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Public Safety at Risk: Caseload Relief Needed to Keep the System from Unraveling

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Kentucky public defender caseloads are at levels that are unethically high and risk public safety. Reducing caseloads will keep the criminal justice system from unraveling.

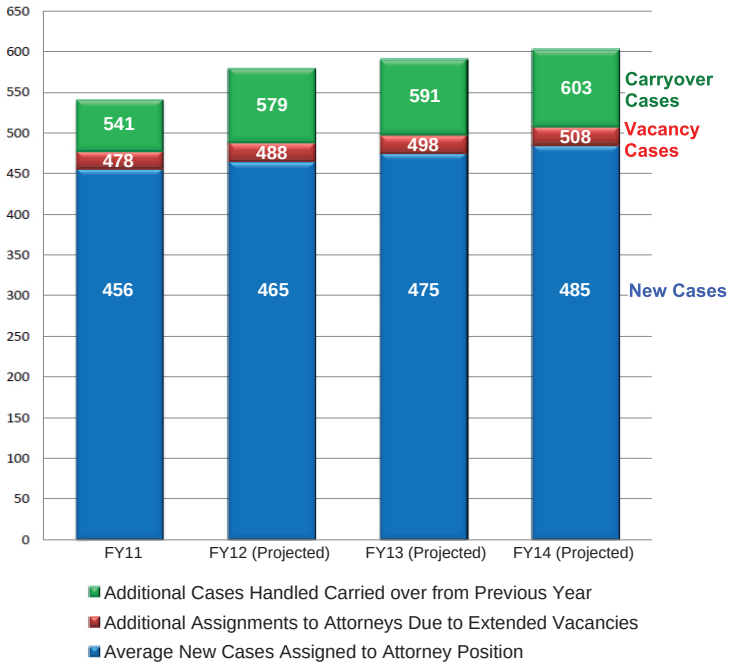
Public defenders play a vital role to the system by providing representation to indigents who have their liberty at risk, protecting public safety by ensuring accuracy in the criminal justice system, and insuring that cases can proceed in compliance with the constitutional mandate of counsel. Our choice is clear: "the state either must see that a defendant is provided counsel or it cannot proceed with a prosecution." *Pillersdorf v. DPA*, 890 S.W.2d 616, 618 (KY 1995). The defender's vital role is threatened when they do not have sufficient time to perform effectively because of excessive caseloads.

Caseload levels impair competent and ethical representation. Lawyers with too many cases are not able to properly interview and adequately communicate with their clients, file and raise necessary motions, conduct fact investigations, challenge questionable evidence, interview relevant witnesses, act diligently, research legal issues, and provide informed legal advice. The thoroughness and preparation necessary for competent representation cannot be provided to every client when the lawyer has too many cases.

While funding for DPA fell 1.5% in FY11 and 2.5% in FY12, caseloads are rising at an average of 2% each year. In FY11, public defenders were appointed to 155,170 trial and post-trial cases statewide. Trial public defenders opened an average of 456 new cases.

