



**REPORT OF THE
KENTUCKY BAR ASSOCIATION
TASK FORCE ON THE PROVISION AND COMPENSATION
OF CONFLICT COUNSEL FOR INDIGENTS**

November 3, 2011

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KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents

Introduction

On November 3, 2011, the membership of the *KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents* passed a Resolution adopting the following Statement, Findings and Recommendations to be disseminated to the public, the Governor and the Kentucky General Assembly for consideration and action.

The importance of conflict-free counsel

It is axiomatic that counsel provided to indigent defendants must be conflict-free and properly compensated in order for justice to be achieved.

The right to legal representation is a core value of the American and Kentucky Bar Associations. Each Association has the goal of promoting meaningful access to legal representation and to the American system of justice for all persons regardless of their economic or social condition. Providing full and effective legal representation to the indigent improves the system of justice in the United States, promotes standards of professionalism and enhances public perception and confidence in the courts and the quality of justice rendered by the court system.

Justice and public safety require the provision and compensation of counsel

Both justice and public safety are advanced by the provision and compensation of counsel for indigents. According to the decision in *Bradshaw v. Ball*, 487 S.W.2d 294 (1972), rendered by the highest court in Kentucky nearly forty years ago, attorneys cannot be appointed to represent indigent defendants without compensation under Kentucky's Constitution. It is the obligation of the state to provide counsel for indigents. In short, the state has the choice of "not prosecuting indigents or of providing compensation for appointed counsel." *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970). Failure to provide effective assistance of counsel in compliance with these decisions, and with the state and federal constitutions, risks costly appeals and retrials due to unjust, unreliable verdicts and, worse, the wrongful conviction of innocent defendants and consequent failure to apprehend and punish the actual perpetrators of crimes. Neither the interests of justice nor public safety are served in such circumstances.

Properly structured and funded plans for the provision of conflict counsel are critical

The minimum requirements of national standards oblige the Commonwealth to improve the current system for providing counsel for indigents in conflict cases and increase the resources necessary to retain the services of competent, well-trained attorneys to handle such cases.

The American Bar Association's *Ten Principles of a Public Defense Delivery System* (2002) contain the most widely accepted and cited standards for the establishment and administration of public defense systems in the country. U.S. Attorney General Eric Holder termed the ABA's ten principles the "basic building blocks" of a properly functioning public defense system.

Fixed-fee contracts have been determined to be ethically problematic, see *American Ins. Ass'n v. KBA*, 917 S.W.2d 568 (Ky. 1996), and they are inconsistent with ABA standards. The eighth of

the ABA Ten Principles states, “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload [and] provide an overflow or funding mechanism for excess, unusual, or complex cases.”

The situation in Kentucky is inconsistent with these standards and in dire need of reform and increased resources and financial support. Unless the current system for the provision and compensation of conflict counsel is addressed and improved, the quality of justice in our courts will suffer, and the needs and interests of judges, prosecutors, victims and the indigent accused will be jeopardized.

Our responsibility to our system of justice

We have a significant professional responsibility to work to advance equal access to justice, especially for the poor:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

SCR 3.130 Kentucky Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, VII.

The overarching intent and purpose of the *KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents* is to improve the administration of justice in the courts of the Commonwealth of Kentucky. In that regard, it is especially important to guarantee that there is equal justice for the poor and that due process is ensured by competent, conflict-free counsel. The following Findings are the result of a comprehensive review of Kentucky's current system for providing counsel to indigents in conflict cases, and our Recommendations reflect necessary reforms and improvements that are in keeping with recognized standards and best practices. It is hoped that the Task Force's findings and recommendations will be reviewed, accepted, adopted and acted upon by the executive and legislative branches, and promptly implemented in the court system.

KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents

Findings

1. KRS Chapter 31 assigns the Department of Public Advocacy (DPA) and the Louisville-Jefferson County Public Defender Corporation responsibility for providing representation in all indigent defense cases.
2. The Kentucky Rules of Professional Conduct require DPA and the Louisville-Jefferson County Public Defender Corporation to provide conflict-free counsel to clients they are appointed to represent.
3. When a client has a waivable conflict, and then knowingly and voluntarily waives a conflict pursuant to RCr 8.30, DPA and the Louisville-Jefferson County Public Defender Corporation can ethically assign attorneys within the same office to represent multiple clients.
4. When a client does not waive a conflict pursuant to RCr 8.30, or when the conflict is not waivable, DPA and the Louisville-Jefferson County Public Defender Corporation must either contract with private counsel or represent the client from a separate work unit or adjoining office where there is independent supervision and an assurance of confidentiality.
5. Representing clients from a separate work unit or an adjoining office has the advantage of counsel having access to full-time support staff, including investigation; but the ongoing, unresolved ethical problem faced by DPA of more cases being handled by staff attorneys whose caseloads are already at a level above the ethical limit is real as indicated by an American Bar Association's May 13, 2006 Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*, found at: http://www.abanet.org/cpr/06_441.pdf
6. In FY 11, Kentucky defenders handled 7,276 conflict cases with 3,563 contracted out to private conflict counsel at an average compensation per conflict case of \$406, with 526 cases handled by an adjoining office and 3,187 handled internally with waivers.
7. DPA currently places the responsibility for seeking conflict contracts with the directing attorneys of field offices for the counties that office covers.
8. Absent an exemption from the KRS Chapter 45A personal services contract procedures, DPA is not able to timely meet its responsibility to respond to court appointments and its clients by complying with the bidding provisions KRS Chapter 45A.
9. Current total compensation for conflict cases statewide is approximately \$1.4 million. That amount is likely to increase with corresponding increases in caseload and multiple defendant prosecutions; Louisville-Jefferson County went over budget last year.
10. The Department of Public Advocacy and the Louisville-Jefferson County Public Defender Corporation do not have sufficient funding or resources to properly compensate private contract counsel to provide conflict representation; nor do they have the capability of providing conflict-free counsel in all appointed cases as required by the Rules and applicable law.

