



**BONNIE HOFFMAN**  
Director of Public Defense  
Reform and Training

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MCILS Rule-Making Liaison,  
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Dear Director Andrus,

On behalf of the National Association of Criminal Defense Lawyers (NACDL), please accept the below comments regarding the Maine Commission on Indigent Legal Services' (MCILS) proposed rule on Caseload Standards for Assigned Counsel and Contract Counsel.

## Introduction

NACDL is a non-profit voluntary professional bar association that promotes a society in which all individuals receive fair, rational, and humane treatment within the criminal legal system. To that end, NACDL seeks to identify and reform systemic flaws and inequities, redress systemic racism, and ensure that its members and others in the criminal defense system are fully equipped to serve all accused persons at the highest level. Founded in 1958, NACDL's more than 10,000 direct members -- and 90 state and local affiliate organizations totaling up to 40,000 attorneys -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges dedicated to advancing the proper, efficient, and fair administration of justice.

As an organization, NACDL has issued numerous reports examining public defense systems in states such as Louisiana ([State of Crisis](#)), South Carolina ([Summary Injustice](#) and [Rush to Judgment](#)), and Florida ([3 Minute Justice](#)); a three-part examination of public defense in America ([Gideon at 50](#) Parts 1, 2 and 3); and an examination of the Federal Indigent Defense System ([Federal Indigent Defense 2015: The Independence Imperative](#)). In 2017, in partnership with the American Bar Association, NACDL published [The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards](#).

NACDL has also served as amicus on numerous filings related to the provision of public defense services in state and local courts including [Hurrell-Harring v. State of New York](#), [Tucker v. Idaho](#), [Kuren v. Luzerne County](#) (PA), and [Lee v. Wisconsin](#) and is currently co-counsel in [litigation in Wisconsin](#)<sup>1</sup> addressing the state's inability to timely provide public defense lawyers to eligible defendants. For more than a year, NACDL has examined Maine's public defense system,

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<sup>1</sup> [Antrell Thomas, et al. v. Antony Evers](#), 2022CV001027 (Brown Cir., filed Aug. 23, 2022).

providing technical assistance to MCILS under a grant from the Department of Justice's Bureau of Justice Assistance. In addition to regularly attending MICALS's public meetings NACDL's public defense staff traveled to Maine to observe court proceedings in various jurisdictions across the state. During that time, the team spoke with defenders, prosecutors, and judges about the state's public defense system.<sup>2</sup>

NACDL hopes that its national perspective, drawn from more than sixty years of advocacy, investigation, training, and public defense reform efforts will be of help. As the nation's preeminent criminal defense bar, NACDL is keenly interested in ensuring public defense providers have caseloads that are reasonable and allow them to fulfill their legal, ethical, and constitutional obligations.

## Why Caseloads Matter

### Constitutional Foundations

Our American criminal justice system's core values include an assurance that individuals who are facing the vast power and resources of the state have access to an advocate who can help level the playing field. Rooted in notions of fairness and predicated on the principle that every person is presumed innocent, the right to counsel is a hallmark of our adversarial system of justice. It is well-documented that excessive caseloads can be so burdensome that lawyers are unable to perform their essential functions. Attorneys with too many cases do not have time to properly review discovery and assess cases; conduct needed legal research; and spend sufficient time with the client and their network to both gain and provide necessary information regarding case facts, legal issues, areas for investigation and challenge.<sup>3</sup> In short, without adequate time, an attorney cannot meaningfully subject the state's case to "the crucible of meaningful adversarial testing."<sup>4</sup>

When an attorney fails to perform the essential duties of a defense lawyer, those failings can function as a denial of the right to counsel in violation of the Sixth Amendment.<sup>5</sup> The need to ensure meaningful public defense representation, including appropriate caseloads, is supported by both ends of the political spectrum. To ensure that the right to counsel is not reduced to merely providing a warm body with a bar card, agencies overseeing public defense must make sure that lawyers have the time resources, and expertise to perform their essential functions. Moreover, s defense lawyers must operate with a sufficient level of independence to allow them to be robust advocates for the clients they represent.

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<sup>2</sup> Between June 6 and June 10, 2022, NACDL's Director of Public Defense, Bonnie Hoffman, and Public Defense Counsel, Monica Milton, attended district court hearings in Machias, Lincoln, Presque Isle, Caribou, and Bangor.

<sup>3</sup> For an overview see Primus, Eve Brensike. "[Defense Counsel and Public Defence](#)." In *Reforming Criminal Justice: Pretrial and Trial Processes*, edited by E. Luna, 3, 121-45. Phoenix, AZ: Academy for Justice, 2017 and Lauren Sudeall Lucas, [Public Defense Litigation: An Overview](#), 51 Ind. L. Rev. 89 (2018).

