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Plight of the Public Defender: Excessive Caseload as a Non-Mitigating Factor in Sanctions for Ethical Violations

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NOTE

Plight of the Public Defender: Excessive Caseload as a Non-Mitigating Factor in Sanctions for Ethical Violations

Order, *In re Karl William Hinkebein*, No. SC96089 (Mo. Sept. 12, 2017)

*Taylor Payne**

I. INTRODUCTION

In 1984, the United States Supreme Court stated in *United States v. Cronin*, “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”¹ Indeed, the right to counsel contained in the Sixth Amendment² is an indispensable protection of the “fundamental right to a fair trial.”³ This truth is perhaps most evident when an indigent individual is accused of a crime and faces the loss of life or liberty. In 1963, the landmark decision of *Gideon v. Wainwright* was handed down wherein the Court for the first time held that indigent criminal defendants facing the possibility of imprisonment must be provided counsel at the government’s expense.⁴ As the Court declared in the years following *Gideon*, “[N]o person

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1. 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

2. U.S. CONST. amend. VI.

3. *Strickland v. Washington*, 466 U.S. 668, 684 (1984); *see also Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (“(The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.” (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)); *id.* at 344 (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

4. *Gideon*, 372 U.S. at 344–45.

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he [has the opportunity to be] represented by counsel at his trial.”⁵ Though states are obligated to provide counsel to indigent state defendants, the Court has made it clear that each state remains free to carry out this obligation as it sees fit.⁶ As a result, states have approached public defense in various ways. In some states, the right to counsel is provided on a county-by-county or even town-by-town basis.⁷ In others, however, public defense is overseen at the state level.⁸ Missouri is a state of the latter sort.⁹

In addition to the United States Constitution,¹⁰ the right to counsel for indigent defendants in Missouri is commanded by the Missouri Constitution¹¹ and reiterated in Missouri’s Supreme Court Rules.¹² So what exactly does it mean to have a right to counsel? The United States Supreme Court has long held that pro forma appointment of counsel is not sufficient; *effective* and *competent* assistance of counsel is required.¹³

Id. at 344 (felonies); *see also* Alabama v. Shelton, 535 U.S. 654, 674 (2002) (suspended sentences); Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (misdemeanors); *In re Gault*, 387 U.S. 1, 41 (1967) (juvenile).

5. *Argersinger*, 407 U.S. at 37.

6. *Know Your State*, SIXTH AMEND. CTR., <http://sixthamendment.org/your-state/> (last visited Oct. 11, 2018).

7. *Id.*

8. *Id.*

9. *See generally* MO. ST. PUB. DEFENDER, <https://publicdefender.mo.gov/about-mspd/> (last visited Oct. 11, 2018).

10. The right to counsel contained in the Sixth Amendment has been incorporated against the states through the Fourteenth Amendment. *See Gideon*, 372 U.S. at 343 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–44 (1936)) (“[C]ertain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.”); *see also* U.S. CONST. amend. XIV.

11. *See* MO. CONST. of 1945, art. I, § 18(a) (“[I]n criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel.”).

12. MO. SUP. CT. R. 31.02. Persons accused of offenses, “the conviction of which would probably result in confinement,” must be informed by the court of their right to counsel should they be without counsel during their first appearance before a judge. *Id.* Moreover, the court must inform the defendant of the court’s willingness to appoint counsel to him should he be unable to afford representation on his own. *Id.* The court’s duty to appoint counsel to an indigent defendant is only waived after a defendant has been informed of his rights to counsel and intelligently waives them nonetheless. *Id.*

13. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”); *see also* *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 412 (Mo. 2007) (en banc) (“Any defendant that has exercised his right to counsel is guaranteed effective assistance of counsel, and courts should do the utmost to protect the defendant’s right to adequate and competent representation.”); *Taylor v. State*, 262 S.W.3d 231, 249 (Mo. 2008) (en banc) (“The Sixth Amendment affords all citizens facing criminal

The Missouri Rules of Professional Conduct (“Missouri Rules”) require just the same: competent representation.¹⁴ In fact, the very first obligation laid out in the Missouri Rules is the obligation to provide competent representation to a client.¹⁵ Of course, the Missouri Rules require more than just competence. They also require counsel to effectively communicate¹⁶ with clients, be diligent in their representation,¹⁷ and much more.¹⁸

The Missouri Rules apply to public defenders just as they do to every other attorney licensed to practice law in the state of Missouri. However, currently in Missouri, public defenders in particular often find themselves incapable of conforming their representation with the Missouri Rules because they have far too many cases, not enough time, and work under a system of state government that cannot or will not provide adequate funding.¹⁹ Like any other attorney who violates the Missouri Rules, public defenders can be sanctioned and even disbarred for failing to uphold their ethical obligations.

This Note discusses the thought-provoking ruling in *In re Karl William Hinkebein*²⁰ and its implications for public defenders in Missouri. Part II of this Note details the facts and holding of the case. Part III of this Note gives a brief history of the Missouri State Public Defender System (“MSPD”), highlighting its current shortcomings and challenges. Part III then discusses the influential ethics opinion issued by the American Bar Association (“ABA”) and the ABA Standards for Imposing Lawyer Sanctions (“ABA Standards”).

Part IV of this Note analyzes the decision of the Supreme Court of Missouri to sanction Karl Hinkebein. Part V discusses the effect of *Hinkebein* on public defenders around the state and the unforgiving circumstances in which many public defenders find themselves. Finally, this Note concludes in Part V with a brief discussion of potential systemic reforms to MSPD.

charges the right to effective assistance of counsel.”). Effective representation under the Sixth Amendment requires appropriate “investigat[ion], prepar[ation], and present[ation of] the client’s case” by counsel. *Id.*

14. See MO. SUP. CT. R. 4-1.1; see also *State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012) (en banc) (discussing that the Sixth Amendment does not sanction pro forma appointment and that a court should consider counsel’s competency before ordering appointment).

15. MO. SUP. CT. R. 4-1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

16. MO. SUP. CT. R. 4-1.4.

17. MO. SUP. CT. R. 4-1.3.

18. See generally MO. SUP. CT. R. 4.

19. See *infra* Section III.B.

20. Order, *In re Karl William Hinkebein*, No. SC96089 (Mo. Sept. 12, 2017), <https://www.courts.mo.gov/page.jsp?id=117575> [hereinafter *Hinkebein Order*].

II. FACTS AND HOLDING

Karl William Hinkebein (“Hinkebein”) is a public defender with MSPD.²¹ Hinkebein became licensed to practice law in the state of Missouri in 1993.²² At the time the instant case was filed, he had worked in the Central Appellate Post-Conviction Relief (“Appellate/PCR”) division of MSPD for over twenty years, and his primary work consisted of representing indigent clients who moved, pro se, for post-conviction relief.²³

The instant case arose from a complaint filed by Darin Robinson with the Office of Chief Disciplinary Counsel (“OCDC”).²⁴ Darin Robinson was a client to whom Hinkebein had been assigned as counsel.²⁵ Robinson’s complaint to OCDC charged that Hinkebein failed to uphold his professional conduct obligations.²⁶ Specifically, Robinson asserted Hinkebein failed to keep him informed about the status of his post-conviction case and failed to file required motions.²⁷ Through investigation of Robinson’s complaint, OCDC discovered Hinkebein failed to uphold his professional conduct obligations with five additional clients to whom Hinkebein had been assigned as counsel.²⁸ The instant case thus encompassed Hinkebein’s professional conduct violations relating to six different indigent defendants, including Robinson.²⁹

On March 31, 2016, OCDC filed an information charging Hinkebein with violating Missouri Rules 4-1.3 (diligence) and 4-1.4 (communication).³⁰ Rule 4-1.3 mandates that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”³¹ Rule 4-1.4 dictates that

- (a) A lawyer shall:
- (1) keep the client reasonably informed about the status of the matter;
 - (2) promptly comply with reasonable requests for information;
- and

21. Informant’s Brief at 7, *In re Hinkebein*, No. SC96089 (Mo. Sept. 12, 2017), 2017 WL 3195810, at *7.

22. *Id.*

23. *Id.*; see also David Carroll & Phyllis Mann, *Missouri’s “Perfect Storm” Explained*, SIXTH AMEND. CTR. (Oct. 16, 2017), <http://sixthamendment.org/missouris-perfect-storm-explained/>; see also MO. SUP. CT. R. 29.15 (“Within [thirty] days after an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant.”).

24. Informant’s Brief, *supra* note 21, at 8.

25. *Id.* at 8.

26. *See id.*

27. *See id.* at 10–12.

28. *Id.* at 8.

29. *See id.* at 9–23.

30. *Id.* at 8.

31. MO. SUP. CT. R. 4-1.3.

(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.³²

Hinkebein entered his appearance as Robinson's counsel on February 14, 2011.³³ Hinkebein filed a motion for an extension of time to file an amended Rule 29.15 motion³⁴ and was granted the extension of time to March 13, 2011. Hinkebein did not write to the prison in which Robinson was incarcerated to arrange telephone calls with Robinson until March 10, March 11, and March 14, 2011 – the earliest attempt at communication with Robinson was made just three days before the Rule 29.15 motion was due on March 13.³⁵ These three instances were the only attempts Hinkebein made to contact Robinson.³⁶

Hinkebein stopped communicating with Robinson entirely after March 2011.³⁷ “At the time the amended Rule 29.15 motion was due, [Hinkebein] had not yet decided [whether he would file the motion] or a statement in lieu of an amended motion.”³⁸ Ultimately, Hinkebein never filed an amended motion or a statement in lieu of an amended motion.³⁹ Robinson was re-assigned to a different public defender, and a trial court subsequently found that Hinkebein had abandoned Robinson in his post-conviction relief action.⁴⁰

Christopher Hines was another client to whom Hinkebein was assigned as counsel, and he is also one of the six subjects of the instant case.⁴¹ Hinkebein entered his appearance as Hines' counsel on or about December

32. Mo. Sup. Ct. R. 4-1.4.

33. Informant's Brief, *supra* note 21, at 10.

34. *Id.* Missouri Supreme Court Rule 29.15 provides a procedure by which persons convicted of a felony may challenge the conviction on the basis

that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law.

MO. SUP. CT. R. 29.15(a).

35. Informant's Brief, *supra* note 21, at 10.

36. *See id.*

37. *See id.*

38. *Id.*

39. *Id.* at 11.

40. *Id.* at 11–12.

41. *Id.* at 12.