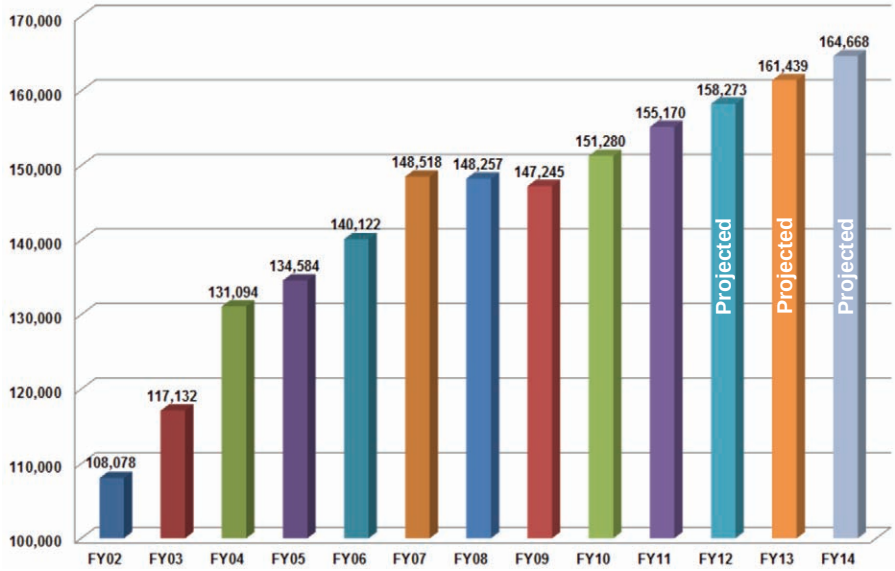
In FY12, the projected newly opened cases per attorney is 466. With the staffing reduction caused by the FY12 budget cut of 2.5%, FY12 actual caseloads will effectively be at 488 cases per attorney. Annual overall DPA cases are projected to rise to 164,668 by the final year of the coming biennium. Without an increase in staffing, caseloads will rise to more than 500 new cases per attorney per year.

Average Defender Caseloads Per Attorney Fiscal Years 2011-14



This unethical level of cases has other consequences. It will undermine the capacity of defenders to fully play their unique role in fighting for full implementation of HB 463. The 2011 penal reform legislation, HB 463, is 150 pages of important policies intended to reduce incarceration costs in order to protect our state's fiscal security. Good criminal justice ideas do not implement themselves especially when there are judges and prosecutors who disagree with them. Public defenders are critical to the full implementation of HB 463 the way the General Assembly intended.

Total Defender Cases Fiscal Years 2002-14



Adequate Funding Sought for Proper Representation of Indigents in Conflict Cases

KBA Board of Governors Calls for Improvements in the Provision and Compensation of Conflict Counsel for Indigents

William E. Johnson
Johnson, True & Guarnieri
Chair, KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents

Margaret E. Keane
President,
Kentucky Bar Association

Additional funding is needed to allow for increased compensation of private attorneys who are willing to take cases where a defendant has a constitutional right to conflict-free counsel and DPA's local office is ethically prohibited from representation.

The Kentucky Bar Association (KBA) Board of Governors unanimously adopted a resolution at its November 18, 2011 meeting endorsing findings and recommendations that call for the Governor and the Kentucky General Assembly to improve the system for the representation of indigents in conflict cases.

The nine recommendations relate to the funding and structure of the system, including allocation of an additional $5.2 million to implement changes that will bring the system into compliance with the ethical and constitutional requirements of the Kentucky Supreme Court and with the professional standards set out by the American Bar Association. In September, 2011, KBA President Margaret E. "Maggie" Keane appointed a special KBA task force comprised of bar leaders, current and former judges, current and former legislators, a former Commonwealth's Attorney and public defenders, in response to concerns expressed by many members of the bench and bar regarding chronic problems in cases involving conflicts and the appointment of counsel. The *KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents* was asked to review those concerns, study the system and make recommendations that would improve the administration of justice in the courts of the Commonwealth of Kentucky.

The report produced by the task force emphasized that it is important to guarantee that there is equal justice for the poor and that due process is ensured by competent, conflict-free counsel. Its findings, which resulted from a comprehensive review of Kentucky's current system for providing counsel to indigents in conflict cases, indicated significant problems and serious deficiencies. Its recommendations reflect reforms and improvements necessary to correct those issues in keeping with recognized standards and best practices.

William E. "Bill" Johnson, a prominent criminal defense lawyer who chaired the Task Force and is a member of the Frankfort law firm of Johnson, True and Guarnieri, agreed, saying "both justice and public safety are advanced by the provision and compensation of conflict counsel for indigents. Our recommendations are common sense steps to bring reform to a system that is currently inadequate in its compensation levels. We are also recommending improvements in the structure used to provide conflict counsel. Additional funding of $5.2 million is needed to properly accomplish those objectives. We presented these recommendations in person to the Governor in December 2011. We look forward to presenting them to legislative leaders."