<sup>4</sup> *U.S. v. Chronic*, 466 US 648, 656 (1984). See also *Avery v. Alabama*, 308 US 444, 446 (1940) ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.") (Footnote omitted).

<sup>5</sup> See e.g. [Wilbur v. City of Mount Vernon](#), No. 2:2011cv01100 (WD WA 2013). See also [Kuren v. Luzerne County \(PA\)](#), [Amicus Brief of the U.S. Department of Justice to Pennsylvania Supreme Court](#).

## Professional Standards

Attorneys in Maine are bound by the Rules of Professional Conduct. These rules apply with equal force and effect when attorneys are providing public defense representation as when they are working on behalf of privately retained clients.<sup>6</sup> Rule 1.3 requires all lawyers to be both diligent and prompt in their work. To effectuate this rule the “lawyer’s workload must be controlled so that each matter can be handled competently,” and in a timely manner because “[e]ven when the client’s interests are not affected in substance [by a delay] . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.”<sup>7</sup> As such, the Rules of Professional Responsibility recognize the practical, procedural, personal, and systemic harms of excessive workloads and the attorney’s obligation to mitigate such harms by controlling their workload. Attorneys with excessive caseloads risk both harming their clients and disciplinary action.<sup>8</sup>

Beyond state rules of professional conduct, jurisdictions often look to The American Bar Association’s [Ten Principles of a Public Defense Delivery System](#) (“ABA 10 Principles”), as it is recognized as a national guidepost for public defense system operations. Principle 5 specifically addresses attorney workloads, explaining a constitutional public defense system is one in which, “[d]efense counsel’s *workload* is controlled to permit the rendering of quality representation.”<sup>9</sup> In further detailing this standard, the ABA 10 Principles make clear that the determination of a “*caseload*” (the number of cases the attorney has) is only one factor to be considered. In addition to considering the number of cases the lawyer has, it is necessary to examine and control the whole of the lawyer’s “*workload*,” taking into consideration their level of experience, the degree of support staff, and each lawyer’s other non-representational responsibilities.<sup>10</sup> It is this whole workload that must be controlled to ensure that the attorney can provide ethically and constitutionally adequate representation.

### **Creating Caseload Standards**

Although caseload standards, by their nature, represent an average, every individual case and client is unique. Sometimes a low-level charge may involve extensive investigation, research, and substantial motions practice; other times a serious charge may reach resolution quickly with little time or resources expended. However, the fact that individual case complexity varies is not, in and of itself, a barrier to implementing caseload standards. Rather, it is a reminder, that caseload systems benefit from a degree of flexibility that is managed and informed by those with criminal defense expertise who can operate with the necessary degree of independence that protects client confidences while allowing for full and frank disclosures.<sup>11</sup>

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<sup>6</sup> ABA Comm. on Ethics and Prof’l Responsibility, [Formal Op. 06-441](#) (2006).

<sup>7</sup> Maine Rules of Professional Conduct, [Rule 1.3, Comments \(2\) and \(3\)](#).

<sup>8</sup> See, e.g., [In Re: Karl William Hinkebein](#) (MO Supreme Court, Sept. 12, 2017); [ABA Journal](#) (Sept. 18, 2017).

<sup>9</sup> [ABA Ten Principles of a Public Defense Delivery System, Principle 5](#) (ABA 2002)(emphasis added).

<sup>10</sup> *Id.* at p. 2, ABA [Formal Ethics Opinion 06-441](#), “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation.” (May 2006).

<sup>11</sup> “The public defense function, including the selection, funding, and payment of defense counsel, is independent.” [ABA Ten Principles of a Public Defense Delivery System, Principle 1](#).

Typically, modern state-level public defense caseload standards are developed through a process that defines relevant case types and representation tasks and then considers the frequency that the various tasks should occur for each case type and the amount of time each task should take.<sup>12</sup> This creates the averages upon which a caseload standard is built.

In addition to state-specific considerations such as charging practices and sentencing schemes, it is also important to account for other factors that add time or complexity to a case. These can include travel distance to meet with clients and attend court proceedings; communication and comprehension complications that arise as a result of language barriers, developmental disabilities, or mental illness; the volume and nature of discovery, including lengthy video and body camera footage and digital data; and the extent and impact of collateral consequences. Caseloads may also be impacted by the presence or absence of support staff, investigator, and social worker assistance, and even the nature of court calendars and procedures that can either reduce or compound the time required for filing motions, scheduling cases, waiting in court, and the duration of proceedings. As a result, we encourage MCILS to include provisions in the rules for regular review and adjustments to the caseload standards to reflect changes in practices.

