

KENTUCKY BAR ASSOCIATION

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December 20, 2103

Governor Steve Beshear
Commonwealth of Kentucky
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601

Dear Governor Beshear:

The Kentucky Bar Association ("KBA") remains concerned about a serious problem that occurs daily in the Courts in this Commonwealth. This concern is about conflicts that occur when the Department of Public Advocacy is called upon by a court to provide a defense for two or more indigent defendants charged with crimes arising out of the same incident. The Public Advocacy office serving the judicial district can only represent one of the indigent defendants. Thus, the court must look to the Public Advocacy office in another judicial district to find a lawyer for representation of the other indigent defendant.

This causes delay in the judicial system processing the case to a conclusion which in turn denies justice to both the defendant and the Commonwealth.

The availability of conflict counsel in the judicial district having jurisdiction over the case solves the conflict and leads to the prompt and constitutional administration of justice. However, the problem that frequently arises is that there is an absence of attorneys willing to serve as conflict counsel in the jurisdiction. The reason there is this absence is because the amounts available for payment to conflict attorneys are so small as to not attract competent attorneys willing to serve as conflict counsel.

The amounts now payable are:

- Misdemeanors - \$250 fixed fee
- Felonies - \$500 fixed fee

Most cases contracted out are felonies. The average of all the cases contracted out was \$384 in FY13.

The amounts needed to attract competent counsel are:

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

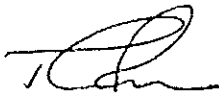
Case type	"Soft" Caps
Capital Cases	\$50,000
A Felonies	\$10,000
B Felonies	\$7,500
C Felonies	\$5,000
D Felonies	\$2,500
Misdemeanors	\$1,000
Juvenile Cases	\$1,000

Thus, the additional sum needed to correct this constitutional deficiency is \$5,682,375 annually. Attached is a memorandum showing how the current conflict system is unconstitutional. The failure to address this problem is likely to lead to litigation in the future.

Please consider including the budget submitted to the 2014 General Assembly an amount of \$5,682,375 each year of the biennium necessary to fund this constitutional need.

Members of the KBA Task Force will be pleased to meet with you to discuss this matter further.

Sincerely,



Thomas L. Rouse
President, Kentucky Bar Association



William E. Johnson
Committee Chair

Memorandum

Kentucky's current conflict system is unconstitutional and vulnerable to disruptive legal challenge

Lawyers employed in the circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so. *In re Formal Advisory Opinion 10-1*, 744 S.E.2d 798, 800 (GA 2013). "We realize that the professional responsibility of lawyers to avoid even imputed conflicts of interest in criminal cases pursuant to Rule 1.10(a) imposes real costs on Georgia's indigent defense system, which continually struggles to obtain the resources needed to provide effective representation of poor defendants as the Constitution requires. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). But the problem of adequately funding indigent defense cannot be solved by compromising the promise of *Gideon*."

Flat fee arrangement in capital case was a conflict of interest that adversely affected the client requiring a reversal of the convictions. *State v. Cheatham*, 292 P.3d 318, 340-41 (KS 2013).

Attorney represented two codefendants who had adverse interests in forged check case; later, pleading defendant was a witness in trial of the non-pleading defendant. Attorney publicly reprimanded and assessed costs of \$2,395.23. *Mattingly v. KBA*, 364 S.W.3d 171 (KY 2012).

In *Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa 2010), the Court determined that a "fee limitation," or a "hard-fee cap" on the amount paid to a conflict attorney handling a public defender-assigned appellate case impermissibly undermined the right of indigents to effective assistance of counsel, and if enforced, would cause a "substantial chilling effect" on the constitutional rights of criminal defendants. Hence, the fee limitations were struck down. The court's logic was that: a) the state has an obligation to pay for the cost of representation of an indigent person, b) each defendant has a right to an effective lawyer, and c) fee limitations could compromise the effectiveness of a lawyer.

Though Kentucky courts have not passed upon the validity of the fee caps in DPA contracts, the KBA has opined that "set fee" arrangements in the insurance defense context violate Kentucky's Rules of Professional Responsibility. See KBA E-368. The Kentucky Supreme Court affirmed that opinion, noting that such an arrangement allows "the insurer to constrain counsel for the insured by, in effect, limiting the defense budget—a practice that Respondent cautioned, in E-331, could create ethical problems similar to those herein." *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568, 572 (Ky. 1996). Consequently, there is a concern that the fee "cap" – which contains many of the same elements that concerned the Kentucky Supreme Court, may eventually be found to be unethical.

Finding \$20-25/hour with \$1,000 cap too low: "Perhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.... Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted." *Jewell v. Maynard*, 383 S.E.2d 536, 540, 544 (W.Va. 1989).



Kentucky Association of Criminal Defense Lawyers

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December 6, 2013

Governor Steve Beshear
Commonwealth of Kentucky
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601

RE: SUPPORT FOR THE PROVISION AND COMPENSATION OF CONFLICT COUNSEL FOR INDIGENTS

Dear Governor Beshear:

We urge you in your 2014 biennial budget request to the General Assembly to support the November 29, 2011 Findings and Recommendations of the *Kentucky Bar Association's Task Force on the Provision and Compensation of Conflict Counsel for Indigents* by providing a request for sufficient funding to ensure adequate compensation to allow attorneys the time and resources necessary to competently represent their contracted indigent clients in capital and noncapital cases.

The Department of Public Advocacy paid an average of \$384 in FY 13 for the 3,858 cases it contracted out to local private criminal defense lawyers across Kentucky. This level of funding is constitutionally inadequate. As important, this level of funding inhibits the timely, efficient processing of criminal cases to resolution. Such inefficiency increases costs on counties who must pay for lengthier incarcerations in their jails while cases await final disposition.

Kentucky remains vulnerable to legal action, which have been successful in other states, challenging the constitutional adequacy of both the level of funding and the fixed cap. In *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970) Kentucky's highest court recognized that "[s]ince the providing of counsel for indigent defendants in criminal prosecutions in the state courts is an obligation imposed on the state by the constitutions it would appear that the payment of reasonable compensation to such counsel would be in the category of an essential governmental expense," and that "it would seem that the state would be left with the choice either of not prosecuting indigents or of providing compensation for appointed counsel."

We understand the limits of available funding. However, this is a problem that has a considered recommended solution that is better addressed through increased funding rather than disruptive legal challenges.

Sincerely,


Larry D. Simon