KBA President Keane said, "it is axiomatic that counsel provided to indigent defendants must be conflict-free and properly compensated in order for justice to be achieved. As an integrated bar representing all Kentucky lawyers, the Kentucky Bar Association is interested in improving access to qualified lawyers and obtaining just results for all parties in criminal cases. By forming this task force, conducting this study and facilitating discussion of problems and solutions, the KBA hoped to promote professionalism and provision of the funding necessary for a proper conflict representation system. It is our responsibility as lawyers and officers of the court to take a leadership role and work toward that end, and we have resolved to do so."

National standards require Kentucky to address the current ethical and financial problems with the conflict system. The Kentucky Association of Criminal Defense Lawyers endorsed the recommendations in a November 29, 2011 Resolution stating, "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." The KACDL Resolution quoted the eighth of the ABA Ten Principles which 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."

In *Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa 2010), the Supreme Court of Iowa 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.

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

Julia H. Adams, Retired Judge, 25th Judicial Circuit
Michael D. Bowling, Former Chair, House Judiciary Committee
Jerry J. Cox, Chair, Kentucky Public Advocacy Commission
Charles E. (Buzz) English, Jr., Past-President, Kentucky Bar Association
Jeff Hoover, Minority Floor Leader, Kentucky House of Representatives
William E. Johnson, Chair, Johnson, True & Guarnieri
Margaret E. "Maggie" Keane, President, Kentucky Bar Association
W. Douglas Myers, President-Elect, Kentucky Bar Association
Lewis G. Paisley, Retired Judge, 22nd Judicial Circuit
Phillip R. Patton, Circuit Court, 43rd Judicial Circuit
Daniel T. Goyette, Chief Public Defender, Louisville-Jefferson County Public Defender Corp.
Edward C. Monahan, Public Advocate, Department of Public Advocacy

The Task Force Report and the KBA Board of Governors resolution is at www.kybar.org.

Though Kentucky courts have not passed upon the validity of the fee caps in DPA contracts, the Kentucky Bar Association 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.

Social Workers Save $100,000 in Incarceration Costs

Through its alternative sentencing social worker program, public defenders can provide significant assistance in reducing incarceration costs and recidivism.

The Governor's and General Assembly's leadership on reducing the increase in incarceration costs is significant. House Bill 463 is good legislation with clear intent of realizing gross savings of $422 million and net savings of $218 million over 10 years. However, good ideas do not implement themselves. DPA stands in a position within the criminal justice system to play a key role in advancing the implementation of HB 463 in a way to achieve its forecasted savings.

DPA social workers develop and present evidence-based individualized alternative sentencing plans to the court as options to incarceration. Persons who would normally be jailed or imprisoned instead serve their sentence in treatment in the community with more effective and less costly outcomes. These alternatives to incarceration decrease jail and prison costs and recidivism. They advance a more efficient and effective justice system. If it is further funded, it will provide more incarceration savings. An independent study done by University of Louisville Kent school of Social Work shows that each social worker saves counties and the state over $100,000 in jail and prison costs. *See*, http://tinyurl.com/sw-pilot

Broad support for defender alternative sentencing social worker program

Judges, prosecutors, the Justice and Public Safety Cabinet's Office of Drug Control Policy, and the Kentucky Chamber of Commerce support this program. Van Ingram, Executive Director for the Kentucky Office of Drug Control Policy, stated:

> *"The DPA alternate sentencing social workers provide much needed individualized sentencing options for prosecutors and Judges. The DPA program is a proven way to help defendants change behavior and not re-offend, saving the state significant incarceration costs. If the program is expanded, more defendants would be helped and more savings would result."*

The Chamber's *The Leaky Bucket* (February 2010) stated, "Kentucky's corrections budget is growing much faster than total state government spending…. The organization is very concerned about spending priorities shifting away from education and stands ready to be a partner with the General Assembly in efforts to address the spiraling costs of our corrections system to make sure Kentucky is making the wisest possible investments of its tax dollars." The Kentucky Chamber of Commerce sees the DPA alternative sentencing social worker program as consistent with the principles embodied by HB 463 and the kind of corrections reform advocated by the Kentucky Chamber - smart investments that save money long-term.