Recommendations

A. Funding

1. The Kentucky public defender system cannot perform its necessary role and function in the criminal justice system without a significant increase in funding. The courts, the public, and defender clients cannot be properly served as required by applicable law and governing rules.
2. A cooperative relationship between defenders and private criminal defense attorneys should continue to ensure clients receive competent representation in conflict cases and to ensure that the courts render valid and reliable results in a timely and fair manner.
3. Sufficient funding must be provided to ensure DPA provides adequate compensation to allow attorneys the time and resources necessary to competently represent their contracted clients in capital and noncapital cases.
4. In contracting with private counsel to handle a conflict case, counsel must be compensated in an amount reasonably sufficient to provide incentive to render the “effective assistance of counsel” contemplated by the Sixth Amendment of the Constitution of the United States. “Reasonableness” is determined by the complexity of the case, the nature of the charges, the time spent in investigating, preparing and trying a case, the experience of the litigator, and other factors.
5. DPA should eliminate hard caps on conflict contracts.
6. Professional development should be a funded requirement of a contract with conflict counsel.
7. An additional \$5.2 million per year should be provided to DPA to provide reasonable compensation without hard caps as follows (full description in Appendix):

Case type	Hourly Rates
Capital Cases	\$125
A or B Felonies	\$100
C Felonies	\$100
D Felonies	\$100
Misdemeanors	\$75
Juvenile Cases	\$75

Case type	"Soft" Caps
Capital Cases	\$50,000
A Felonies	\$10,000
B Felonies	\$7,500
C Felonies	\$5,000
D Felonies	\$2,500
Misdemeanors	\$1,000
Juvenile cases	\$1,000

Mandatory training (at no cost to conflict counsel): \$72,100

B. Structure and Statute

1. DPA should create a conflict contract division that has responsibility for:
 - a) Seeking qualified local attorneys to enter into contracts for conflict case representation; and
 - b) Ensuring the professional development and oversight of conflict counsel.
2. DPA conflict contracts should be statutorily exempt from the KRS Chapter 45A contract process because otherwise DPA cannot promptly provide counsel pursuant to court order as required.

DPA Conflict Counsel Proposal

Proposal: Replace the current system of mostly "flat-rate" contracts with a system that pays an hourly rate with a soft cap and that requires ongoing training for participating attorneys that is provided by DPA. Hourly rates and the soft caps will vary depending on the severity of the case, ranging from misdemeanors and juvenile cases to capital cases. Oversight and coordination of the system would be done by a Division-level Director to improve efficiency and consistency statewide. Funding to be provided to the Louisville Metro Public Defenders's Office to implement the plan is included in the estimates below.

Non-Trial Cases **\$5,403,175**

For purposes of this proposal, it is estimated that 95% of cases will end without going to a jury trial or extended litigation. For these cases, results of a survey of conflict attorneys were used to determine the average number of hours expected to be spent on a non-trial case. The results of the survey were consistent with caseload standards of the National Advisory Commission on Criminal Justice Standards (no defender should handle more than 400 misdemeanors, 150 felonies, or 200 juvenile cases in a year).

	Hourly Rates	Hours Per Case	Cost/Case
Capital Cases	\$125	166	\$20,750
A or B Felonies	\$100	25	\$2,500
C Felonies	\$100	15	\$1,500
D Felonies	\$100	10	\$1,000
Misdemeanors	\$75	5	\$375
Juvenile Cases	\$75	6	\$450

Trial Cases **\$944,500**

For the 5% of cases that are estimated to end in a jury trial or extended litigation, it is projected that the average cost will likely be the cap, with the number of cases approved to exceed the cap roughly equal to the number of cases where the total still falls short of the cap.

	"Soft" Caps		"Soft" Caps
Capital Cases	\$50,000	D Felonies	\$2,500
A Felonies	\$10,000	Misdemeanors	\$1,000
B Felonies	\$7,500	Juvenile Cases	\$1,000
C Felonies	\$5,000		

Mandatory Training Provided at No Cost **\$77,250**

Training would be required as part of a conflict contract and DPA would provide the training at no cost to the participating attorney. Listed below are seminars that are part of DPA's regular educational calendar along with the cost to DPA for providing the education. If an attorney participated in all 5 events, the cost would be more than \$1500. There are approximately 150 conflict attorneys currently. The estimate is based on an assumption that all 150 attorneys attend the annual conference and one other educational event.

	Length	Costs/Atty		Length	Costs/Atty
District Court	5 days	\$350	Annual Conference	2 days	\$165
Circuit Court	5 days	\$350	Death Penalty	5 days	\$350
Practice Institute	5 days	\$350			

Administration and Oversight of Program **\$280,000**

Rather than continue a system where each local office negotiates separate conflict contracts, DPA would employ a division director to oversee and negotiate contracts within the system. In addition to improving consistency and efficiency, this would also avoid the possible appearance of conflict arising when the office that has the conflict chooses the conflict attorney and his compensation. The Louisville Metro Public Defender's office will establish a similar independent division within its office to handle conflicts cases and accomplish the same objectives.

Estimated Total Cost of Proposal: **\$6,704,925**

Additional Funding Needed: **\$5,254,925**