21, 2012.⁴² Again, Hinkebein filed a motion for extension of time and was granted until March 5, 2013, to file an amended Rule 29.15 motion.⁴³ Hinkebein did not attempt to arrange telephone calls with Hines in prison until March 4, March 5, and March 6, 2013.⁴⁴ Hinkebein spoke with Hines about his case for the first time on March 4 – one day before the amended motion was due.⁴⁵ Hinkebein stopped communicating with Hines from March 2013 until August 15, 2013.⁴⁶

Hinkebein communicated with Hines on or about August 15, 2013, but only after Hines complained to Hinkebein's supervisor that he had not heard from Hinkebein.⁴⁷ Hinkebein never filed the amended motion or a statement in lieu of an amended motion.⁴⁸ A trial court later found Hinkebein had abandoned Hines in his post-conviction relief action.⁴⁹

William Williams is also a subject of the instant case.⁵⁰ Hinkebein entered his appearance as Williams' counsel on or about September 9, 2013.⁵¹ Hinkebein was granted an extension of time to file an amended Rule 29.15 motion until November 10, 2013.⁵² Hinkebein's caseload timeline shows the earliest entry regarding work on Williams' case was November 19, 2013, – more than a week after the amended motion was due.⁵³ Hinkebein first spoke with Williams on November 21, 2013, – eleven days after the amended motion was due.⁵⁴ Hinkebein did not speak with Williams after November 21 and failed to speak with five of the six witnesses Williams identified during the November 21 conversation.⁵⁵ A trial court later found Hinkebein had abandoned Williams in his post-conviction relief action.⁵⁶

Hinkebein was also found to have abandoned Dustin Watson, Allen Giles, and Jeremy Arata under similar circumstances wherein Hinkebein failed to communicate with the aforementioned and failed to file the appropriate motions in their post-conviction relief actions, even after receiving extensions of time in each instance.⁵⁷ Hinkebein had been admonished on three previous occasions by OCDC for the same violations he was accused of

42. *Id.*

43. *Id.*

44. *Id.* at 13.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 14.

50. *See id.*

51. *Id.*

52. *Id.*

53. *Id.* at 15.

54. *Id.*

55. *Id.* at 15–16.

56. *Id.* at 16.

57. *Id.* at 16–23.

in the instant case: lack of diligence and failure to reasonably communicate with clients.⁵⁸

In May of 2015, a disciplinary hearing panel was appointed to hear Hinkebein's case.⁵⁹ The hearing was held on July 26, 2016, in Jefferson City, Missouri.⁶⁰ The panel issued its decision on October 31, 2016, concluding Hinkebein violated Missouri Rules 4-1.3 and 4-1.4.⁶¹ The panel recommended that Hinkebein "be placed on probation for one (1) year with conditions that he not violate the Missouri Rules . . . and that he report to the Chief Disciplinary Counsel, or his designee, every ninety (90) days."⁶² The Supreme Court of Missouri, through its Order of February 28, 2017, ordered the case briefed and argued.⁶³

While Hinkebein freely admitted his violation of the Missouri Rules, he argued they were "primarily attributable to his severe health problems and excessive caseload."⁶⁴ Hinkebein argued these factors were "outside [his] control" and he had "no viable options related to his workload."⁶⁵

Hinkebein called his health issues a "significant factor" in his inability to timely file motions in all six cases.⁶⁶ Hinkebein's medical records are sealed, and therefore details of his health problems are not publicly known, but according to Hinkebein's brief, his serious health issues – which began in 2004 – "became critical in 2010."⁶⁷ Hinkebein felt he was not functioning normally at a "reasonable [physical] level" until 2014.⁶⁸ According to Hinkebein's brief, unless he was "fairly critically ill or in the hospital," Hinkebein was working approximately fifty hours per week despite his health problems.⁶⁹ Even when hospitalized, Hinkebein worked on cases when he could.⁷⁰

Hinkebein argued that, in addition to his health issues, his excessive caseload was a factor in his inability to conform his conduct to the Missouri Rules.⁷¹ Hinkebein asserted he did not have the option to reject case assignments unless it created a conflict of interest.⁷² Further, he asserted his supe-

58. *Id.* at 7–8.

59. *Id.* at 8.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 9.

64. Respondent's Brief at 8, *In re Karl William Hinkebein*, No. SC96089 (Mo. Sept. 12, 2017), 2017 WL 3195811, at *8.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 9.

70. *Id.*

71. *Id.* at 8.

72. *Id.* at 10 ("Respondent does not have the option to reject assignments, unless he has a conflict of interest."). Despite Hinkebein's assertion, it should be noted that,

rior “really would not have had any options” even if Hinkebein had informed him that he was missing deadlines.⁷³ Hinkebein believed that “[i]ndividual public defenders [were] trapped” – that despite large caseloads, rejecting an assignment would result in being fired.⁷⁴ At the time of Hinkebein’s disciplinary hearing in July, his caseload was “approximately 110, which was higher than anyone else in his office.”⁷⁵ Hinkebein “work[ed] more hours than any other attorney in [his] office,” and his supervisor testified, “[Hinkebein] is dedicated and has a very good work ethic.”⁷⁶

Two questions were presented for the Supreme Court of Missouri: whether Hinkebein violated any Missouri Rules, and if so, “what discipline, if any, was appropriate for those violations.”⁷⁷ The Supreme Court of Missouri found that Hinkebein violated Rules 4-1.3 and 4-1.4(a) and that he should be disciplined. The Court suspended Hinkebein’s license indefinitely but stayed the suspension, placing Hinkebein on probation for one year.⁷⁸

III. LEGAL BACKGROUND

Section A of this Part gives a brief history of MSPD. Section B of this Part details MSPD’s widespread and continuous problems with funding and excessive caseloads. Section C then briefly explores pertinent Missouri Rules, while Section D details how those rules apply to public defenders in Missouri. Section E then discusses the ABA Standards for Imposing Lawyer Sanctions, including recognized aggravating and mitigating factors.

A. Brief History of MSPD

MSPD provides legal assistance to indigent defendants in Missouri who have been convicted or accused of crimes.⁷⁹ The State of Missouri relies almost exclusively on MSPD to provide indigent defense services throughout the state, with MSPD providing representation in over 100,000 cases a year.⁸⁰

according to the Missouri Rules, excessive caseload can create a conflict of interest. Rule 4-1.7 states that a conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” MO. SUP. CT. R. 4-1.7(2).

73. Respondent’s Brief, *supra* note 64, at 10.

74. *Id.*

75. *Id.* at 12.

76. *Id.* at 9.

77. *Case Summaries for September 7, 2017*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=115187> (last visited Oct. 14, 2018).

78. Hinkebein Order, *supra* note 20.

79. *Church v. Missouri*, 268 F. Supp. 3d 992, 997 (W.D. Mo. 2017), *rev’d*, 913 F.3d 736 (8th Cir. 2019); *see also* MO. ST. PUB. DEFENDER, <https://publicdefender.mo.gov/about-mspd/> (last visited Oct. 11, 2018).

80. *Church*, 268 F. Supp. 3d at 997. This figure includes “new cases and cases carried over from previous years.” *Id.*

MSPD has three separate divisions: the Trial Division, the Appellate/PCR Division, and the Capital Division.⁸¹ MSPD employs almost 380 attorneys, with most working in the Trial Division.⁸²

After the United States Supreme Court's 1963 decision in *Gideon* affirmed that states have an obligation under the Sixth Amendment to provide indigent clients with representation,⁸³ courts in Missouri appointed – but did not compensate – private attorneys to represent indigent defendants in Missouri.⁸⁴ In September 1971, the Supreme Court of Missouri held that after September 1972 it would no longer “compel the attorneys of Missouri to discharge alone ‘a duty which constitutionally is the burden of the State.’”⁸⁵ The one-year window provided by the court was intended to give the Missouri General Assembly an opportunity to provide a permanent solution to the problem.⁸⁶

A “blended system of local public defender offices and appointed counsel programs”⁸⁷ was utilized beginning in 1972 when the Missouri General Assembly passed chapter 600 of the Revised Statutes of Missouri (“RSMo”), which established the Public Defender Commission⁸⁸ and secured paid counsel for indigent defendants through “a system of full-time public defenders.”⁸⁹ By 1973, fourteen MSPD offices were present in Missouri, and that number grew to eighteen by 1977.⁹⁰ However, by 1981, less than ten years after its inception, MSPD was already in difficult financial straits, running out of appropriated funds before the end of each fiscal year.⁹¹ When called upon to right the state's wrongs – that is, its inability to pay its public defenders – the Supreme Court of Missouri concluded it did not have the power to compel the state to pay its attorneys but it did have the power to compel members of

81. *Id.*

82. *Id.* “[R]oughly 313” public defenders work in the Trial Division. *Id.*

83. *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).

84. *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 875 (Mo. 2009) (en banc).

85. *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971).

86. *Id.*

87. *Pratte*, 298 S.W.3d at 875.

88. The purpose of the Public Defender Commission was to appoint full-time public defenders to four-year terms and oversee MSPD. *Our Distinguished History*, MO. ST. PUB. DEFENDER, <https://publicdefender.mo.gov/about-mspd/history-of-mspd/> (last visited Oct. 11, 2018).

89. ABA, EVALUATING FAIRNESS AND ACCURACY IN THE STATE DEATH PENALTY SYSTEMS: THE MISSOURI DEATH PENALTY ASSESSMENT REPORT 168 (2012) [hereinafter ABA, DEATH PENALTY SYSTEMS], https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf.

90. *Our Distinguished History*, *supra* note 88.

91. *Pratte*, 298 S.W.3d at 876.

The Missouri Bar to represent indigent defendants.⁹² The court directed attorneys to “represent indigent defendants until the legislature chose to fix the lack of funding.”⁹³

In 1982, House Bill 1169 (“HB1169”) overhauled the public defender system and created the Office of State Public Defender (“OSPD”).⁹⁴ HB1169 gave OSPD the authority to issue guidelines for indigence determination, outlined the legal services to be provided for qualified defendants entitled to counsel, authorized the appointment of private counsel in indigent defense cases for a set contract fee, and provided for the collection of costs relating to the representation of indigent clients.⁹⁵

In 1987, fifteen years after chapter 600 was enacted, twenty-three public defender offices existed in Missouri.⁹⁶ Portions of the state not served by the existing public defender offices were served through state contracts with private attorneys.⁹⁷ According to MSPD’s website, MSPD was handling approximately 41,000 cases annually in the years around 1987.⁹⁸

In 1989, MSPD underwent another major overhaul in response to the rising cost of the contract counsel program and the increasing unwillingness of private attorneys “to take on indigent cases for the fees paid by . . . [MSPD].”⁹⁹ Funding provided in 1989 allowed for the reorganization of the system into three distinct legal services divisions: (1) the Trial Division, (2) the Appellate/PCR Division, and (3) the Capital Division.¹⁰⁰ This is the organization of MSPD that still exists as of the writing of this Note.¹⁰¹

Currently, MSPD has “[thirty-three] district offices, [six] appellate sections, and [three] capital sections.”¹⁰² MSPD has continued to struggle with underfunding and excessive caseloads. In 2017, a Boone County judge appointed thirty-seven private attorneys to represent indigent clients due to

92. *Id.* (“In *State ex rel. Wolff v. Ruddy*, the Court was asked to compel the state to pay attorneys for their work. 617 S.W.2d 64, 64 (Mo. banc 1981). At that time, this Court said that it did not have the power to do so but that it did have the power to turn to The Missouri Bar and compel lawyers to represent indigent defendants.”).

