Chester County lawyer Samuel C. Stretton. Courtesy photo

EXPERT OPINION

Ethics Forum: Questions and Answers on Professional Responsibility

I am a lawyer employed by the Public Defender's Office in one of Pennsylvania's counties. My office is extremely overworked. Many of the lawyers have left and have not been replaced. The caseload is impossible. What are my duties and responsibilities?

October 07, 2021 at 11:19 AM

14 minute read

By Samuel C. Stretton

The rules are very clear that a lawyer cannot handle more cases than they can do so competently.

I am a lawyer employed by the Public Defender's Office in one of Pennsylvania's counties. My office is extremely overworked. Many of the lawyers have left and have not been replaced. The caseload is impossible. What are my duties and responsibilities?

The question is an interesting and timely one. This column in the past has discussed problems with court appointed and public defenders offices and the ethics of many of the policies that have been accepted in Pennsylvania. For instance, there is no question that court-appointed counsel who just receives a flat fee for an unlimited number of cases are in a total conflict of interest with their court-appointed clients. A flat fee of $3,000 or $3,200 per month, which does not include overhead, and where there is no cap on the number of cases the lawyer handles is just absolutely unethical. It puts the lawyer in a total conflict with a client. A lawyer cannot go to trial on all of those cases. It is in the lawyer's interest to work things out, but it might not be in the client's. Public defender's offices have many of the same problems. It is just not as obvious as the flat fee conflict with sometimes 100 or more cases assigned to court-appointed counsel in the counties.

Philadelphia has a graduated fee system where the attorney gets a flat rate for preparation or trial, and flat per diem fees for days of trial. Philadelphia fees are grossly inadequate and there are usually long delays before payment. Many lawyers have continued to accept court-appointed cases because they feel obligated to do so, but it is not a good system.

The legacy of *Gideon* has now been lost. The U.S. Supreme Court had ordered and found that the right effective assistance of counsel applies also to the state trails and therefore granted Clarence Earl Gideon a new trial. This decision resulted in the creation of modern public defender's offices and conflict counsel offices. The legacy of *Gideon* has been lost when these systems are totally underfunded and become a numbers game where there truly are barriers to effective legal representation.

Despite criminal defendants' opinions to the contrary, many public defenders are some of the best criminal trial lawyers in Pennsylvania. The Philadelphia Public Defender's Office is a classic example of some of the most wonderful trial lawyers and appellate lawyers around. But there has to be adequate funds to continue effective representation. Without adequate funds, good experienced trial lawyers will start to leave as has happened in many counties. Unfortunately, the last thing county or city governments want to do is pay for criminal defense. For many years, this writer and others have argued that the court-appointed and public defender system should be uniform statewide and be funded statewide. It should not be funded by individual counties, many of which have great disparities in rates of payment, caps, etc.

As a result of being underfunded, many times public defender's offices in the counties and in the cities become pretty much a guilty plea machine. That is not a good system. This writer remembers in Lebanon County in the past, he would come to hearings and see lines of people in the hallways. When he inquired what was going on, he was told it was all criminal defendant listed. They were in a line and they would meet with a district attorney who would hand them their discovery and tell them their plea offer. They would tell them their plea offer was good for that day. If they accepted it, they went into the courtroom and there were mass guilty pleas taking place of sometimes 100 to 200 people at a time. They did not have private counsel. Obviously, that is unconstitutional and a totally unethical system, and also violates the right to counsel. But that was how the system was being utilized. Gideon would turn in his grave as would his lawyer, Abe Fortas.

Sometimes, there has to be litigation. This author remembers back in the early 1990s, the Berks County Public Defender's Office had just a room for the defenders. There was an order by the president judge at the time that defenders couldn't use the law library. The law books in their office were years behind. They had no filing or tracking system and were regularly missing appellate deadlines. They would go to preliminary hearings, which were scheduled a minute and a half apart. That resulted in the waiver of most preliminary hearings. On the morning of trial, the defender would be given the discovery and an offer to go down and tell the client. If the client rejected it, they went to trial, and the defenders comment usually would be, it is up to the client to bring their witnesses in. A suit was filed and there was a settlement where the defenders got a real office and use of the law library. Also, the preliminary hearings were then scheduled for 15 minutes per preliminary hearing. Litigation, at times, is necessary for change.

What has to be done by public defenders or court-appointed counsel is they have to refuse cases. They have to refuse taking cases or tell their employer that they can't handle anymore at this point in time. That is obviously a risky business because usually public defenders or assistant public defenders, at least in smaller counties, are not unionized and don't have a contract. Therefore, they are employees at will and subject to being terminated by either the county commissioners or by the chief public defender. Whether one is a public defender or court-appointed counsel, the ethical duties still remain the same. Lawyers can't prejudice their clients by their own conflict. They have to provide their client good representation. They can't miss deadlines. They can't give an excuse that they are just a public defender and getting a low rate of pay. That does not cut it. Court-appointed counsel and defenders are held to the same ethical standards as private counsel.

