20,000 for serving nearly 4 years in prison) and *Olson v. North*, 276 Ill. App. 457 (1934) (jury awarded \$30,000 even though no actual jail time served but was reduced by trial court to \$7,500) and *Geddie v. St. Paul Fire & Marine Ins. Co.*, 354 So. 2d 718 (La. App.) (appeals court reduced trial court's award from \$7,000 per month of incarceration due to his lawyer's negligence to \$1,500 per month), cert. denied, 356 So. 2d 1011 (La. 1978). Malpractice that results in a loss of liberty can lead to damages for emotional distress. See *Wagenmann v. Adams*, 829 F.2d at 222 (emotional distress damages recoverable if distress genuine and reasonably foreseeable consequence of lawyer's misconduct); *Bowman v. Doherty*, 235 Kan. 870, 877, 686 P.2d 112, 119 (1984) (plaintiff jailed due to negligence of his criminal defense attorney suffered injury which could cause compensable mental distress).

223. St. Louis Post Dispatch, *supra* note 212, at 1, col. 8.

may well be personally liable for any judgment beyond that amount.<sup>224</sup> The chief public defender for St. Louis explained that Warzycki was not uniquely at fault: "We're scared to death something like that could happen again. . . . The scary thing is that anyone in this office looks at Joe Warzycki and they say, 'My God, if that can happen to Warzycki, that can happen to me.'" <sup>225</sup>

## VI. CONCLUSION

Lawyers in public defender offices often find themselves with a caseload of such magnitude that the attorneys simply may not be able to provide the proper time and attention to each client. Overburdened defenders, however, are not exempt from the standards of the profession as specified in the *Code of Professional Responsibility* and the *Model Rules of Professional Conduct*, and are subject to professional discipline by increasingly vigilant bar disciplinary committees for failing to provide competent, diligent representation.

Defenders may be especially vulnerable not only to professional discipline, but to malpractice claims as well.<sup>226</sup> Unlike attorneys in other fields of practice, the level of representation of criminal defense attorneys is frequently subject to scrutiny since a common claim on appeal by defendants attempting to have convictions overturned is the assertion that they did not receive the effective assistance of counsel. Appellate court determinations that counsel's representation was indeed ineffective can subsequently subject the attorney not only to discipline but can provide the basis for a civil claim of legal negligence as well.<sup>227</sup>

Another factor adding to the defender's predicament is the existence of the

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224. *Id.* See *Sanchez v. Murphy*, 385 F. Supp. 1362 (D. Nev. 1974). In *Sanchez*, a defendant brought a malpractice action against both the staff public defender who represented him as well as the head of the Public Defender Office; the court granted summary judgment to the office head and let the action continue for malpractice against the staff attorney. The court held that the chief public defender cannot be held vicariously liable for the alleged malpractice of the staff defender as long as there is no "proof of personal participation by the Public Defender in the alleged actionable misconduct of the staff counsel." *Id.* at 1365.

225. St. Louis Post Dispatch, *supra* note 212, at 1, col. 8.

226. There have been proposals that would strengthen the connection between disciplinary proceedings and malpractice suits. See, e.g., Comm. on Professional Responsibility, The Disposition of Cases of Professional Incompetence, 32 Report of the Ass'n of the Bar of the City of New York 130, 137 (1977). The report recommended that the disciplinary committee should not limit itself to reviewing complaints made to the committee but should review malpractice suits as well. *Id.* at 136. It was also suggested that insurance companies inform the committee of claims that are filed against them. *Id.* Some bar grievance boards, when warranted, do recommend to complainants that they file a malpractice action. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEM 36 at 186-88 (Final Draft 1970).

227. Some appellate courts may be so angered by counsel's ineffectiveness, that they take the opportunity to invite the wrongfully convicted defendant to commence a malpractice action. See *In re Greenfield*, 11 Cal. App. 3d 536, 544-45, 89 Cal. Rptr. 847, 851-52 (1970). In *Greenfield*, a California Court of Appeals, reversing the defendant's conviction upon finding "a series of errors" committed by counsel, proceeded to express great concern about effectiveness of criminal defense lawyers: "[L]egal malpractice in criminal cases is all too common. . . . Depersonalization and shallowness are acute dangers in the mills of criminal justice in our metropolitan centers. Somehow these lawyers missed the elementary notion that a member of the bar must use diligence and care in representing his client." *Id.* at 544-45, 89 Cal. Rptr. at 851-52.

*Standards for Criminal Justice* promulgated by the American Bar Association. Juries in a malpractice action assessing the standard of care used by counsel may look to the enumeration in the Standards of the duties of a defense attorney to his or her client. Of particular interest to juries may be the *Standards'* repeated emphasis of the need for counsel to *promptly* attend to the work required to be done in preparation of the client's defense.<sup>228</sup> The *Standards* not only prohibit the defender from using his excessive caseload as an excuse for neglect of his client, but even specifically warn counsel not to accept more clients than those he can effectively represent.<sup>229</sup>

Not even the most skillful and competent of attorneys can provide proper representation to all their clients if they simply have too many of them. The lack of adequate funding for defender offices impacts not only upon the indigent who do not receive the proper assistance in responding to the charges against them, but also upon the professional integrity and standing of the defenders assigned to represent them.

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228. See STANDARDS FOR CRIMINAL JUSTICE 4-1.2, 4-3.6, 4-4.1 (1982).

229. *Id.* at 4-1.2(d).



