

## FORMAL OPINION NO 2007-178

### Competence and Diligence: Excessive Workloads of Indigent Defense Providers

#### Facts:

Lawyer *A* is employed by a public defender firm (“the firm”), where Lawyer *A* represents indigent clients accused of criminal offenses. Lawyer *B* is the direct supervisor of Lawyer *A*. Lawyer *C* is the executive director of the firm. A board of directors, which includes some lawyers, oversees the business of the firm. Lawyer *C*’s responsibilities include negotiating and entering into the firm’s contracts with a state agency pursuant to which the firm agrees to represent a certain number of clients annually.

Lawyer *D* is a partner in a small firm that is part of a consortium of firms that contract with the state to accept court appointments to represent indigent defendants. Lawyer *E*, also a member of the consortium, negotiates the contract between the consortium and the state and also administers the contract for the consortium. A board of directors, which includes some lawyers, oversees the business of the consortium.

Lawyer *F* is a sole practitioner who is paid by the state on an hourly basis to accept court appointments to represent indigent defendants.

Lawyers *A*, *D*, and *F* each believe that they have an excessively large caseload of court-appointed clients.

#### Questions:

1. What are the ethical obligations of Lawyers *A*, *D*, and *F* with respect to representation of their court-appointed clients?
2. What are the ethical obligations of lawyers who supervise other lawyers who may have excessive caseloads?

#### Conclusions:

See discussion.

**Discussion:**

On May 13, 2006, the American Bar Association (ABA) adopted Formal Ethics Opinion 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Case-loads Interfere with Competent and Diligent Representation,”<sup>1</sup> which includes a comprehensive discussion of the questions presented in this opinion. Because the ABA opinion relies, with one notable exception addressed below, on the Model Rules of Professional Conduct (RPCs) that are identical or very similar to the Oregon RPCs, the ABA opinion offers useful guidance for Oregon lawyers. For that reason, the opinion is quoted often and at length herein.

Under Oregon RPCs

- 1.1,<sup>2</sup>
- 1.2(a),<sup>3</sup>

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<sup>1</sup> The opinion may be ordered from the ABA at <[www.abanet.org/cpr/pubs/ethicopinions.html](http://www.abanet.org/cpr/pubs/ethicopinions.html)>.

<sup>2</sup> Oregon RPC 1.1, entitled “Competence,” provides: “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>3</sup> Oregon RPC 1.2, entitled “Scope of Representation and Allocation of Authority between Client and Lawyer,” provides in section (a):

Subject to paragraphs (b) and (c), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

- 1.3,<sup>4</sup> and
- 1.4,<sup>5</sup>

all lawyers are required to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make. As ABA Formal Ethics Opinion No 06-441 observes, the rules “provide no exception for lawyers who represent indigent persons charged with crimes.” For each client, a lawyer is required to, among other things, “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients,” among other responsibilities. ABA Formal Ethics Op No 06-441. A lawyer who is unable to perform these duties may not undertake or continue with representation of a client. Oregon RPC 1.16(a).<sup>6</sup>

A caseload is “excessive” and is prohibited if the lawyer is unable to at least meet the basic obligations outlined above. The ABA opinion

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<sup>4</sup> Oregon RPC 1.3, entitled “Diligence,” provides: “A lawyer shall not neglect a legal matter entrusted to the lawyer.” Cf. ABA Model RPC 1.3, which requires that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

<sup>5</sup> Oregon RPC 1.4, entitled “Communication,” provides: “(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.” ABA Model RPC 1.4(a) also requires a lawyer to promptly inform the client of any decision or circumstance requiring the client’s informed consent, consult with the client about the means to achieve the client’s objectives, and consult with the client about any relevant limitation on the lawyer’s conduct if the lawyer knows the client expects assistance not permitted by the rules of professional conduct or other law.

<sup>6</sup> Oregon RPC 1.16(a) provides in part that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . the representation will result in violation of the Rules of Professional Conduct or other law[.]”

notes that various jurisdictions have suggested or adopted numerical caseload standards for public defense providers, and Oregon has also approved a “guide” to maximum caseloads.<sup>7</sup>

But the ABA opinion correctly observes that the determining factor is not the number of cases a lawyer may be asked to handle but whether the workload is excessive. Although the number of cases may be a major determinant of workload, other factors include “case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.” Thus, if Lawyers A, D, and F believe that their workload prevents them from fulfilling their ethical obligations to each client, then their workload “must be controlled so that each matter may be handled competently.” ABA Model RPC 1.3 cmt [2].<sup>8</sup>

How a lawyer controls his or her workload will depend on the environment in which that lawyer works, keeping in mind that a lawyer’s primary obligation is to existing clients. Thus, Lawyer A, who works at a public defender firm, should seek supervisor approval from Lawyer B for

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<sup>7</sup> Oregon State Bar, *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases* (1996) (available at <[www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html)>).

<sup>8</sup> ABA Formal Ethics Opinion No 06-441 refers to Principle 5 of the ABA’s *Ten Principles of a Public Defense Delivery System* (2002), which requires: “Defense counsel’s workload is controlled to permit the rendering of quality representation.” Similarly, the *Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense*, adopted by the Oregon Public Defense Services Commission on February 6, 2006, provides that “[n]either defender organizations nor assigned counsel shall accept workloads that, by reason of their size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.” (Available at <[www.oregon.gov/OPDS/CBS/pages/qualificationstandards.aspx](http://www.oregon.gov/OPDS/CBS/pages/qualificationstandards.aspx)>.) Furthermore, language from the model contracts signed by public defense providers in Oregon requires that providers meet the minimum professional standards of the Oregon State Bar and the American Bar Association, and that each provider maintain “an appropriate and reasonable number of attorneys and support staff to perform its contract obligations.” (Available at <[www.oregon.gov/OPDS/CBS/pages/modelcontractterms.aspx](http://www.oregon.gov/OPDS/CBS/pages/modelcontractterms.aspx)>.)

