



LEGISLATIVE UPDATE

COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

VOL. No. 29, 2008

DEPARTMENT OF PUBLIC ADVOCACY

FUNDING FOR PUBLIC DEFENDERS SLASHED; SERVICE REDUCTIONS TO BEGIN JULY 1

By Ernie Lewis, Public Advocate

The 2008 General Assembly failed to fund indigent defense at an amount sufficient to maintain services, particularly in FY09. As a result, for the first time since the early 90's, the Department of Public Advocacy (DPA) will have to pull out of thousands of constitutionally mandated cases. These cutbacks will begin July 1. What will happen to the thousands of indigents who have a right to counsel when that occurs? That's anybody's guess. What is clear is that DPA will be funded at \$2.3 million less in FY09 than their amended FY08 budget, and that DPA will only be able to deliver \$37.8 million in public defender services. What is also clear is that those people denied counsel will not be able to be held unless the Commonwealth provides counsel to them.

How Did This Situation Occur?

Kentucky has under funded indigent defense for many years. For at least the past 17 years, in report after report, national and local experts have decried the woeful funding devoted to public defense in Kentucky. In 1991, Bob Spangenberg, head of a national group with an expertise in providing counsel to the poor, wrote to the Public Advocacy Commission that "[w]hile the public defender offices around

Continued on page 2

"Be it hereby resolved that the Public Advocacy Commission believes that if the DPA budget is cut as it currently is in HB 406, that the Public Advocate has no choice but to implement some or all of his service reduction plan."

— Public Advocacy Commission Resolution 2008



*Robert Ewald, Chairman
Public Advocacy Commission*

Service Reduction Necessary to Obtain Ethical Caseloads

The DPA will do everything within its power to contain costs. In all DPA trial offices, the following steps will be taken.

- ◆ **Conflicts.** DPA will no longer pay private attorneys in conflict of interest situations. The Public Advocate will encourage judges to appoint those lawyers and then order the Finance Cabinet to pay for those lawyers as a necessary governmental expense.
- ◆ **Involuntary commitments.** Most involuntary commitment cases under KRS 202A occur in Lexington, Louisville, Hopkinsville, and Hazard. Outside of Jefferson County, no involuntary commitment cases will be handled by DPA offices. The effect of the budget cuts is presently under review by the Louisville Metro Public Defender's Office.

In some offices with excessive caseloads, addition service reductions may be required. The Trial Division Director is presently evaluating the vacancies in each office in every local jurisdiction and working with the regional managers and directing attorneys to craft an office-specific plan to achieve ethical caseload levels. Reductions could include some or all of the following:

- ◆ **Class B misdemeanors**
- ◆ **Status offender cases.**
- ◆ **Family court cases**
- ◆ **Probation and parole revocations**

INSIDE

- ◆ **Public Advocacy Commission Resolution 7**
- ◆ **2008 Criminal Justice Legislation 9**
- ◆ **Missed Chance for SW Pilot Program 12**
- ◆ **ACCD Ten Tenets 14**

Continued from page 1



Ernie Lewis, Public Advocate

the state all appear to suffer from case overload and lack of adequate funds and resources, my observation is that the Louisville Office is already in a state of crisis.” In 1995, in the Final Recommendations to the *Governor’s Task Force on the delivery and funding of quality public defender services*, it was stated that “[p]resent caseload levels in

Jefferson and Fayette County exceed 650 cases per lawyer. Clearly, additional funding is needed to reduce such heavy caseload levels in Louisville to a manageable number so that those full-time defenders can provide competent, quality representation to their indigent clients.”

In 1998, Bob Spangenberg wrote on behalf of the Bar Information Project of the American Bar Association that “[o]vershadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA’s caseloads have increased dramatically, while funding has failed to keep pace...DPA full-time trial defenders handled an average of 604 felony, misdemeanor, juvenile and other cases per attorney, with public defenders in Louisville handling as many as 820 cases.” In 1999, the *Blue Ribbon Group*, a group of 22 high level Kentucky legislators, judges, bar officials, and law professors, stated in Finding #5 that “[t]he Department of Public Advocacy per attorney caseload far exceeds national caseload standards.” In 2005, in response to the burgeoning caseloads of public defenders, the Public Advocacy Commission stated in its *Justice Jeopardized Report* in Finding #1: “Kentucky public defenders have far too many cases. In FY04 & FY05, those caseloads were at 189% of national standards. These caseloads are jeopardizing the justice being provided to Kentucky’s poor.”