93. *Id.* (citing *Ruddy*, 617 S.W.2d at 67).

94. H.R. 1169, 81st Gen. Assemb., 2d Reg. Sess. (Mo. 1982) (codified as amended at MO. REV. STAT. § 600.019 (2016)); see also *Our Distinguished History*, *supra* note 88. OSPD was created to be an independent arm of the state’s judicial branch. *Our Distinguished History*, *supra* note 88.

95. *Our Distinguished History*, *supra* note 88.

96. *Id.*

97. *Id.*

98. *Id.*

99. *State ex rel. Missouri Pub. Def. Comm’n v. Pratte*, 298 S.W.3d 870, 876 (Mo. 2009) (en banc); see also ABA, DEATH PENALTY SYSTEMS, *supra* note 89, at 169.

100. *Our Distinguished History*, *supra* note 88.

101. *Pratte*, 298 S.W.3d at 876; see *Our Distinguished History*, *supra* note 88.

102. *Our Distinguished History*, *supra* note 88.

MSPD's excessive caseload and inability to take on more cases at the time.¹⁰³ In addition, Texas County has been completely privatized, meaning indigent defense is wholly provided by private attorneys who contract with MSPD.¹⁰⁴ These and MSPD's other proliferative problems are explored further in Section B below.

B. A System in Crisis: Overworked and Underfunded

MSPD has been the subject of increasingly sharp criticism in recent years, but intense concern has been present for decades. MSPD has been independently evaluated on ten occasions since 1989.¹⁰⁵ Lack of funding and excessive caseloads have been a concern in nearly all of these evaluations.¹⁰⁶

1. Funding

The Missouri General Assembly provides funding for MSPD via annual appropriations that are subject to the approval of the Missouri governor.¹⁰⁷ Funds are almost exclusively pulled from Missouri's general revenue.¹⁰⁸ For fiscal year 2018, funding for MSPD constituted less than one-half of one percent of Missouri's general revenue.¹⁰⁹

103. Caitlin Campbell, *Boone County Court Appoints 37 Private Attorneys to Indigent Clients*, COLUM. DAILY TRIB. (Oct. 4, 2017), <http://www.columbiatribune.com/news/20171004/boone-county-court-appoints-37-private-attorneys-to-indigent-clients>.

104. Sky Chadde, *Some Missouri Lawmakers Want to Privatize the Public Defender System. For One County, It Starts March 1.*, ST. LOUIS POST-DISPATCH (Feb. 20, 2018), http://www.stltoday.com/news/local/govt-and-politics/some-missouri-lawmakers-want-to-privatize-the-public-defender-system/article_162ed0cc-0490-52d9-b623-40a4b82b19e5.html.

105. *Church v. Missouri*, 268 F. Supp. 3d 992, 997 (W.D. Mo. 2017), *rev'd*, 913 F.3d 736 (8th Cir. 2019). Assessments have been conducted by The Spangenberg Group in 1993 and 2005; the Missouri Senate Interim Committee in 2006; The Spangenberg Group and the Center for Law, Justice, and Society at George Mason University in 2009; the U.S. Department of Justice – Bureau of Justice Statistics in 2010; the American Bar Association in 2010; the National Juvenile Defender Center in 2013; the American Bar Association and RubinBrown in 2014; the U.S. Department of Justice in 2015; and the Sixth Amendment Center in 2016. *Id.*

106. *See State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 876 (Mo. 2009) (en banc). Over the years, felony prosecutions tripled, but funding for MSPD has not increased commensurately. *Id.*

107. ABA, DEATH PENALTY SYSTEMS, *supra* note 89, at 168.

108. *Church*, 268 F. Supp. 3d at 997.

109. *Id.*; *see also* MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2018 ANNUAL REPORT 6 (2018), <https://publicdefender.mo.gov/wp-content/uploads/2018/08/MSPD-2018-Annual-Report.pdf> [hereinafter FISCAL YEAR 2018 ANNUAL REPORT].

As of 2017, “Missouri [ranked] [forty-ninth] among the [fifty] states in funding for indigent defense.”¹¹⁰ A 2016 study by the Sixth Amendment Center determined “Missouri’s per capita spending on indigent defense is approximately one-third of the average of the [thirty-five] states surveyed.”¹¹¹ The Sixth Amendment Center found Missouri spent \$6.20 per resident on indigent defense in fiscal year 2015 as compared to an average of \$18.41 for the other thirty-five states surveyed.¹¹² Reports by the National Juvenile Defender Center and the ABA called Missouri’s funding for public defense “woefully inadequate to guarantee the constitutional rights of indigent[] defendants”¹¹³

Even those working within MSPD have expressed concern that MSPD is violating its constitutional duties to indigent Missourians.¹¹⁴ In August 2015, the Director of MSPD, Michael Barrett, wrote to then-Governor Jay Nixon and requested additional funds for MSPD, warning, “[T]he rights of poor Missourians are being violated throughout the state because MSPD’s resources are too few and the caseloads are too high.”¹¹⁵ Barrett requested \$10 million in supplemental funds, but Governor Nixon denied this request.¹¹⁶ At the time of this request, numerous studies showed that MSPD’s inadequate funding was a threat to the constitutional rights of indigent defendants in Missouri.¹¹⁷

The Missouri Legislature attempted to provide reprieve for MSPD in fiscal year 2015, approving an extra \$3.4 million in funding.¹¹⁸ However, then-Governor Nixon vetoed the funding.¹¹⁹ Even after the legislature overrode his veto, Nixon withheld the funds from MSPD.¹²⁰ For fiscal year 2017, the legislature again attempted to provide additional funding to MSPD, approving \$4.5 million in additional funds.¹²¹ Nixon again thwarted that effort, directing that MSPD receive only \$1 million.¹²² In response to Nixon’s withholding, Barrett and the Public Defender Commission filed a lawsuit in the Circuit Court of Cole County, arguing the decision to withhold funds from MSPD violated the Missouri Constitution.¹²³ Barrett stated in a press release

110. *Church*, 268 F. Supp. 3d at 997.

111. *Id.* (reporting on the Sixth Amendment Center study’s finding).

112. *Id.*

113. *Id.* at 997–98.

114. *See id.* at 998.

115. *Id.* at 997.

116. *Id.* at 997–98.

117. *See* assessments listed *supra* note 104.

118. *Church*, 268 F. Supp. 3d at 998.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Bob Watson, *Missouri Public Defender System Sues over Funding Cuts*, FULTON SUN (July 6, 2016), <http://www.fultonsun.com/news/missouri/story/2016/jul/06/missouri-public-defender->

regarding the lawsuit that “[t]hroughout his two terms in office, Gov[ernor] Nixon has seldom passed on an opportunity to weaken a poor person’s constitutional right to counsel.”¹²⁴ Cole County Circuit Judge Jon Beetem dismissed the lawsuit, holding Nixon had the legal authority to withhold the funds.¹²⁵

Many may remember when Barrett – frustrated with Nixon’s repeated refusal to approve funding for MSPD – assigned Nixon to a case under a state law provision that allows the Director of MSPD, in extraordinary circumstances, to “delegate” legal representation to any member of the state bar of Missouri.¹²⁶ In looking to assign cases to attorneys outside of MSPD, Barrett stated that he would start with “the one attorney in the state who not only created [the] problem, but is in a unique position to address it.”¹²⁷ Nixon ultimately did not have to obey Barrett’s appointment of him to a criminal case (the power to appoint attorneys to criminal cases rests with courts alone),¹²⁸ but a message was sent nonetheless.

In 2017, Barrett stated, “If you go back three years, \$6 million has been left on the table for [MSPD].”¹²⁹ In fiscal year 2017, 17.99% of MSPD attor-

system-sues-over-funding-cuts/631465/. See generally Barrett v. Nixon, No. 16AC-CC00290, 2016 WL 8970077 (Mo. Cir. Ct. 2016).

124. *Public Defender Files Legal Challenge to Governor’s Withhold Actions*, MO. ST. PUB. DEFENDER (July 13, 2016), <https://publicdefender.mo.gov/public-information/mspd-in-the-news/pdffileslegalchallenge/>; see also Watson, *supra* note 123.

125. Barrett, 2016 WL 8970077, at *2; see also Bob Watson, *Public Defenders’ Budget in Limbo*, NEWS TRIB. (June 10, 2017), <http://www.newstribune.com/news/local/story/2017/jun/10/public-defenders-budget-limbo/677489/>.

126. Letter from Michael Barrett, Dir. of Mo. Pub. Def. Sys., to Jay Nixon, Governor of Mo. (Aug. 2, 2016), <https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/c/ff/cff01561-2e8e-5d40-99bd-d016eab58a13/57a2ace631005.pdf.pdf>. [hereinafter Letter from Michael Barrett to Jay Nixon]. Barrett was invoking his power under MO. REV. STAT. § 600.042.5 (2016) (giving the Director of MSPD the authority to “[d]elegate the legal representation of an eligible person to any member of the state bar of Missouri”). Ultimately, a Cole County Circuit Court judge ruled that the authority vested in the Director of MSPD under section 600.042.5 does not include the ability to appoint Nixon or any other private attorney, to a case – only courts can do that. See Celeste Bott, *Court Rules Public Defender Can’t Appoint Missouri Governor as a Defense Attorney*, ST. LOUIS POST-DISPATCH (Aug. 25, 2016), https://www.stltoday.com/news/local/govt-and-politics/court-rules-public-defender-can-t-appoint-missouri-governor-as/article_c59059f8-98c8-50fe-9068-12a9b092b7f3.html.