Each social worker saves a net $100,000 in incarceration costs.

Proposed Amendment of HB 463: Put in the Constitutionally Required "Clear and Convincing Evidence" Standard

In the last issue of *The Advocate*, Public Defender Corps Fellow and DPA staff attorney Ray Ibarra wrote about *U.S. v. Salerno*, 481 U.S. 739 (1987), in which the United States Supreme Court held that a person considered by the government to be a danger to the public can be denied bond only upon a showing of "clear and convincing evidence" that the accused is such a danger. This standard was deemed necessary to protect the rights of the accused Salerno - who was an underboss of the Genovese "family" in New York - under the United States Constitution's Fifth Amendment substantive due process rights. *Salerno* thus became an exception to the case of *Stack v. Boyle*, 342 U.S. 1 (1951), which had held that the Eighth Amendment prohibited setting bail higher than what is reasonably calculated to assure that the accused will appear at trial.

As was also mentioned in Mr. Ibarra's article, it is now clear that the Eighth Amendment's right to be free of "excessive bail" has been applied to the states through the Fourteenth Amendment. See *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3034-35, n. 12 (2010). The upshot of the article was that for a denial of a bond (or setting of a bond in an amount higher than is reasonably calculated to assure attendance at trial) based upon whether the accused is a "danger to the public," the judge setting bail must make such a finding based on "clear and convincing evidence" in order to be constitutional. Mr. Ibarra urged that HB 463 be so interpreted to comport with the federal constitutional mandate.

With the General Assembly back in session, now is the time to incorporate constitutional standards into the letter of the law, and amend the law to explicitly include the "clear and convincing standard" into bond decisions which turn upon a finding of dangerousness to the public. DPA proposes the following amendment:

> **431.066 Pretrial release and bail options -- Assessment of flight risk, likelihood of appearing at trial, and risk of danger -- Credit toward bail for time in jail.**
>
> (1) When a court considers pretrial release and bail for an arrested defendant, the court shall consider ***the pretrial risk assessment report, and make a determination*** whether ***there is clear and convincing evidence that*** the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released….
>
> And
>
> **218A.135 Pretrial release of defendant charged with offense for which conviction may result in presumptive probation**.
>
> (1) Any statute to the contrary notwithstanding, a defendant charged with an offense under this chapter for which a conviction may result in presumptive probation shall be placed on pretrial release on his or her own recognizance or on unsecured bond by the court subject to any conditions, other than bail, specified in KRS 431.515 to 431.550.
> (2) The provisions of this section shall not apply to a defendant who is found by the court ***by clear and convincing evidence, and after considering the pretrial risk assessment report,*** to present a flight risk, or to be a danger to himself or herself or a danger to others…

Incorporating the standard into the rule will save the time and confusion that would otherwise exist by educating through briefing and argument this constitutional standard, and will ensure that the constitutional standard will not go ignored or unheeded by defense lawyer, prosecutor and judge alike.

It will also help equalize the ability of the poor and well-off alike to realize their presumption of innocence. Empirical studies show that defendants who are detained awaiting trial are more likely to be convicted and less likely to receive probationary sentences than their counterparts released pending trial. Wheeler & Wheeler, "Bail Reform in the 1980's: A Response to the Critics, " 18 *Crim. L. Bull.* 228 (1982). Do we really want the right to bail only for the wealthy?

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