In response to the *Justice Jeopardized Report* of the Public Advocacy Commission, Governor Fletcher proposed and the 2006 General Assembly adopted a budget that added \$3 million to DPA’s budget in each year of the biennium. This purportedly was intended to fund 53 new positions in order to reduce the caseloads of Kentucky’s public defenders. However, as soon as the biennium began, it became clear that DPA was not funded sufficiently to add 53 new positions. DPA had funding for fewer than 30 of those positions. The Public Advocate requested a current year appropriation for DPA in the 2007 General Assembly. When this was not forthcoming, the Public Advocate requested some relief from the Justice and Public Safety Cabinet. Governor Fletcher entered an Executive Order granting additional resources to several agencies in the Cabinet, but DPA was not among them. As a result, in February of 2007, the Public Advocate instituted a hiring freeze that lasted

until July 1, 2007. By mid-May of 2007, the Public Advocate ordered that bills could no longer be paid in order to get to the end of the fiscal year in the black. These actions, particularly allowing vacancies to soar, resulted in ending FY07 in the black. However, in early July, DPA had \$750,000 in unpaid bills. Once the new fiscal year began, the red ink increased each month.

DPA Requested A Budget That Would Have Achieved Ethical Caseload Levels

DPA requested a budget in the fall of 2007 that would have solved its historical funding problems. Primarily, had it been funded it would have reduced caseload levels to no more than 400 new cases per lawyer over the biennium. In FY07, DPA trial attorneys handled an average of 436 new cases per lawyer, including 23% in circuit court. Based upon the National Advisory Commission maximum caseload levels of no more than 150 felonies, no more than 200 juvenile cases, and no more than 400 misdemeanors, DPA’s mixed caseloads handled by most of its attorneys would mandate no more than 310 cases per lawyer in order to comply with national standards. DPA requested funding to bring the average caseloads down to 400 (350 in rural offices and 450 in urban offices). DPA also requested funding anticipating a 3% increase in caseloads in FY09 and FY10. This request was made because DPA has been averaging an 8% increase in caseloads each year since 2000.

DPA Requested \$2.8 Million To Fund The New Lexington Public Defender’s Office

Of particular concern during the past 12 months has been the Lexington Public Defender’s Office. Lexington/Fayette County features over 10,000 cases annually. Until August of 2007, public defender services were delivered by the Fayette County Legal Aid, Inc. (FCLA), a nonprofit corporation funded jointly by DPA and Lexington Urban County Government. In FY07, DPA contributed \$969,000 to FCLA, while Lexington contributed \$108,000. In addition, between \$200,000 and \$300,000 annually went to the FCLA from partial fees collected there. (Fayette County judges recover partial fees at the highest level in the state, contrary to what some thought during the budget process). In April of 2007, the chair of the board of FCLA notified the Public Advocate and stated that they would not have sufficient funds to make it through the year. In June of 2007, FCLA asked DPA to take over the responsibility for delivering services to indigents in Fayette County. DPA did so in August of 2007. What DPA found was that only 13 lawyers remained, staff had few functioning computers, there were insufficient numbers of support staff, lawyers carried caseloads in excess of 600 cases per lawyer, and no retirement payments had been made for several years.

In order to request a budget for this new office, DPA became informed that the prosecutors in Lexington received approximately \$5.9 million each year, that they had 37 prosecutors, and 10 victims' advocates. In this context, DPA requested \$2.8 million for 22 lawyers, 2 conflict lawyers, 8 support staff, 2 investigators, and 2 social workers. Even at this funding level, Lexington public defenders would have carried caseloads of over 470 cases per lawyer.

The Governor's Budget

DPA's FY08 budget was \$38.3 million prior to being amended in the 2008 General Assembly. The Governor proposed in HB 406 a current year appropriation of \$2 million, increasing DPA's budget for FY08 to \$40.3 million. In FY09, however, the Governor proposed only \$39 million. Included in the \$39 million was \$1.8 million for the new Lexington Office. In FY10, the Governor proposed \$40.3 million.