127. Letter from Michael Barrett to Jay Nixon, *supra* note 126.

128. Bott, *supra* note 126.

129. Watson, *supra* note 125. Barrett noted that then-Governor Greitens continued the withholding of \$3.5 million in appropriations initiated by Governor Nixon. *Id.*

neys left MSPD.¹³⁰ MSPD stated, “A significant contributing factor to turnover is the salaries MSPD is able to pay [assistant public defenders].¹³¹ For fiscal year 2018, a budget committee was willing to grant MSPD a \$6.8 million funding increase, but then-Governor Eric Greitens approved an increase of only \$1 million.¹³² However, in its Fiscal Year 2018 Report, MSPD noted a \$3.5 million core restoration in addition to the aforementioned \$1 million increase, which resulted in a net \$4.5 million increase in available general revenue funds.¹³³ There were no withholdings in fiscal year 2018.¹³⁴ For fiscal year 2019, MSPD was appropriated funds to increase the salaries of public defenders.¹³⁵

2. Excessive Caseload Burden

In 2009, a report by The Spangenberg Group and the Center for Justice, Law and Society at George Mason University concluded that MSPD’s caseload burden was “a crisis so serious it has pushed the entire criminal justice system in Missouri to the brink of collapse.”¹³⁶ Resources – including staff – have been a concern for MSPD since 1993 when The Spangenberg Group concluded that MSPD “lack[ed] the necessary resources to provide competent representation” and that “[t]he legal staff need[ed] to be increased as soon as possible.”¹³⁷

Concerns had not dissipated more than ten years later in 2005 when the Missouri Bar Association created a Public Defender Taskforce (“Taskforce”) to assist the Public Defender Commission in addressing the deficiencies of MSPD.¹³⁸ The Taskforce commissioned The Spangenberg Group to conduct another study on MSPD in 2005.¹³⁹ The Spangenberg Group again found the

130. MISSOURI PUBLIC DEFENDER COMMISSION, MISSOURI STATE PUBLIC DEFENDER SYSTEM BUDGET REQUEST FISCAL YEAR 2019, at 18 (2017), https://oa.mo.gov/sites/default/files/FY_2019_Public_%20Defender_Budget_Request.pdf [hereinafter BUDGET REQUEST FISCAL YEAR 2019].

131. *Id.*

132. Marshall Griffin, *A Look at How Missouri Will Spend \$27.8 Billion, Should Gov. Greitens Approve*, KCUR89.3 (May 7, 2017), <http://kcur.org/post/look-how-missouri-will-spend-278-billion-should-gov-greitens-approve#stream/0>.

133. FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 109.

134. *Id.*

135. *Id.*

136. ROBERT L. SPANGENBERG, DAVID J. NEWHOUSE & JON B. GOULD, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM: A FINAL REPORT 64 (2009), [http://www.nlada.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20\(TSG\).pdf](http://www.nlada.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20(TSG).pdf).

137. *Church v. Missouri*, 268 F. Supp. 3d 992, 998 (W.D. Mo. 2017) (first two alterations in original), *rev’d*, 913 F.3d 736 (8th Cir. 2019).

138. *Id.*

139. *See id.*

operations of MSPD troubling, concluding that hardworking public defenders were routinely failing to comply with MSPD Guidelines¹⁴⁰ and the Missouri Rules due to excessive caseloads.¹⁴¹ A 2006 Missouri Senate report found that from 2000 to 2006, MSPD's caseload increased by more than 12,000 cases, but there had been no proportional additions made to its staff.¹⁴² MSPD's caseload crisis has continued to grow.¹⁴³

The Missouri Bar Association retained The Spangenberg Group again in 2009 to conduct yet another report on MSPD. The report, summarized here by District Court Judge Nanette K. Laughrey, found that

public defender workloads had worsened since its 2005 report and, as a result of those workloads, public defenders were failing to (1) conduct prompt interviews of their clients following arrest, (2) spend sufficient time interviewing and counseling their clients, (3) advocate effectively for pretrial release, (4) conduct thorough investigations of their cases, (5) pursue formal and informal discovery, (6) file appropriate and essential pleadings and motions, (7) conduct necessary legal research, and (8) prepare adequately for pretrial hearings, trial, and sentencing.¹⁴⁴

Concerned with MSPD's increasingly complex and outsized caseload and the lack of an increase in public defenders to go with it, the Public Defender Commission enacted a "caseload protocol" regulation, which took effect in 2008.¹⁴⁵ The protocol allowed "a district defender office to decline additional appointments when it has been certified as being on limited availability after exceeding its caseload capacity for at least three consecutive calendar months."¹⁴⁶ In 2012, the Supreme Court of Missouri upheld the validity of this protocol.¹⁴⁷ Nonetheless, MSPD offices that attempted to turn away cases triggered "resistance from prosecutors, judges, and legislators."¹⁴⁸

140. "MSPD Guidelines for Representation [were] adopted by the Missouri State Public Defender Commission [and] set out the Commission's expectations of its attorneys in order to meet the [ethical and constitutional] standards for effective representation of clients served by Missouri Public Defenders." BUDGET REQUEST FISCAL YEAR 2019, *supra* note 130, at 3.

141. *Church*, 268 F. Supp. 3d at 998.

142. *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 877 (Mo. 2009) (en banc).

143. *Id.*

144. *Church*, 268 F. Supp. 3d at 998.

145. *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 599, 599 n.4 (Mo. 2012) (en banc).

146. *Id.* at 597.

147. *See id.* at 612. However, subsections of the rule as originally promulgated have been held invalid by the Supreme Court of Missouri. *Pratte*, 298 S.W.3d at 890 (rejecting a public defender office may decline to take on any new appointments until the caseload falls below the commission's standard, but "allowing a public defender

Legislators even threatened to privatize the entire system if MSPD continued to turn away cases.¹⁴⁹ The legislature did not make good on its threat, but it nonetheless crippled MSPD's efforts to limit its excessive caseload. In 2013, the legislature passed section 600.062, RSMo, which explicitly denied the Director of MSPD and the Public Defender Commission "the authority to limit the availability of a district office or [any MSPD public defender] to accept cases based on a determination that the office has exceeded a caseload standard."¹⁵⁰ Section 600.062 dictated that unless a court provided prior approval, MSPD could not refuse to provide representation to indigent defendants.¹⁵¹ Until 2017, MSPD had not refused to take on cases "in any consistent or systematic way" since the passage of section 600.062.¹⁵²

A 2014 report once again highlighted MSPD's deficiencies. The ABA and RubinBrown, an accounting firm, tasked researchers with calculating the minimum number of hours an appointed counsel would need to devote to various kinds of cases in order to meet constitutionally permissible standards of representation.¹⁵³ MSPD data from 2013 was then used to determine whether these standards were being met.¹⁵⁴ On average, no single category of case met the minimum standards calculated by the ABA and RubinBrown.¹⁵⁵ The following table displays the troubling results of the study.¹⁵⁶

office to decline categories of cases is contrary to [section 600.042.4(3)] and is invalid.").

148. *Church*, 268 F. Supp. 3d at 999. "In some circuits, cases that were turned away were assigned to non-MSPD attorneys with no criminal defense experience who were not compensated for their time." *Id.*

149. *Id.*

150. MO. REV. STAT. § 600.062 (2016).

151. *Id.*

152. *Church*, 268 F. Supp. 3d at 999. In October 2017, MSPD's District 13 stopped accepting new cases and created a "wait list." See *infra* notes 254–70 and accompanying text. As of the writing of this Note, the District is still utilizing the wait list system and has not yet begun to accept new cases. See *infra* notes 254–70 and accompanying text.

153. *Id.* See generally RUBINBROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014),

https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lr_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

154. RUBINBROWN, *supra* note 153, at 15.

155. See *id.*; see also *Church*, 268 F. Supp. 3d at 999.

156. See RUBINBROWN, *supra* note 153, at 6, 16; see also *Church*, 268 F. Supp. 3d at 999.

Table 1. Hours Needed and Spent by Type of Case¹⁵⁷

Type of Case	Non-Capital Murder or Homicide	A/B Felony	C/D Felony	Felony Sex Offense	Misdemeanor	Probation Violation
Min. to Meet Constitutional Obligations	106.6 hours	47.6 hours	25 hours	63.8 hours	11.7 hours	9.8 hours
Time Spent by MSPD Public Defenders in 2013	84.5 hours	8.7 hours	4.4 hours	25.6 hours	2.3 hours	1.4 hours
Difference	22.1	38.9	20.6	38.2	9.4	8.4

The study results showed that, throughout the state, MSPD offices were functioning far beyond their workload capacity. In the Trial Division, public defenders “were able to devote the minimum required hours to only 2.4% of all A/B Felony cases (or 97 out of 4,127 total A/B felony cases) and 1.4% of C/D felony cases (or 311 out of 21,491 total C/D felony cases).”¹⁵⁸

These numbers reflect that, in one year alone, *thousands* of indigent defendants in Missouri were appointed attorneys who could not devote enough time to their cases to meet constitutional standards of representation. In addition to a constitutional crisis, MSPD has acknowledged its attorneys are violating its own MSPD Guidelines for Representation.¹⁵⁹ In its budget request for fiscal year 2019, MSPD stated that “[case] overload has forced lawyers and investigators alike to cut corners, skip steps, and make on-the-fly triage decisions in order to keep up with the deluge of cases coming in the door. As a result, effectiveness in many of these cases is seriously compromised.”¹⁶⁰ For fiscal year 2019, the General Assembly granted MSPD \$49,613,083 – a roughly \$4 million increase over fiscal year 2018 but still far below the \$75,392,296 MSPD requested in order to provide constitutionally adequate representation.¹⁶¹

157. The information in this table is generated from the results of the 2014 RubinBrown report. RUBINBROWN, *supra* note 153, at 6. All data from the minimum constitutional obligations row can be found at *id.*, while all the data in the time spent by MSPD row can be found at *id.* at 16.

158. *Church*, 268 F. Supp. 3d at 999.

159. *Id.* at 998.

160. *Id.*

161. *Lack of Adequate Funding Forces Missouri Public Defenders to Shortchange Constitutional Rights*, ACLU (May 17, 2018), <https://www.aclu-mo.org/en/news/lack-adequate-funding-forces-missouri-public-defenders-shortchange-constitutional-rights>; *see also*, MO. OFFICE OF ADMIN., FISCAL YEAR 19 APPROPRIATION BILL BY DEPARTMENT 4 (2019),

In 2017, a class action lawsuit was filed against the State of Missouri and then-Governor of Missouri Eric Greitens, alleging Missouri had “failed to meet its constitutional obligation to provide indigent defendants with meaningful representation.”¹⁶² Five plaintiffs sought relief on behalf of themselves and for all indigent persons who were at the time, or would be during the pendency of the litigation, subject to formal charges that carried penalties of imprisonment, confinement, detention, or incarceration in a Missouri state court and who were eligible to be represented by MSPD.¹⁶³ Following the U.S. District Court for the Western District of Missouri’s denial, in part, of Missouri’s and Greitens’ motions to dismiss, the case was appealed to the U.S. Court of Appeals for the Eighth Circuit.¹⁶⁴ The Eighth Circuit heard oral arguments on April 10, 2018.¹⁶⁵ On January 10, 2019, the Eighth Circuit issued its opinion, reversing the district court’s denial of the motions to dismiss and remanding to the district court for further proceedings.¹⁶⁶ The Eighth Circuit’s opinion exemplifies the difficulty that inheres in seeking systemic reform through lawsuits that name the state itself or the state’s governor as a defendant – absent special circumstances, both are virtually always shielded from suit through various immunity doctrines.¹⁶⁷

<https://oa.mo.gov/sites/default/files/FY%202019%20Totals%20by%20Department.pdf>.