Clearly, the statewide public defenders organization and the Pennsylvania Criminal Defense Lawyers Association should start to deal with this issue of too many cases because it is getting rather extreme. To answer the current question, a lawyer has an obligation to do the right thing and the right thing is not to keep taking cases where one does not have the resources or time to handle them. A person who has an active trial practice is not going to be able to handle 100 to 200 files without doing a disservice to his client.

Under Rule 1.16 of the Rules of Professional Conduct titled "Declining Terminating Representation," a lawyer shall not represent a client if the representation will result in a violation of the Rules of Professional Conduct. Clearly, if one can't be diligent, have the time to prepare, and be competent, a lawyer then should not take on any new cases.

There are specific rules also about court appointments and handling them. In days of old, every lawyer in the county was required to take court appointments. Of course, it was easier then because most people had general practices and tried everything. In this modern world, most lawyers specialize and do not have a general practice. Therefore, most lawyers don't do court appointments or work as public defenders and only a small percentage of lawyers who do carry the entire burden of the bar. Under Rule of Professional Conduct 6.1, a lawyer is encouraged to provide voluntary pro bono type of legal representation. That is a nice theory, but not often followed and practiced. Under Rule 6.2 about accepting appointments, the rule states a lawyer shall not seek to avoid

appointments, and if appointed shall represent a person except for good cause. Examples of good cause are when representing a client that would likely result in a violation of the Rules of Professional Conduct, or representing a client that is going to place an unreasonable financial burden on the lawyer, or representing a client whose case is so repugnant to the lawyer that it would impair the attorney-client relationship. It is interesting to note the ethical rules still don't reflect the modern era of massive caseloads and terribly underfunded defender and court-appointed programs. Nowhere in there is a provision to be able to withdraw if they are given too many cases.

Comment 2 to Rule 6.2 does state the following. In terms of requesting to withdraw or not take a case, "Good cause exists if the lawyer could not handle the matter competently—or if undertaking the representation would result in an improper conflict of interest, for example when a client or the cause is so repugnant to the lawyer as to be likely to impair the attorney-client relationship or the lawyer's ability to represent the client." Comment 3 to Rule 6.2 discusses court-appointed counsel and defenders and states, "An appointed lawyer has the same obligation to the client as retained counsel, including the obligation of loyalty and confidentiality and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules." The Rules of Professional Conduct, of course, require diligence in representation under Rule 1.3, proper communication and regular communication with a client under Rule 1.4; and competency in representation under Rule 1.1.

One of the other problems often seen is the disparity between the budgets for district attorneys or other prosecution offices as opposed to public defender offices and conflict counsel offices or jobs. The disparity is usually fairly substantial.

The Rules of Professional Conduct are very clear that a lawyer cannot handle more cases than they can do so competently.

The only way things are going to change is when lawyers stand up. It is easy for a county to pick off or punish individual lawyers. True reform has to be done by the statewide public defenders organization or organizations like the Pennsylvania or National Association of Criminal Defense Lawyers. At some point, individual lawyers have to stand up or they have to collectively go out and hire a lawyer to file a suit as did the Berks County public defender 30-plus years ago when this writer was retained to file the suit in federal court.

Unfortunately, criminal law has become a numbers game. It is numbers that count. How many cases has a judge moved on the criminal side, how many cases has an office moved, how many guilty pleas are there? The system doesn't respect how fair, knowledgeable, or good the judge or the lawyers are, or things of that nature. A judge who has good numbers, meaning they moved a lot of cases, will be well-rewarded within the system. That may mean that they are not being fair, but that doesn't count anymore. Only good disposition numbers mean anything.

It is an unspoken dirty secret that each county recognizes they are underfunding their indigent defense. Many competent and good lawyers carry the burden without complaint, but it is not fair and right, and even competent good lawyers are limited if they have too many cases and not enough resources to do them properly. Further, these court-appointed lawyers are often taken to the Disciplinary Board and rewarded for their efforts by a suspension.

Therefore, lawyers should stand up or organizations stand up, but the ultimate and really only true solution that is going to work is for Pennsylvania to finally adopt a statewide funding system, a statewide public defender's office, and a court-appointed system where there is uniformity and statewide funding. The time is now to make the change so the purpose of *Gideon* can become alive again.

A judicial candidate can go to political functions and can speak during the election year.

I am a candidate for judge. Can I go to events and rallies such as women's marches, either for abortion or against abortion, or similar types of matters, or am I prohibited?

Because Pennsylvania elects their judges, the Code of Judicial Conduct has an exception for involvement with political activities. A judicial candidate can go to political functions and can speak, etc. This is only during the year of their election. In fact, in Pennsylvania, it starts the day after the general election of the year before the judicial elections and continues until Dec. 31 of the election year.