The House Budget

The House version of the budget continued the current year appropriation of \$2 million. The House also concurred with the appropriation of \$39 million for FY09. The House increased the Governor's request for FY10 to \$42.8 million.

The Senate Budget

The Senate also agreed with the current year appropriation of \$2 million for FY08. However, for FY09 the Senate funded DPA at only \$37.2 million, \$1.1 million below the FY08 budget, and \$3.1 million below the amended FY08 budget of \$40.3 million. The Senate removed all funds for the Lexington Office, and included budget language that would have required the local government to fund the office.

The Enacted Budget for FY09-10

The budget that was passed after the free conference committee dropped the current year appropriation of \$2 million down to \$1.8 million, leaving DPA with an amended budget for FY08 of \$40.1 million. For FY09, DPA was funded at \$37.8 million, a cut of \$2.3 million from the amended FY08 budget. The budget for FY10 is \$41.6 million. The budget includes language regarding Lexington: "Included in the above General Fund appropriation is \$1,570,000 in fiscal year 2007-2008 and \$1,570,000 in each fiscal year of the 2008-2010 biennium for the operation of the Lexington Public Defender's Office." The budget memorandum states that in FY10, \$2.5 million "will be added to the base in the second year. The Commissioner may use this funding for attorney positions, or to expand the social worker program, or a combination of both at his discretion."

The FY09 Budget As Enacted Puts DPA Into Crisis Beginning July 1, 2009

The enacted budget leaves DPA in crisis for FY09. For FY08, with the \$1.8 million in a current year appropriation, DPA will be able to continue providing services at its current level, although some bills may remain unpaid until the new fiscal year.

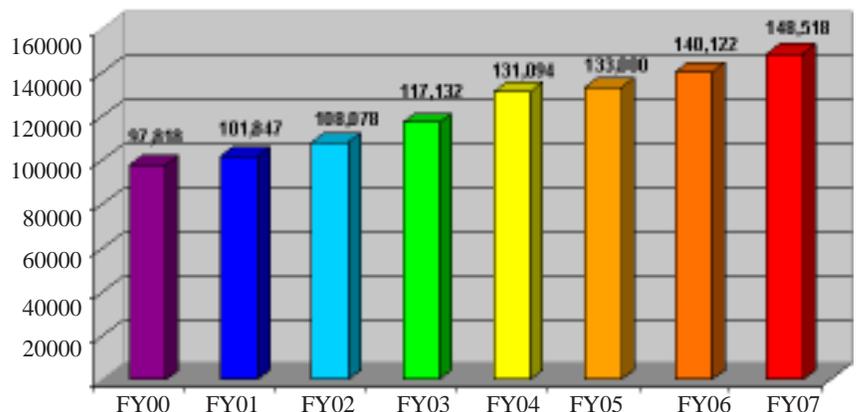
In addition, with a \$41.6 million budget for FY10, it is likely that unless caseloads go up considerably, DPA will be able to provide a reasonable level of services in that fiscal year. This will have to be reconsidered at the end of FY09 based upon caseload figures.

It is in FY09, however, beginning in July of 2008 that the problems occur. DPA loses \$2.3 million from its amended budget of \$40.1 million. Simply put, this will not be sufficient to deliver legal services to the predicted 148,000 persons deemed eligible by the courts of the Commonwealth. DPA will not have funding for at least 54 positions, including 30 trial attorney positions. DPA will have only \$1.5 million for the Lexington Office, less than 1/3rd of what is spent by prosecutors in Lexington. DPA will be able to hire only 17 attorneys in Lexington, compared to 37 prosecutors, and those attorneys would carry caseloads of over 600 cases per lawyer. Throughout the state, trial lawyers' caseloads would soar in some places where vacancies could not be filled.