162. *Church*, 268 F. Supp. 3d at 997.

163. *Id.* at 1003–08.

164. *Id.* at 1023; Dennis Crouch, *A Few Eighth Circuit Cases*, PATENTLY-O (Apr. 9, 2018), <https://patentlyo.com/patent/2018/04/eighth-circuit-cases.html> (“The appeal by the State argues for immunity. In particular, the Government argues that: (a) the Eleventh Amendment and the doctrine of sovereign immunity bar Plaintiffs’ claims against the State of Missouri; (b) Plaintiffs’ claims against Missouri’s Governor do not fall within the *Ex parte Young* exception to sovereign immunity; and (c) . . . absolute legislative immunity bars Plaintiffs’ claims against the Governor.”).

165. *See Case Number 17-2857: Shondel Church v. State of Missouri*, EIGHTH CIR. CT. OF APPEALS, http://media.ca8.uscourts.gov/cgi-bin/genlSrch.pl?pa_type=cs (search 17-2857 in case number box and click submit. On the next page click the “play” hyperlink next to “Oral Argument 04/10/2018.”) (last visited Dec. 28, 2018).

166. *Church v. Missouri*, 913 F.3d 736, 754 (8th Cir. 2019) (finding Missouri’s general sovereign immunity foreclosed suit against the State absent its consent, including Plaintiffs suit seeking prospective equitable relief; Governor’s actions were not basis for an *Ex parte Young* action and therefore he was entitled to sovereign immunity; and Governor’s authority to withhold appropriations was a legislative act which conferred upon him legislative immunity even if sovereign immunity did not apply).

167. State officials are not entitled to sovereign immunity and are not shielded from official-capacity suits seeking injunctive relief when government officials attempt to enforce an unconstitutional law. *Ex parte Young*, 209 U.S. 123 (1908). In addition, states can waive their Eleventh Amendment immunity when they remove an action from state to federal court. *See Lapidus v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002). However, removing an action from state to federal court does not waive a state’s general sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[S]overeign immunity of the States neither derives from, nor is

C. Missouri Rules of Professional Conduct: MSPD Attorneys' Continuing Violations

The Missouri Rules require attorneys to hold themselves to certain standards of conduct.¹⁶⁸ The purpose of the Missouri Rules and any attorney discipline that may flow from their violation is to “protect the public and the administration of justice.”¹⁶⁹

The Missouri Rules relating to diligence and communication are particularly relevant to attorneys who are facing excessive caseloads. Rule 4-1.3 mandates that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”¹⁷⁰ Rule 4-1.4 dictates that:

(a) A lawyer shall:

- (1) keep the client reasonably informed about the status of the matter;
- (2) promptly comply with reasonable requests for information; and
- (3) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.¹⁷¹

Despite the individual obligations of each lawyer under the Missouri Rules, MSPD’s excessive caseload prevents public defenders from meeting regularly with their clients and often results in meeting meaningfully with a client for the first time only weeks before the start of the client’s trial.¹⁷²

Moreover, time constraints and heavy caseloads prevent proper investigation of clients’ cases and prevent adequate preparation for trial and plea negotiations.¹⁷³ Most public defenders do not have adequate time to review and analyze discovery early enough in a case to make meaningful decisions

limited by, the terms of the Eleventh Amendment.”); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) (“[T]he sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.”).

168. *See generally* MO. SUP. CT. R. 4.

169. *See Missouri Attorney Discipline System*, MO. OFF. OF CHIEF DISCIPLINARY COUNSEL, <https://www.mochiefcounsel.org/>.

170. MO. SUP. CT. R. 4-1.3.

171. MO. SUP. CT. R. 4-1.4.

172. *Church v. Missouri*, 268 F. Supp. 3d 992, 1001 (W.D. Mo. 2017), *rev’d*, 913 F.3d 736 (8th Cir. 2019).

173. *Id.*

regarding whom to depose and when further investigation is necessary.¹⁷⁴ Depositions are taken in only a “small fraction” of cases, leaving potentially crucial information outside of the public defender’s knowledge.¹⁷⁵ In short, public defenders in MSPD are routinely violating their ethical obligations under the Missouri Rules.

D. The ABA and the Supreme Court of Missouri: “No Exception for Public Defenders”

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-411 (“Formal Opinion”)¹⁷⁶ – its “first ever ethics opinion concerning the obligations of lawyers, burdened with excessive caseloads, who provide indigent defense representation.”¹⁷⁷ ABA ethics opinions must be based on the ABA Rules of Professional Conduct (“ABA Rules”), and thus, there was “never any real doubt” about what the Formal Opinion would say regarding professional obligations in the midst of excessive caseloads.¹⁷⁸ The Formal Opinion unequivocally stated that there are “no exceptions” for public defenders;¹⁷⁹ “all lawyers have a duty to furnish competent and diligent [representation].”¹⁸⁰

Further, the Formal Opinion held that when an excessive caseload or soon-to-be excessive caseload prevents competent and diligent representation, new cases cannot be accepted, and the onus is on the lawyer to request that new appointments be stopped.¹⁸¹ If an attorney already has an excessive caseload preventing competent and diligent representation, the attorney should “move to withdraw from a sufficient number of cases” to bring their representation into conformance with their ethical obligations once again.¹⁸²

The Supreme Court of Missouri has also weighed in on public defenders’ professional conduct responsibilities in the face of extreme caseloads,

174. *Id.*

175. *Id.*

176. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 06-411 (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf [hereinafter Formal Opinion].

177. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFS., EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 1 (2009), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf [hereinafter Eight Guidelines]. See generally Formal Opinion, *supra* note 176.

178. NORMAN LEFSTEIN, ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 32 (2011).

179. Formal Opinion, *supra* note 176, at 3.

180. Eight Guidelines, *supra* note 177, at 1.

181. Formal Opinion, *supra* note 176, at 4–5.

182. *Id.* at 9.

echoing the ABA's conclusion in the Formal Opinion. In *Missouri Public Defender Commission v. Waters*, the court held that “no exception exists to the [Missouri Rules] for lawyers who represent indigent persons.”¹⁸³ Further, the Supreme Court of Missouri held that “[c]ounsel violates [Rules 4-1.1, 4-1.3, and 4-1.4 when] she accepts a case that results in a caseload so high it impairs her ability to provide competent representation, to act with reasonable diligence, and to keep the client reasonably informed.”¹⁸⁴ Therefore, “public defenders are risking their own professional lives” when they are appointed to – and when they accept – an excessive number of cases.¹⁸⁵

Public defenders do not bear ethical obligations alone. Supervisors responsible for public defenders have ethical responsibilities when their subordinates are violating – or are about to violate – rules of professional conduct.¹⁸⁶ The Formal Opinion recognized the duty of supervisors in managerial positions in circumstances where subordinate lawyers face excessive caseloads.¹⁸⁷ Supervisors, and indeed even the top echelons of defender services, are required to make “reasonable efforts” to ensure subordinate lawyers comply with applicable ethical rules.¹⁸⁸ Supervisors should monitor caseloads to ensure lawyers can deliver competent and diligent representation.¹⁸⁹ When supervisors are aware that a lawyer has an excessive caseload, supervisors have a duty to take remedial action, and failure to do so makes supervisors themselves responsible for the professional conduct violations of subordinate lawyers.¹⁹⁰

Further, when a subordinate lawyer feels the resolution of a manager is not reasonable with respect to remedial measures taken or not taken, the Formal Opinion commands the subordinate lawyer to continue up the chain of command, “perhaps leading to the matter being brought to the head of the defender program and even to the program’s governing board, if there is one.”¹⁹¹ In 2009, the ABA promulgated Eight Guidelines of Public Defense Related to Excessive Workloads (“Eight Guidelines”), which advised public defender programs, like MSPD, to employ “a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks . . . are performed” and reiterated the duties of those with “management responsibilities.”¹⁹²

183. *State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) (en banc).

184. *Id.* at 607.

185. *Id.* at 608 (quoting *State ex rel. Mo. Pub. Def. Comm’n v. Pratte*, 298 S.W.3d 870, 880 (Mo. 2009) (en banc)).

186. See Formal Opinion, *supra* note 176, at 1.

187. *Id.*

188. *Id.*

189. *Id.* at 8.

190. *Id.*

191. LEFSTEIN, *supra* note 178, at 32.

192. Eight Guidelines, *supra* note 177, at 2.

E. The ABA Standards for Imposing Lawyer Sanctions

In 1986, the ABA promulgated the ABA Standards in an attempt to make lawyer discipline effective by establishing clear standards for sanctions.¹⁹³ The ABA Standards set forth a “comprehensive system of sanctions” designed to promote “thorough, rational consideration of all factors relevant to imposing a sanction in an individual case.”¹⁹⁴ The ABA Standards seek to ensure that factors are given appropriate weight in light of the purposes of lawyer discipline and that “only relevant aggravating and mitigating circumstances are considered at the appropriate time.”¹⁹⁵ The Joint Committee on Professional Sanctions (“Sanctions Committee”) – the committee responsible for promulgating the ABA Standards – “adopted a model [for imposing sanctions] that looks first at the ethical duty and to whom it is owed[] and then at the lawyer’s mental state and the amount of injury caused by the lawyer’s misconduct.”¹⁹⁶

The model developed by the Sanctions Committee asks courts to answer the following questions when imposing sanctions:

- (1) What ethical duty did the lawyer violate [– a] duty to the client, the public, the legal system, or the profession?[]; (2) What was the lawyer’s mental state [– d]id the lawyer act intentionally, knowingly, or negligently?[]; (3) What was the extent of the actual or potential injury caused by the lawyer’s misconduct [– w]as there a serious or potentially serious injury?[]; and (4) Are there any aggravating or mitigating circumstances?¹⁹⁷

The ABA Standards assume the most important ethical duties are those to the client, including: “the duty of loyalty,” the duty to preserve client property, the duty to “maintain client confidences,” the duty to “avoid conflicts of interest,” “the duty of diligence,” “the duty of competence,” and “the duty of candor.”¹⁹⁸ As for a lawyer’s mental state, the ABA Standards assert that

[t]he most culpable mental state is [that of] intent[–] when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The [second] most culpable mental state is that of knowledge[–] when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the con-

193. ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS 2 (1992) [hereinafter STANDARDS FOR SANCTIONS], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf.