a variety of remedial measures, which might include transfer of nonrepresentational duties to others within the office, declining appointment on new cases, transferring current cases, and filing motions with the court to withdraw from enough cases to achieve a manageable workload. If a supervisor fails to approve appropriate relief, then Lawyer *A* should “continue up the chain of command within the office,” ultimately appealing to the executive director, Lawyer *C*. If satisfactory relief is still not received, Lawyer *A* “must take further action,” suggesting appeals to the firm’s board of directors and the filing, without firm approval, of motions to withdraw. Lawyer *A* might also seek assistance from the state agency that administers the firm’s contract, and the Public Defense Services Commission, which approves the contract.

Lawyer *D* must take similar steps to control her workload, first requesting that Lawyer *E*, the administrator of the consortium, withhold the assignment of new cases, and/or approve the transfer of cases to another lawyer within the consortium, as long as another lawyer will be able to provide ethical representation. If Lawyer *E* does not provide appropriate assistance, then Lawyer *D* might appeal to the governing body for the consortium. Ultimately, Lawyer *D* may also move to withdraw from a sufficient number of cases to achieve a manageable workload.

The actions that Lawyer *F*, the sole practitioner, might take include declining new appointments until that lawyer’s workload is reduced to a level that permits accepting new cases, and/or filing motions to withdraw from a sufficient number of cases to achieve a manageable workload.

Supervisory lawyers, including a firm director or manager, may violate ethical responsibilities when subordinate lawyers have excessive workloads. The ABA opinion describes two ways such violations may occur. First, under ABA Model RPC 5.1(a) firm managers “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Second, in subsection (b), the Model Rule requires that a lawyer with supervisory authority over another lawyer “shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” The Oregon RPCs have no

counterpart to Model RPC 5.1(a) or (b). However, Oregon RPC 5.1(a) and (b), like ABA Model RPC 5.1(c), make a lawyer responsible for the misconduct of another lawyer if “the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved,” or, in the specific case of supervisory lawyers, that lawyer “knows of conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”<sup>9</sup>

If supervisory Lawyer *B* or executive director Lawyer *C* know that Lawyer *A* or other subordinate lawyers have workloads that prevent them from providing competent representation to each client, they are responsible for the misconduct of the subordinate lawyer if they fail to take effective remedial actions. The ABA opinion acknowledges, however, that a supervisory lawyer’s assessment of whether a subordinate lawyer’s workload is excessive is “a difficult judgment.” As a result, “[w]hen a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor’s resolution ordinarily will constitute a ‘reasonable resolution of an arguable question of professional duty’ as discussed in [ABA Model] Rule 5.2(b).” When the resolution is “reasonable” on an issue that is “arguable,” under either ABA Model RPC 5.2(b) or Oregon RPC 5.2(b), a subordinate lawyer may be excused from misconduct if that lawyer acts at the direction of a supervisory lawyer. However, Oregon RPC 5.2(b)

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<sup>9</sup> Oregon RPC 5.1, entitled “Responsibilities of Partners, Managers, and Supervisory Lawyers,” provides:

A lawyer shall be responsible for another lawyer’s violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

does not protect the supervisory lawyer, whose remedial action will still be tested against a “reasonableness” standard.”<sup>10</sup>

How these rules apply to Lawyer *E*, who administers the work of a consortium, depends on the structure of the consortium and the relationship between Lawyer *D* and Lawyer *E*. For example, if Lawyer *D* may not decline new appointments to indigent clients or may not file motions to withdraw from current-client cases without the prior approval of Lawyer *E*, then Lawyer *E* may have established herself as a de facto supervisory lawyer and incurred potential responsibility under Oregon RPC 5.1.<sup>11</sup>

As noted, the ABA opinion does not address the ethical responsibilities of lawyers involved in the process of contracting for the provision of public defense services. For the reasons discussed above, Lawyer *C*, who heads a public defender office, and Lawyer *E*, who negotiates the contract for a consortium, may be responsible for the misconduct of other lawyers if they contract for caseloads knowing that they do not have adequate lawyer and other support staff to provide competent representation to each client. Likewise, managers who knowingly “induce” other lawyers to violate the RPCs by knowingly contracting for excessive caseloads may violate Oregon RPC 8.4(a)(1), which makes it “professional misconduct for a lawyer to . . . violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

Lawyers representing indigent clients must refuse to accept a workload that prevents them from meeting their ethical obligation to each

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<sup>10</sup> Oregon RPC 1.0(k) defines *reasonable* as the conduct of a “reasonably prudent and competent lawyer.”

<sup>11</sup> Oregon RPC 1.0(d), in defining a *law firm*, recognizes that even in the absence of a firm agreement or association, lawyers may organize themselves or work together in such a manner to create “indicia sufficient to establish a de facto [sic] law firm among the lawyers involved.” Furthermore, Comment 2 to ABA Model RPC 1.0 observes that if lawyers “present themselves to the public in a way that suggests that they are a firm *or conduct themselves as a firm*, they should be regarded as a firm for the purposes of the Rules” (emphasis added).

client. Lawyers who work in public defense organizations should seek the assistance of supervisors and managers in achieving manageable workloads. When those supervisors and managers have knowledge of excessive workloads among firm lawyers, they must make reasonable efforts to remedy the problem.

**Approved by Board of Governors, September 2007.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.2 to § 7.2-8 (competence), § 7.3 (diligence), § 7.5-1 (abiding by client's decision; scope of representation), § 7.4 (client communication) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 11–12 (2000) (supplemented periodically).