Caseloads Have Gone Up 8% Each Year Since 2000

The chart below tells this entire story graphically. In 2000, the year following the *Blue Ribbon Group Report*, total caseloads were at 97,818. At the time, the average number of new cases opened per trial attorney was 410, down from 475 in FY99. In each successive year, caseloads have gone up. Caseloads took a big jump in FY 04, to 131,094, up 12% from the previous year. At that time, per attorney caseloads were at 489, up from 484 in FY03. Since 2004, caseloads continued to increase. From FY06 to FY07, caseloads increased 5.8%. In FY07, per attorney caseload was down to 436. Overall, caseloads have averaged an 8% increase since 2000.

Total DPA Caseload



Continued on page 4

Continued from page 3

As a result of these increasing caseloads, per attorney caseloads have remained high. Despite repeated reports and funding requests, DPA per attorney caseloads were at 436 in FY07, 6% higher than they were in 2000.

Public Defender Caseloads Exceed National Standards By At Least 40%

The National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973 recommended in Standard 13.12 “Workload of Public Defenders” the following:

“The caseload of a public defender office should not exceed the following:

felonies per attorney per year: not more than 150
misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court [delinquency] cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and Appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.”

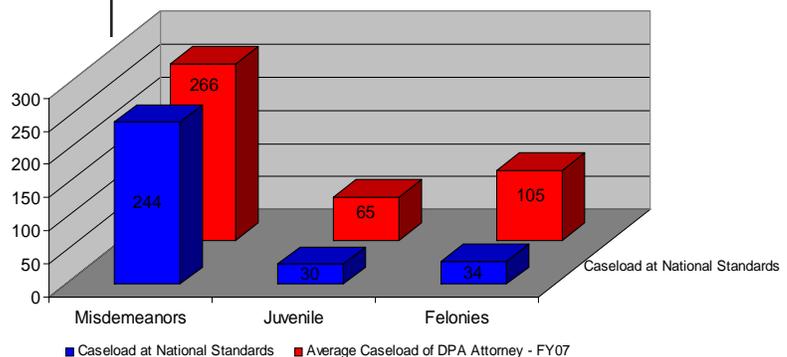
In 2002, the American Bar Association approved the *Ten Principles of a public defense delivery system*. Principle # 5 requires that “defense counsel’s workload is controlled to permit the rendering of quality representation.” In the commentary to Principle #5, it states that “National caseload standards should in no event be exceeded, but the concept of workload (*i.e.*, caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.”

On August 24, 2007, the American Council of Chief Defenders issued a *Statement on Caseloads and Workloads*. This statement includes a resolution that reaffirms the NAC caseload standards, saying that these “caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified. If a defender or assigned counsel is carrying a mixed caseload which includes cases from more than one category of cases, these standards should be applied proportionally... Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards.”

Kentucky public defenders mostly carry mixed caseloads. That is, because 26 of DPA’s 30 offices are primarily rural in nature, most attorneys must represent felonies, misdemeanors, and juvenile cases. More specialization occurs in the four urban offices in Louisville, Lexington, Covington, and Boone County.

Kentucky public defenders in FY07 carried mixed caseloads consisting of 436 new open cases per year. 23% of the caseload occurred in circuit court, 15% in juvenile court, and 61% in district court. 1% of the caseload occurred in family court. Evaluating this mixed caseload for consistency with the NAC standards is somewhat complex. However, based upon the percentages above, Kentucky public defenders compared to the national standards can be understood by the chart below:

DPA Caseloads Compared to National Standards

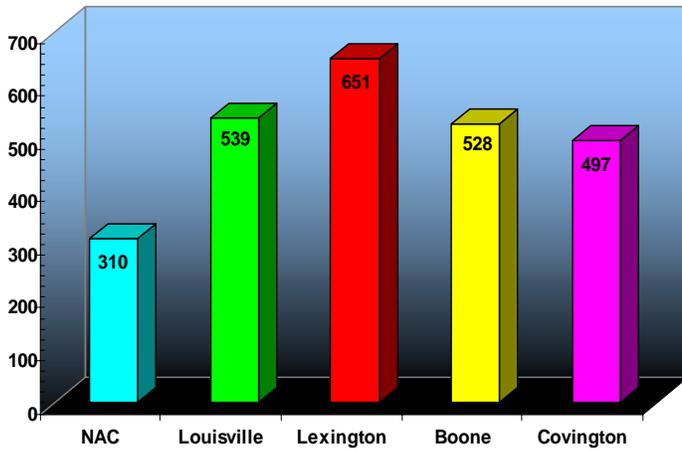


A Kentucky public defender carrying a trial caseload consistent with the NAC standards would carry no more than mixture of 34 felonies, 30 juveniles, and 244 misdemeanor cases, totaling 310 cases. At 436 cases, Kentucky public defenders carry caseloads that exceed the national caseload standards by 40%.