194. *Id.*

195. *Id.*

196. *Id.* at 3.

197. *Id.* at 4–5.

198. *Id.* at 5.

scious objective or purpose to accomplish a particular result. The least culpable mental state is negligence[–] when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.¹⁹⁹

The extent of the injury is “defined by the type of duty violated and the extent of actual or potential harm.”²⁰⁰ There are various levels of injury in the model – “serious injury,” “injury,” and “little or no injury.”

Under the ABA Standards, answers to the first three questions regarding duty, mental state, and injury shape the baseline sanction that could be imposed.²⁰¹ After making an initial determination as to the appropriate sanction, aggravating and mitigating factors are then considered and may have the effect of increasing or decreasing the appropriate sanction.²⁰²

The Sanctions Committee outlined specific aggravating and mitigating factors. “Aggravating factors include: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses . . .” and more.²⁰³ “Mitigating factors include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; . . . (e) full and free disclosure to the disciplinary board; . . . (f) inexperience in the practice of law; . . . (h) physical disability; . . .” and more.²⁰⁴ The existence of an excessive caseload is not a mitigating factor articulated in the ABA Standards.²⁰⁵

199. *Id.* at 6.

200. *Id.*

201. *Id.* at 4–5.

202. *Id.* at 6.

203. *Id.* at 17. Other aggravating factors include:

- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution;
- (k) illegal conduct, including that involving the use of controlled substances.

Id.

204. *Id.* at 18. Other mitigating factors include:

- (d) timely good faith effort to make restitution or to rectify consequences of misconduct; . . .
- (g) character or reputation; . . .
- (i) mental disability or chemical dependency including alcoholism or drug abuse when:

IV. INSTANT DECISION

It was undisputed by both OCDC and Hinkebein that Hinkebein violated Missouri Rules 4-1.3 and 4-1.4(a).²⁰⁶ Therefore, the material question in the instant case was the severity of the discipline to be imposed.²⁰⁷ The Supreme Court of Missouri heard oral arguments on the matter from Alan Pratzel, Chief Disciplinary Counsel for OCDC, and Sara Rittman of Rittman Law LLC, attorney for Hinkebein. Pratzel asked the court to “suspend Hinkebein’s law license with no leave to apply for reinstatement for one year.”²⁰⁸ Hinkebein argued his professional conduct violations warranted only a reprimand.²⁰⁹

A. Argument

Pratzel argued the ABA Standards on which the court regularly relies dictated a baseline sanction of suspension in the instant case.²¹⁰ According to ABA Standard 4.42, a suspension is warranted if an attorney acts with a knowing lack of diligence that causes injury or potential injury to a client.²¹¹ ABA Standard 4.42 also dictates that suspension should be the baseline sanction when a lawyer “engages in a pattern of neglect and causes injury or po-

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- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent’s recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
 - (j) delay in disciplinary proceedings;
 - (k) imposition of other penalties or sanctions;
 - (l) remorse;
 - (m) remoteness of prior offenses.

Id.

205. *See id.*

206. Respondent’s Brief, *supra* note 64, at 7; *see also* Oral Argument at 00:30–46, 02:31–36, *In re* Karl William Hinkebein, No. SC96089 (Mo. Sept. 12, 2017), <https://www.courts.mo.gov/file.jsp?id=117413>.

207. *See* Oral Argument, *supra* note 206, at 02:38–42.

208. *Case Summaries for September 7, 2017*, *supra* note 77.

209. *Id.*

210. *See* Oral Argument, *supra* note 206, at 02:43–53.

211. STANDARDS FOR SANCTIONS, *supra* note 193, at 12 (“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.”); *see also* Oral Argument, *supra* note 206, at 02:53–03:03.

tential injury to a client.”²¹² Pratzel argued those criteria had been met in the instant case in that “six of [Hinkebein’s] clients were deprived of necessary and appropriate legal services due to [Hinkebein’s] neglect of their cases.”²¹³ Pratzel argued Hinkebein was “clearly knowing” in that he was “conscious[ly] aware[] of the nature and circumstances of [his] misconduct.”²¹⁴

Pratzel conceded that while there was arguably no injury in the instant case because all six clients were able to eventually file Rule 29.15 motions²¹⁵ and none were meritorious, there was a potential for injury because had any one of them been meritorious, relief for that client would have been delayed and “placed in jeopardy by the fact [Hinkebein] neglected their [case].”²¹⁶ Pratzel described aggravators in the consideration of sanctions as the three previous admonitions of Hinkebein – the “pattern of misconduct, [the fact] there were multiple offenses, and [the fact that] the victims . . . were vulnerable.”²¹⁷

Pratzel acknowledged there were mitigating factors to be considered in Hinkebein’s case, including that Hinkebein gave full and free disclosure, Hinkebein was cooperative and remorseful, “and [Hinkebein] suffers from a physical disability.”²¹⁸ However, Pratzel noted that five out of the six times Hinkebein failed to file the required motions for his clients he had been out of the hospital for months.²¹⁹ Moreover, Pratzel pointed out Hinkebein failed to communicate with clients until the deadline for the required motions had passed and hospitalization is not an adequate excuse for this sort of misconduct.²²⁰

Pratzel took special effort to argue that excessive caseload should not be a mitigating factor when considering the appropriate sanction.²²¹ Pratzel noted that Hinkebein’s brief argued his excessive caseload was a factor in his misconduct and further that Hinkebein’s brief cited studies that concluded public defenders in MSPD have excessive caseloads that burden their ability to provide diligent representation.²²² Pratzel stated the “apparent point” of these arguments was to have “the court treat an excessive caseload as a mitigating factor, if not an outright defense[,] in this case and any case involving a public defender who neglects client matters.”²²³ When pushed by the court to explain why he thought excessive caseload was not relevant to sanc-

212. STANDARDS FOR SANCTIONS, *supra* note 193, at 12; *see also* Oral Argument, *supra* note 206, at 03:03–08.

213. *See also* Oral Argument, *supra* note 206, at 03:13–19.

214. *Id.* at 03:43–49.

215. *See supra* note 34.

216. Oral Argument, *supra* note 206, at 04:00–38.

217. *Id.* at 04:40–05:05.

218. *Id.* at 05:06–21.

219. *Id.* at 12:23–48.

220. *Id.* at 12:54–13:10.

221. *See id.* at 06:00–23.

222. *See id.* at 05:41–6:00.

223. *Id.* at 06:00–14.

tions,²²⁴ Pratzel argued that the ABA Standards did not make excessive caseload a mitigating factor and further that allowing excessive caseload to mitigate sanctions would make for a “slippery slope.”²²⁵

Pratzel opined that not only would such mitigation extend to all public defenders engaged in misconduct but it might then possibly apply to *any* attorney with a heavy caseload, including private counsel and even prosecutors.²²⁶ Pratzel emphasized to the court that any significant mitigation granted should be based on Hinkebein’s physical disability and should not be based on the claim of excessive caseload.²²⁷

On behalf of Hinkebein, Rittman argued Hinkebein was plagued by “severe and chronic physical health problems coupled with a broken public defender system.”²²⁸ The court, however, was skeptical of the latter half of Rittman’s argument and expressed that it saw no difference between public defenders and young associates at big firms who are overburdened by the work they are asked to perform.²²⁹ Notably, one judge remarked, “I see a big problem . . . if we allow attorneys to say my boss made me do it because when they take the oath to follow the [Missouri] Rules . . . , sometimes that means not taking a case, and sometimes that means taking a different job.”²³⁰

In response to this statement, Rittman asked the court to consider what benefit it would be to either the public or MSPD for a qualified, experienced, and skilled lawyer to quit.²³¹ The court responded that Hinkebein could have done much in between the two extremes of quitting and failing to represent his clients, including letting a supervisor know the dire situation he was in.²³² Rittman replied that Hinkebein’s supervisor already knew of his situation and reminded the court that the supervisor had in fact testified he would not have been able to do anything about Hinkebein’s caseload, regardless of a complaint by Hinkebein.²³³ The court then challenged: “Is that acceptable? To not say anything because you think you’ll be rejected as opposed to trying [to bring this to a supervisor for remedial measures]?”²³⁴ The court further noted that if the supervisor failed to act, the supervisor himself would face consequences for condoning ineffective assistance of counsel.²³⁵

224. *Id.* at 07:21–26.

225. *Id.* at 07:43–08:31.

226. *Id.* at 08:10–09:33.

227. *Id.* at 15:21–45.

228. *Id.* at 17:42–53.

229. *Id.* at 18:06–19.

230. *Id.* at 18:35–55.

231. *Id.* at 19:13–39.

232. *Id.* at 19:43–20:23. “The fear that they might not like that and there might be some retribution – I question if that’s reasonable – but that’s a long way from saying ‘I’ve just got to quit.’” *Id.* at 20:10–23.

233. *Id.* at 21:43–48.

234. *Id.* at 21:23–29.

235. *Id.* at 21:48–55.

Rittman ultimately argued that excessive caseload should be considered by the court in determining sanctions for Hinkebein but that the court should also consider the “compelling” mitigating factor of Hinkebein’s physical health and critical illness.²³⁶ Rittman noted Hinkebein’s previous admonitions were seven years ago,²³⁷ and the potential for harm in the cases at bar was not great because abandonment routinely takes place, and courts routinely allow newly-appointed counsel to file amended motions out-of-time.²³⁸ Rittman concluded by asserting that suspension would be “clearly excessive” for Hinkebein in light of his health problems and his caseload.²³⁹ In rebuttal, Pratzel argued that if the court found Hinkebein’s health problems were such that they sufficiently mitigated his misconduct to probation, the court should impose a stayed suspension with probation, but in no case should it consider excessive caseload or status as a public defender as a mitigating factor.²⁴⁰

B. Decision

The Supreme Court of Missouri found Hinkebein violated Missouri Rules 4-1.3 and 4-1.4(a) and that he should be disciplined.²⁴¹ After considering its previous decisions, the ABA Standards, as well as all aggravating and mitigating circumstances, the court suspended Hinkebein’s license indefinitely but stayed the suspension and placed Hinkebein on probation for a period of one year.²⁴² While the court wrote that it “consider[ed] . . . aggravating and mitigating circumstances,” it made no mention of specific factors that proved particularly influential to its decision to impose a stayed suspension and probation.²⁴³

V. COMMENT

The overburdened and underfunded MSPD is collapsing on itself. While the indigent defendants who rely on this system are the persons we should be first and foremost concerned about, public defenders are also in a difficult position. Section A of this Part discusses the unlikelihood of excessive caseload becoming a mitigating factor in ethical violations for public defenders. Section B of this Part highlights the inability of the ABA’s mandates to solve the pressing problems facing MSPD’s public defenders. Section C then turns to a discussion of the ramifications of *Hinkebein*. Section D

236. *Id.* at 25:35–26:36.