When developing standards, MCILS should afford due consideration to attorneys' ancillary obligations that may contribute to their workload. While "*caseload*" refers to the number of cases an attorney handles over a given time,<sup>13</sup> "*workload*" considers the whole of an attorney's obligations and more accurately reflects the time and resources an attorney has to devote to a particular case. Attorneys of all levels have varying factors that contribute to their workload. These can include attending training, supervising staff, data entry, and even their level of experience.

### **Caseload Standards Must Include a Focus on Ensuring Meaningful Representation**

While NACDL does not take a position on whether the proposed case types, point values, or average hours proposed in Chapter 4 are reasonable for Maine, any standards should be informed by prevailing professional standards for ethical, effective, and constitutional representation.<sup>14</sup> Desires to ensure an adequate stream of income for defense lawyers, or to minimize state expenditures for public defense services, cannot be factors in determining the

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<sup>12</sup> Examples of recent caseload studies include those done in [Colorado](#) (ABA), [Idaho](#) (Boise State University), [New Mexico](#) (ABA), [Oregon](#) (ABA), [Rhode Island](#) (ABA/NACDL), [Texas](#) (Texas A&M) and [Utah](#) (RAND). A description of the Delphi Method and other considerations in undertaking caseload studies can be found in [Use of Delphi Method in ABA SCLAID Public Defender Workload Studies](#), ABA (2021).

<sup>13</sup> Note that caseload measurements can be made on a rolling basis, examining the number of cases an attorney has in any 12-month period, or it can be measured on a fixed, annual basis. Decisions about which is the most effective measure should be made by considering factors such as the sophistication of the jurisdiction's data management system, level of staffing, and the quality and timeliness of data inputs.

<sup>14</sup> See e.g., ABA [Criminal Justice Standards for the Defense Function](#), 4<sup>th</sup> ed. (2017) and National Legal Aid and Defender Association [Performance Guidelines for Defense Representation](#), 4<sup>th</sup> ed. (2006). See also, Guideline 1, [ABA Eight Guidelines of Public Defense Related to Excessive Workloads](#) (2009).

number of cases an attorney may handle or the number of hours a particular case type might require. Caseload numbers must allow attorneys to be able to engage in all of the core functions of a criminal defense lawyer including regular, timely and substantive client communication; research and investigation; review of discovery and a robust motions practice; preparing for trials, negotiating pleas, and presenting meaningful sentencing arguments.<sup>15</sup>

The consequences of an underfunded public defense system should not be foisted on the backs of either the attorneys providing public defense services or the clients they represent. If the state wishes to minimize the cost of providing constitutionally mandated public defense, it should pursue steps to reduce the number of cases being funneled into the legal system rather than attempt to overwork or underpay public defense lawyers. Concerns that caseload limits are set too low to allow attorneys to earn sufficient income to retain them as court appointed counsel should be resolved with efforts to increase compensation rather than grow caseloads.

### **Adequate Compensation Can Mitigate the Need to Maintain an Excessive Caseload**

When defenders are not adequately compensated for their time, they can be forced to increase the volume of their work<sup>16</sup> in order to sustain their practice.<sup>17</sup> Relying almost exclusively on private attorneys to meet the state's public defense obligation, it is especially critical that the state ensure assigned counsel rates are appropriate to meet the costs associated with a functional law practice. Recognizing the state's public defense providers must cover operating expenses from office space and office staff, pay taxes and health care costs, and make payments for everything from internet service to student loans all from the state's hourly rate, it is easy to understand the thin margins many public defense providers are operating under. Forcing attorneys to juggle a large-volume practice is harmful to individual clients, the community, the individual attorney, and the legal system as a whole. Insufficient time to conduct investigation can lead to wrongful convictions; overburdened attorneys will fail to gather critical mitigating evidence leading to excessive sentences; unprepared attorneys will require continuances crowding court dockets and delaying resolution for victims; and burnout will drive lawyers from the profession all together.<sup>18</sup>

The recent increase of the state's hourly rate from \$60 to \$80 represents a modest but important step in providing adequate compensation, but a substantial gap remains.<sup>19</sup> Without a reasonable hourly rate, with a provision for regular increases to account for inflation, lawyers

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<sup>15</sup> ABA Criminal Justice Standards, [Defense Function](#) (4<sup>th</sup> ed., 2017).

<sup>16</sup> This can include taking on federal appointments in addition to state court cases, maintaining a substantial private practice, handling cases in multiple states, or pursuing additional income streams.