Excessive public defender caseloads have a significant impact. They overload the individual lawyer, leading to burnout and rapid turnover. They may depress the holding of jury trials, as lawyers feel the pressure to process cases. Outside Louisville and Lexington, data shows there were only 236 jury trials in circuit court out of some 33,316 cases, or less than 1% of cases. Further, as stated in the *ACCD Statement on Caseloads* “[e]xcessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This can mean that innocent people are wrongfully convicted, or that persons who are not dangerous and who need treatment, languish in prison at great cost to society. It can also lead to the public’s loss of confidence in the ability of our courts to provide equal justice.”

The caseload problem is particular acute in DPA’s four urban offices. The below chart demonstrates the four urban offices compared to the National Advisory Commission Standards (NAC) adapted to the Kentucky situation.

Department of Public Advocacy Urban Offices



The American Bar Association States That Excessive Public Defender Caseloads Are Unethical

ABA Formal Opinion 06-441, issued on May 13, 2006 was issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility. The opinion restates what every lawyer and every judge knows to be true and applies it to the context of the public defender’s world. “All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation.”

Responsibility of the Delivery System

The focus of the ABA Opinion is on the individual lawyer, the lawyers’ supervisors, and the delivery system itself. Particularly important is the focus on the delivery system. The opinion states that a “lawyer’s workload ‘must be controlled so that each matter may be handled competently.’” Whose responsibility is it to “control workload?” In private practice, it is the responsibility of the individual lawyer or the firm for which she works. That responsibility becomes more ambiguous in the context of a public defender system. While the opinion clearly places the responsibility for controlling workload on the individual lawyer representing the individual client, it does not let the system itself off the hook. It cites with approval the *ABA Ten Principles* (2002). Principle #5 of those principles requires defense counsel’s workload to be controlled “to permit the rendering of quality representation.” Compliance with these principles is a responsibility of whatever system is in place, whether it be city, county, or state. In Kentucky,

“[e]xcessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This can mean that innocent people are wrongfully convicted, or that persons who are not dangerous and who need treatment, languish in prison at great cost to society. It can also lead to the public’s loss of confidence in the ability of our courts to provide equal justice.”

— ACCD Statement on Caseloads

because Chapter 31 creates a statewide public defender system, the responsibility is squarely on the Commonwealth.

American Council of Chief Defenders Ethics Opinion 03-01 (2003) states that a “chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency’s attorneys to provide competent, quality representation in every case...When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency’s attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.”

DPA’s Plan To Reduce Services

During this year’s General Assembly, the Public Advocate notified the Senate that services would have to be cut if the House budget of \$39 million for FY09 was sustained. A service reduction plan was disseminated to the Court of Justice as well. In response, the Senate cut the budget an additional \$1.9 million, down to \$37.1 million. After the free conference committee was held, the budget as enacted increased only to \$37.8 million. This represented a \$500,000 cut before the FY08 budget was amended. It represented a cut of \$3.3 million from the amended FY08 budget. And it guaranteed that services would have to be cut.

DPA can only deliver \$37.8 million in legal services in FY09. As an Executive Branch agency, DPA must stay within its allotted budget. **Like all other Executive Branch agencies, DPA must cut services when its budget is cut.** Since the General Assembly adjourned, universities, school systems, social service agencies, and others have announced the

manner in which they would have to cut services in order to live within their budget. DPA is no different. DPA cannot put off a capital project because all of our expenses are personnel related. DPA cannot raise tuition or fees. DPA only has the ability to say no. And say no it must.