237. *Id.* at 26:37–27:05.

238. *See id.* at 30:01–49.

239. *Id.* at 31:09–32:30.

240. *Id.* at 33:10–30, 34:30–35:30.

241. Hinkebein Order, *supra* note 20.

242. *Id.*

243. *See id.*

concludes this Part by briefly discussing potential solutions to MSPD's crisis – solutions that have proved elusive.

A. Excessive Caseloads Will Not Mitigate Ethical Violations of Missouri Public Defenders

One can speculate with reasonable confidence that the Supreme Court of Missouri did not consider Karl Hinkebein's excessive caseload to be a mitigating factor for his ethical violations. Not only do the ABA Standards fail to enumerate excessive caseload as a mitigating factor, but there are also sound reasons why such mitigation would prove problematic.

The Supreme Court of Missouri recognized the potential pitfalls of allowing excessive caseload to serve as a mitigating factor, with one judge explicitly agreeing with Chief Disciplinary Counsel Pratzel's concern that such mitigation would create a "slippery slope."²⁴⁴ Indeed, if one applied excessive caseload as a mitigating factor for public defenders, there does not seem to be a compelling reason that excessive caseload would not be applied as a mitigating factor to *any* lawyer who faced a heavy caseload.²⁴⁵ The Supreme Court of Missouri is unlikely to allow the Missouri Rules to be "diluted" in such a way.²⁴⁶ Attorneys should be incentivized to ensure they are handling only the number of cases in which they can provide competent and diligent representation. Allowing excessive caseload to mitigate ethical violations would strip the ethical rules of their intent to regulate each individual lawyer's conduct and allow lawyers to abdicate their important ethical responsibilities based on failures of the larger system in which they operate. While systemic flaws should be addressed, indigent defendants the nation over would be severely harmed if lawyers faced mere slaps on the wrist for serious ethical violations.

Instead of a willingness to mitigate violations with excessive caseload considerations, the Missouri Supreme Court seems to view public defenders as having two choices when faced with overburdening workloads: (1) approach a supervisor and hope they can provide remedial measures or (2) if the problem cannot be fixed, quit.²⁴⁷ One judge's remark bears repeating: "[W]hen [attorneys] take the oath to follow the [Missouri] Rules . . . , sometimes that means not taking a case, and sometimes that means taking a different job."²⁴⁸

244. Oral Argument, *supra* note 206, at 33:51–34:02. "I understand your concern about recognizing a mitigator of caseload – I share some of your concerns about that being a slippery slope." *Id.*

245. *See id.* at 08:10–09:33.

246. *See id.* at 34:30–35:40.

247. *See id.* at 18:35 –55. "I see a big problem . . . if we allow attorneys to say my boss made me do it." *Id.*

248. *Id.*

B. The ABA's Formal Opinion Is Not a Solution to MSPD's Problem

The ABA's Formal Opinion outlines the duties of a lawyer facing an excessive caseload that hinder or prevent competent and diligent representation in a case.²⁴⁹ When public defenders face an excessive caseload, they should not take on more cases.²⁵⁰ If appointed to new cases, they should file a motion to withdraw, and if that motion is denied, they should appeal.²⁵¹ Moreover, public defenders should, if necessary, work their way up the chain of command of their public defender system in the event of an excessive caseload.²⁵² They should first notify and seek remedial measures from supervisors.²⁵³ Supervisors then have a duty to make reasonable efforts to take remedial measures in order to ensure a subordinate lawyer is not violating the rules.²⁵⁴

The majority of these mandates, though theoretically logical, cannot alone lessen the excessive caseloads plaguing MSPD. In a system so afflicted by lack of funding, lack of staff, and high turnover rates, a supervisor's knowledge of an attorney's excessive caseload will have little effect. This is because effective remedial measures are often unavailable. Hinkebein's case illustrates this point. An obvious remedial measure that a supervisor might "reasonably" pursue involves attempting to reassign current (or divert new) cases from an overworked attorney to a different, less burdened attorney. But within MSPD, there simply are no lawyers with manageable caseloads who can easily take on extra cases – *everyone* has an excessive caseload.²⁵⁵ Thus, supervisors often find their hands are tied as much as subordinate lawyers, and there are a limited number of remedial measures other than case reassignment that can be "reasonably" pursued without adequate resources and staff.

For the Formal Opinion's suggestions and mandates to be effective, MSPD must have at least some public defenders that are not already overburdened so that caseloads can be redistributed within MSPD when needed. Moreover, individual public defenders need to be able to turn down cases when necessary and – as recognized by the Eight Guidelines²⁵⁶ – assign cases

249. Formal Opinion, *supra* note 176, at 1–2.

250. *Id.* at 4–5.

251. *See id.* at 5.

252. *Id.* at 6.

253. *Id.*

254. *See id.*

255. *See* information *supra* Table 1.

256. Eight Guidelines, *supra* note 177, at 3. Guideline 5, in part, directs public defender agencies like MSPD to avoid excessive caseloads by:

- Providing additional resources to assist the affected lawyers;
- Curtailing new case assignments to the affected lawyers;
- Reassigning cases to different lawyers within the defense program, with court approval, if necessary;

to private attorneys when necessary. In the absence of sweeping and meaningful reform that unburdens the system, some MSPD offices have chosen to temporarily turn down new cases altogether.²⁵⁷

C. No Representation, No Sanctions

In October 2017, David Wallis, one of the District Defenders of District 13 for MSPD, wrote a letter to local courts stating, “[E]very attorney under [my] supervision is currently violating the [Missouri] Rules Their current caseloads create a conflict of interest with existing clients because they are forced to choose effective representation of one client to the detriment of other clients.”²⁵⁸ Wallis then stated the District 13 office, which handles Boone County and Cooper County cases, would no longer be immediately entering appearances in cases wherein a defendant qualifies for representation by MSPD.²⁵⁹ Wallis wrote, “This is simply about ensuring all [District] 13 public defenders are able to maintain their license to practice law without threat of discipline by OCDC.”²⁶⁰

The Boone and Cooper County office “started an internal wait list for defendants who qualify for representation.”²⁶¹ District 13 attorneys immediately handle cases for the accused in jail,²⁶² but wait list others – for how long

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- *Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;*
 - *Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;*
 - *Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;*
 - *Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and*
 - *Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.*

Id. (emphasis added).

257. Letter from David Wallis, Area 13 of the State Pub. Def. Sys., to Boone and Cooper Cty. Courts (Oct. 2, 2017), <http://boonecountybar.org/september-26-letter-from-david-wallis-area-13-of-the-state-public-defender-system-to-boone-and-cooper-county-courts/> [hereinafter Letter from David Wallis].

258. *Id.*

259. *See id.*

260. *Id.*

261. *Id.*

262. In an interview with the Columbia Daily Tribune in October 2018, Michael Barrett, Director of MSPD, said, “Right now that is the current policy in Boone County. If someone is incarcerated pretrial, they are not placed on the wait list. We represent them right away.” Pat Pratt, *Director: Public Defenders Can’t ‘Keep Up’ with Caseloads*, COLUM. DAILY TRIB. (Oct. 13, 2018, 1:46 PM), <http://www.columbiatribune.com/news/20181013/director-public-defenders-cant-keep-up-with-caseloads>.

depends on the severity of the charges.²⁶³ As of October 2018, the wait list system was still in effect.²⁶⁴ At times, the wait list included over 600 different cases.²⁶⁵ In September 2018, state leaders gave Wallis' office \$100,000 to reduce the District 13 wait list.²⁶⁶ District 13 used those funds in part to contract with approximately twenty private attorneys to handle the "aging cases on the wait list," prioritizing felony cases that had been on the wait list for over six months.²⁶⁷

When the wait list was implemented, MSPD believed that, despite the wait list creating longer case pendency, cases would actually be resolved more expeditiously "once [MSPD] [was] able to ethically enter" and begin work on them.²⁶⁸ In October 2018, Wallis stated that District 13 attorneys were doing better work and working longer hours because they were experiencing positive outcomes for their clients.²⁶⁹ Wallis recognized, however, that the improved work done on cases, particularly for the accused in custody, came at the cost of others waiting months for legal help.²⁷⁰ Nonetheless, according to Michael Barrett, Director of MSPD, "[T]he wait list allows [MSPD to provide] constitutionally competent representation for our existing clients, which is in stark contrast to life before the wait lists."²⁷¹

When he first made the wait list announcement in 2017, Wallis stated his only ends were to achieve "effective, zealous and diligent representation of poor persons by [attorneys] who are not under threat of Bar discipline by ODCD."²⁷² Wallis and his attorneys were not the only public defenders who feared disciplinary action by ODCD. According to Barrett, "[MSPD] received a number of resignations in the hours following oral argument in [the

263. See *Boone County Public Defenders Get More Money to Handle Wait List*, ABC17 NEWS (Oct. 22, 2018), <https://www.abc17news.com/news/boone-county-public-defenders-get-more-money-to-handle-wait-list/818956576>; see also Letter from David Wallis, *supra* note 257 (explaining that they monitor an "attorney[s'] work load and the wait list, and [then] assign[s] attorneys to cases based on custody status and severity of the charge(s)").