A judge has to be careful when they go to campaign in related events not to in any way suggest how they would decide cases. The best answer is always whatever one's philosophical beliefs might be, the judicial candidate will follow the law. Rule 4.2 notes for political campaigns, a judge has to always act consistent with the independence, integrity, and impartiality of the judiciary. Under Rule 4.2(b), a candidate for elective judicial office should establish a campaign committee, speak on behalf of his or her candidacy, purchase tickets for political events, accept endorsements, and contribute to political organizations. Under 4.2(c), a judge who is a candidate for political office cannot use campaign contributions for their private benefit or use their court staff if they are already a judicial officer for campaign purposes, or make false statements, or make any statement that would affect the outcome or impair the fairness of a matter pending in any court.

To run an effective campaign, there is nothing wrong for a judicial candidate to go to political events. In fact, if one did not go, it would raise questions and also most likely contribute to the defeat of a candidate if there was any other valid opposition. A judicial candidate has a right to be present and a right to be aware of what is going on in the community and to listen and learn. A judicial candidate can participate in marches, but a judicial candidate cannot tell how they would vote or decide cases that come before them. Some judicial candidates have been under the misimpression that they can't go to political events. They certainly can and should if they want to get elected.

Although, in this modern age, many people have criticized the elected judicial office, it is still an excellent way to staff the judiciary. Elections do put more burden on voters to learn about who they are voting for, but elections allow good and competent lawyers to run who would never have a chance if it was all were appointed or all were part of an old-boy or old-girl system, or just a pure political system. Elections allow for a good and diverse and usually very knowledgeable judiciary. Without elections, one would never know why and how some people were appointed and other people never would be. At least in an elective system, lawyers have a chance to become a judge if they work hard and have the good skills. In an appointed system unless one knows someone, the chances of getting an appointed judgeship without some major political mentor is very slim. Finally, the election requires a judicial candidate to knock on doors and meet the citizens. This process broadens the candidate's understanding of their community and gives the candidate better insight into the people. All of this contributes to making a better judge.

Chester County lawyer **Samuel C. Stretton** *has practiced in the area of legal and judicial ethics for more than 47 years. He welcomes questions and comments from readers. If you have a question, call Stretton directly at 610-696-4243 or write to him at 103 S. High St. P.O. Box 3231, West Chester, Pennsylvania, 19381.*

October 21, 2021

'Nobody Asked Me, But ...' My Thoughts on Legal Ethics, Practice Management

By Daniel J. Siegel

9 minute read

REGULATION | ENFORCEMENT

Compliance Hot Spots

This week, we break down the latest developments in compliance, enforcement and government affairs, reporting on what regulators are up to and arming in-house counsel and their outside partners with the insight to obtain better outcomes.

By Andrew Goudsward

October 19, 2021

Personal Injury Lawyer Who 'Lost His Compass' Sentenced to Federal Prison, $1.6M Restitution

By Katheryn Hayes Tucker

3 minute read

November 02, 2021

Defense Counsel Hit With Sanctions by Lackawanna Judge Alleges Preferential Treatment for Plaintiffs Counsel in Crash Case

By P.J. D'Annunzio

3 minute read

YOUR GUIDE TO THE LATEST JUDICIAL NEWS

Bench Report

What's happening with judges across the country, from the opinions they're writing to the rules they're facing, and the scrutiny they may (or may not) be under? This week, Jacqueline Thomsen delivers the latest on judicial trends, including who might be next to sit on the bench and what's in store for the future of the judiciary.

By Jacqueline Thomsen

Partner Moves to Davis Polk

THE AMERICAN LAWYER

Law Firm Profit Metrics Still High, but Talent War 'Boiling Point' Nears

THE AMERICAN LAWYER

Survey Suggests the Path to Law Firm Partnership Is Getting Longer

THE AMERICAN LAWYER

More From ALM

CLE Center

Premium Subscription

With this subscription you will receive unlimited access to high quality, online, on-demand premium content from well-respected faculty in the legal industry. This is perfect

Team Accounts

Our Team Account subscription service is for legal teams of four or more attorneys. Each attorney is granted unlimited access to high quality, on-demand premium

Bundle Subscriptions

Gain access to some of the most knowledgeable and experienced attorneys with our 2 bundle options! Our Compliance bundles are curated by CLE Counselors and include

for attorneys licensed in multiple jurisdictions or for attorneys that have fulfilled their CLE requirement but need to access resourceful information for their practice areas.

View Now

content from well-respected faculty in the legal industry along with administrative access to easily manage CLE for the entire team.

View Now

current legal topics and challenges within the industry. Our second option allows you to build your bundle and strategically select the content that pertains to your needs. Both options are priced the same.

View Now

Go to CLE Center