<sup>17</sup> Norman Lefstein, [Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate](#), 38 *Hastings Const. L.Q.* 949 (2011).

<sup>18</sup> See e.g. ["At some point the dam is going to break": NH Faces Shortage of Public Defenders](#), *Cassidy Jensen, Concord Monitor*, October 31, 2021.

<sup>19</sup> In comparison, effective January 1, 2023, attorneys providing public defense representation in federal court in Maine and elsewhere are compensated at \$164.00 per hour. For nearly a decade the federal CJA rate has been regularly increased each year to account for increases in the cost of living. [CJA Panel Attorney Hourly Rates](#), last visited January 26, 2023.

will either be unable to afford to continue to provide public defense representation or be compelled to take on an excessive number of cases to meet their costs. Public defense lawyers, like other public sector service providers, should be paid a wage that is commensurate with their government employee peers and encourages and supports this work as a meaningful, sustainable career.<sup>20</sup>

### **The Importance of Providing Adequate Resources for Supervision and Support**

To provide meaningful insight to Maine regarding its effort to develop caseload standards, NACDL conducted outreach to four public defense systems that provide oversight to local offices and rely heavily on the private bar to provide representation. Interviews were conducted with senior leadership in Indiana, upstate New York, Texas and Washington. Although each state's system had areas of variation, when it came to monitoring and enforcing caseload standards, these leaders shared many common experiences, expectations, and cautions.

All four agencies made clear that the efficacy of caseload standards are only as good as the reporting, monitoring, and support systems put into place with them. Absent mechanisms that make it easy for attorneys to regularly and accurately provide caseload information, agencies like MCILS will struggle to monitor and accurately assess caseloads as they change over time. Common challenges included insufficient, incomplete, or untimely data regarding appointed and overall caseload, leading all four to emphasize the need for low-burden systems that facilitate accurate and timely reporting. They also recommended that oversight agencies consider the frequency of the required data reporting, looking to ensure data is collected frequently enough to allow meaningful oversight and feedback while not doing it so frequently, that the reporting becomes a burden which can lead to incomplete or untimely data and, even worse, attorneys opting out of providing public defense services.

All four agencies reported it was common for attorneys to reach their maximum caseloads. As a result, they all echoed the importance of state oversight agencies acting to support the defense lawyers, notifying them in advance if they are on a track to reach/exceed the maximums; meeting with attorneys to discuss current caseloads, troubleshoot issues, and develop plans to mitigate impacts on clients and the court system if an attorney is going to reach capacity; and identifying needs and ways the agency can support and assist attorneys, especially small and solo practitioners, to help make their current caseloads more manageable.

As a result, NACDL suggests that the implementation of any caseload standards be accompanied by sufficient staffing, resources and infrastructure to support quality oversight, not merely quantity oversight. Staff must have the personnel and resources to engage in court observations and meet regularly with all system stakeholders, including defense lawyers,

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<sup>20</sup> See e.g. [ALEC Resolution in Support of Public Defense](#), (Sept. 2019) "That compensation for public defense providers is sufficient to ensure the recruitment and retention of qualified and skilled advocates taking into consideration for public defenders the rates being paid to other government employees performing similar functions, and for court-appointed counsel the overhead costs and prevailing attorneys' fees for the jurisdiction."

directly impacted individuals and community members for feedback. MCILS must be sufficiently empowered to advocate on behalf of defenders to address issues that impact caseload such as timely access to clients and confidential meeting spaces for those in custody; funding for investigators, social workers, and experts; timely and complete provision of discovery and other case related materials; and barriers created by court procedures and processes.

Empowering MCILS through adequate staffing, resources, and authority to be able to help support public defense lawyers will have long-term benefits for both retaining lawyers within the system and effective representation that benefits the client and the community.

## **Conclusion**

Controllable workloads produce quality, ethical, and constitutional representation. Reasonable caseloads allow attorneys to fulfill their role—shining a light on government overreach and abuses of power; protecting against wrongful convictions and excessive punishments; facilitating connections to services and supports to mitigate against recidivism; and ensuring fair trials. When defenders are provided with adequate compensation, time, resources, and support, the entire community benefits.

NACDL applauds the efforts of MCILS to promote a constitutional public defense system for the people of Maine, and remains available to provide assistance, guidance, and support. Any questions relating to this submission may be directed to Bonnie Hoffman, NACDL Senior Director of Public Defense ([bhoffman@nacdl.org](mailto:bhoffman@nacdl.org), 202-465-7649).

Thank you for your time and consideration of this important issue.