264. See *Boone County Public Defenders Get More Money to Handle Wait List*, *supra* note 263.

265. *Id.*

266. *Id.*

267. *Id.*

268. Letter from David Wallis, *supra* note 257.

269. See *Boone County Public Defenders Get More Money to Handle Wait List*, *supra* note 263.

270. *Id.*

271. Pratt, *supra* note 262.

272. Letter from David Wallis, *supra* note 257.

Hinkebein] case.”²⁷³ Barrett, in 2018, stated that the wait lists have helped retain MSPD defenders post-*Hinkebein*.²⁷⁴

D. Choosing to Privatize in Texas County

An alternative to the wait list system is the privatization of public defense work. MSPD has decided one Missouri county will do just that – as of March 1, 2018, indigent defendants in rural Texas County will be appointed private counsel, which the state of Missouri will pay for.²⁷⁵

Texas County is home to approximately 26,000 residents.²⁷⁶ In 2017, MSPD opened roughly 530 cases in Texas County, with only one being handled by a privately contracted attorney.²⁷⁷ Like most MSPD offices, the problem with MSPD’s previous representation in Texas County was the excessive caseload.²⁷⁸ In this instance, the large caseload was the result of a single MSPD office – District 25 – representing six counties simultaneously.²⁷⁹ According to MSPD’s annual report, the MSPD office responsible for Texas County was assigned approximately 3,700 total cases in 2017.²⁸⁰ There are only thirteen public defenders assigned to this particular office.²⁸¹ Thus, if cases were divided evenly, each attorney in this office would have been assigned and responsible for almost 285 cases in 2017 alone.²⁸² That equals a new case every 1.3 days.²⁸³

It seems probable the outsized caseload took a toll on the public defenders working in this office. In a span of eighteen months, eleven out of the thirteen attorneys quit.²⁸⁴ Although the office re-hired as these attorneys

273. Letter from Michael Barrett, Dir. of the Mo. State Pub. Defs’ Office, to Boone Cty. Bar Ass’n (Oct. 2, 2017), <http://boonecountybar.org/letter-to-bcoba-from-the-director-of-the-missouri-state-public-defenders-office/>.

274. Pratt, *supra* note 262 (“Before we did wait lists, it sent [MSPD attorneys] packing . . . They feared for their law licenses and they left. If we don’t have wait lists and they have too many cases they can’t handle, they say I’m afraid someone is going to challenge my law license and I’m out of here.”).

275. Chadde, *supra* note 104.

276. *Id.*

277. *Id.*

278. *See id.*

279. *Id.*

280. *Id.* For comparison, that is almost one thousand fewer cases than St. Louis County, which has a population five times greater than all six of District 25’s counties combined. *Id.*

281. *Id.*

282. This number was calculated by taking the total number of cases assigned in 2017 (3,700) and dividing by the thirteen attorneys in the office (3,700/13 = 284.6).

283. This number was calculated by dividing the number of days in a year (365 excluding leap years) by the calculated number of cases an attorney in the MSPD office representing Texas County was theoretically assigned in 2017 (365/285 = 1.28).

284. Chadde, *supra* note 104.

left, a turnover rate of almost eighty-five percent in eighteen months is enough to give pause.²⁸⁵

The rate of compensation for contract work in Texas County will depend on the severity of the case, as is the standard for all of MSPD's contract work. An initial retainer fee is paid in accordance with the following guidelines, with additional compensation for cases resolved by trial.

Table 2. Private Attorney Compensation Rates²⁸⁶

Description	Contract Guideline
Murder 1st Degree	\$10,000
Sexual Predator Trial	\$8,000
Sexual Predator Hearing	\$4,000
Other Homicide	\$6,000
AB Felony Drug	\$750
AB Felony Other	\$1,500
AB Felony Sex	\$2,000
CDE Felony Drug	\$750
CDE Felony Other	\$750
CDE Felony Sex	\$1,500
Misdemeanor	\$375
Juvenile - Non-Violent	\$500
Juvenile - Violent	\$750
Probation Violation	\$375
PCR Rule 24.035 Motion	\$500
PCR Rule 24.035 Evidentiary Hearing	\$250
PCR Rule 24.035 Appeal	\$500
PCR Rule 29.15 Motion	\$1,000
PCR Rule 29.15 Evidentiary Hearing	\$500
PCR Rule 29.15 Appeal	\$1,875
Direct Appeal	\$3,750

285. *Id.* This was found by dividing the number of attorneys who left by the number of attorneys in the office (11/13 = 84.61).

286. This table is originally from *Panel Attorney Opportunities and Contract Rates*, MO. ST. PUB. DEFENDER, <https://publicdefender.mo.gov/private-counsel-opportunities/mspd-contracting/panel-rates/> (last visited Oct. 14, 2018). The following information is found below the table at its original source: "Jury Trial: \$1,500 for the first day and \$750 for each additional day, partial days prorated. Bench Trial: \$750/day, partial days prorated." *Id.*

Despite the problems MSPD was facing in Texas County, there is no guarantee private attorneys will step up to the plate. Representative Robert Ross, R-Yukon, who represents Texas County, thinks they will.²⁸⁷ He believes private attorneys will “love that opportunity for business.”²⁸⁸

In fact, Ross is an advocate of privatizing nearly the entire MSPD system. On February 6, 2018, Ross introduced House Bill 2396 (“HB2396”), which, though it never gained traction, would have mandated that certain legal services provided to indigent defendants be contracted out to private attorneys.²⁸⁹ HB2396 would have repealed the provision allowing OSPD to contract with private attorneys on a case-by-case basis only.²⁹⁰ HB2396 would have instead commanded that “all class C, D, and E felony cases, all misdemeanor cases, all traffic cases, and all probation violation cases” be contracted out to private attorneys.²⁹¹ These cases make up almost ninety percent of MSPD’s caseload, according to MSPD’s 2017 annual report.²⁹² Under this proposal, MSPD would have handled approximately nine percent of its current caseload – Class A and B felonies such as murder, first-degree robbery, and certain sex crimes.²⁹³

HB2396 would have implemented a competitive bidding process for awarding contacts to private attorneys.²⁹⁴ Under HB2396, contracts would have been awarded to the lowest bidder, but “priority” would have been “given to bidders who exhibit experience in criminal law, demonstrate the capacity to provide effective representation in all assigned cases, and carry sufficient malpractice insurance.”²⁹⁵ Bids would have been subject to and approved by the presiding judge of the judicial circuit where the services were to be rendered.²⁹⁶

Despite its curb appeal, a low-bid contract system such as that contemplated by HB2396 would most likely cost the state more money instead of saving it money. Private attorneys are very unlikely to bid on contracts at the extremely low cost that MSPD expends per case. On average, MSPD spent only \$325 per trial division case disposition in 2017,²⁹⁷ and private attorneys

287. Chadde, *supra* note 104.

288. *Id.*

289. H.R. 2396, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018), <https://house.mo.gov/billtracking/bills181/hlrbillspdf/6205H.01I.pdf>.

290. *Id.*

291. *Id.*

292. See MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2017 ANNUAL REPORT 20 (2017), <https://archive.org/details/2017MOPublicDefenderAnnRpt/page/n0> [hereinafter FISCAL YEAR 2017 ANNUAL REPORT]; see also Chadde, *supra* note 104.

293. Chadde, *supra* note 104.

294. H.R. 2396.

295. *Id.*

296. *Id.*

297. FISCAL YEAR 2017 ANNUAL REPORT, *supra* note 292, at 13 (2017) (“The average direct cost of all cases disposed by [MSPD] (including Death Penalty Repre-

are exceptionally unlikely to make bids this low – many experienced, private criminal defense lawyers make almost that much *per hour*.²⁹⁸ Further, legislation like HB2396 raises concerns about ensuring competent representation – awarding cases to attorneys with the lowest bids will result in less-experienced lawyers (perhaps not always even criminal defense lawyers) receiving cases more often than experienced lawyers whose time is worth more.²⁹⁹ This Note does not attempt to touch on all of the potential problems inherent to large-scale privatization, but such a drastic measure ought not be considered lightly.³⁰⁰

Adequate funding would negate the desire to privatize MSPD, but Missouri has been battling a severe budget crisis,³⁰¹ and creative methods for funding would be required.³⁰² Scholars have proposed re-examining criminal offenses – “reducing more misdemeanors to infractions or civil forfeitures”³⁰³ – and “check[ing] spiraling corrections budgets”³⁰⁴ as a means of saving money that can be funneled to MSPD.

sentation) in Fiscal Year 2017 was \$396.52. The Trial Division average was just \$325.31.”)

298. See Heather Cole, *Compare & Contrast: Missouri Lawyer Price Range from \$65 to \$793 Per Hour*, MO. LAW. WKLY. (June 17, 2013), <https://molawyersmedia.com/2013/06/17/compare-contrast-missouri-lawyer-prices-range-from-65-to-793-per-hour/>.

299. The word “priority” is not absolute. The possibility would still exist that a low bidder – one without enough experience to make them qualified – wins a bid because it is markedly lower than a more qualified attorney. Moreover, “experience in criminal law” is a vague standard, and the proposal made no attempt to define what constitutes “experience.” Similarly, the proposal made no attempt to define what constitutes the “capacity to provide effective representation in all assigned cases.” HB2396 attempted to hedge these equivocal standards by creating a quality assurance program. See H.R. 2396. With the assistance of the presiding judge in each circuit, the quality assurance program would have sought “to ensure that defendants are being provided quality representation by private attorneys awarded contracts . . .” *Id.*

300. For a broader discussion of historically deficient systems of privatization, see U.S. DEP’T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

301. See generally Phill Brooks, *Missouri Heading for a Looming Budget Cliff*, COLUM. DAILY TRIB. (Jan. 28, 2018), <http://www.columbiatribune.com/news/20180128/missouri-heading-for-looming-budget-cliff>.

302. See Rodney Uphoff, Foreword, *Broke and Broken: Can We Fix our State Indigent Defense System?*, 75 MO. L. REV. 667 (2010) for proposed solutions on saving money that could then be allocated to the public defender system.

303. *Id.* at 675.

304. *Id.* at 676.

V. CONCLUSION

Since 2005, many efforts have been undertaken to improve MSPD's hand-in-hand problems of underfunding and excessive caseload, yet none have proved particularly effective.³⁰⁵ Until adequate funding is provided that allows for more attorneys and reasonable caseloads throughout the system, public defenders will continue to face circumstances that make it difficult to comply with the Missouri Rules, and indigent defendants will suffer. Without a workable systemic solution, mandates from the ABA, such as those found in the ABA's Formal Opinion, can alleviate the problem only so much.

This leaves public defenders in a catch-22 situation. *Hinkebein* suggests that if a public defender cannot find relief through the chain of command or court order, quitting may be the necessary solution. Not only are public defenders unlikely to be keen on quitting, but if quitting is the necessary solution following unmet requests for remedial relief, MSPD and the public will be harmed by the loss of experienced and skilled public defenders – resignations would exacerbate MSPD's already high turnover rates and its continuing inability to reassign cases to less burdened attorneys. Nonetheless, *Hinkebein* serves as a warning to Missouri public defenders: Even the hard-working and highly motivated defender who continues on in the face of an excessive caseload faces the possibility of sanctions for ethical violations – sanctions that will not be mitigated by the public defender's excessive caseload. Public defenders are “risking their professional lives,” indeed.

305. See generally ABA, MO PUBLIC DEFENDER CASELOAD RELIEF EFFORTS TIMELINE (2012), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/02/annual_summit_onindigentdefenseimprovement/ls_sclaid_annual_review_gross_mo_pub_def.authcheckdam.pdf.