There is of course an implicit tension in the position DPA is taking. DPA is a statewide public defender organization

charged with representing all cases in which someone is eligible under Chapter 31. At the same time, DPA lawyers must remain ethical to maintain their bar licenses. DPA must represent all eligible persons to whom they have been appointed. DPA has been given only \$37.8 million to represent all eligible persons. At \$37.8 million and 148,000 cases, some

Continued on page 6

“When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency’s attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.”

— American Council of Chief Defenders
Ethics Opinion 03-01 (2003)

of DPA lawyers would be rendering unethical services to clients unless cases are turned away. Thus, DPA has taken the unprecedented step of developing a plan to reduce services.

The plan is as follows:

- ◆ DPA will do everything within its power to contain costs.
- ◆ DPA will no longer pay private attorneys in conflict of interest situations. The \$1.2 million savings will be applied to meet the \$3.3 budget cut. DPA directing attorneys will put together a list of private lawyers willing to take cases under these circumstances and give the list to judges. The Public Advocate will encourage judges to appoint those lawyers and then order the Finance Cabinet to pay for those lawyers as a necessary governmental expense.
- ◆ Involuntary commitments. Most involuntary commitment cases under KRS 202A occur in Lexington, Louisville, Hopkinsville, and Hazard. Outside of Jefferson County, no involuntary commitment cases will be handled by DPA offices. The effect of the budget cuts is presently under review by the Louisville Metro Public Defender’s Office. The Public Advocate will encourage judges to appoint private counsel and to order the Finance Cabinet to pay those lawyers as a necessary governmental expense.
- ◆ Class B misdemeanors. In individual offices with excessive caseloads, DPA on an individual office basis will identify categories of cases that the office will not handle. The local judges will be notified of those categories of cases. Judges will be encouraged to appoint private lawyers and to order the Finance Cabinet to pay those lawyers as a necessary governmental expense. In some instances where there are numerous vacancies in a local office or caseloads are otherwise excessive, Class A misdemeanors may also be involved. The Public Advocate will also encourage local jurisdictions as a matter of policy to ensure no jail time for nonviolent misdemeanors, as a result of which no right to counsel would attach **and no collateral consequences could occur.**
- ◆ Status offender cases. The Public Advocate will encourage juvenile court judges not to detain status offenders.
- ◆ Family court cases
- ◆ Probation and parole revocations

It should also be noted that the Chief Justice has initiated an Affidavit of Indigency Workgroup. The purpose of this workgroup is to review the affidavit of indigency and to improve it. The larger purpose is to determine what can be done to ensure that only those people eligible for receiving a public defender are receiving a public defender.

The Public Advocacy Commission Resolved To Cut Service Levels

DPA’s service reduction plan has been presented to the Public Advocacy Commission, the oversight commission of the Department of Public Advocacy. The Public Advocate presented the plan to the Commission at its February 29th meeting. The Commission supported the plan by passing a resolution. After detailing the circumstances of the DPA’s budget, the Commission resolution states that “services cuts of some kind are required. Whereas the Public Advocate has informed the Commission of a plan to cut services in a way that would minimize impact on the liberty interests of most of DPA clients. This plan includes cost containment, no longer funding conflict cases and utilizing the savings to restore 20-25 positions, no longer accepting appointments in status offender, family court, Class B misdemeanor, some Class A misdemeanors, parole violations, and other similar cases; Be it hereby resolved that the Public Advocacy Commission believes that if the DPA budget is cut as it currently is in HB 406, that the Public Advocate has no choice but to implement some or all of his service reduction plan. Be it further resolved that the Public Advocacy Commission encourages Kentucky policy makers to fund the Department of Public advocacy sufficiently to ensure that public defenders do not carry excessive caseloads.”

This Plan Is Not Undertaken Lightly

Public defenders do not want to cut services. Virtually all public defenders do what they do because they believe in the Constitution and particularly the right to due process and the right to counsel. They want to represent all persons eligible for their services. I personally have worked for 12 years as Public Advocate to broaden and enrich the right to counsel for the poor in Kentucky. Yet, in this particular instance, and hopefully for this one time, DPA must cut services because simply put the General Assembly failed in its obligations to fund fundamental constitutional services. ■

“I personally have worked for 12 years as Public Advocate to broaden and enrich the right to counsel for the poor in Kentucky. Yet, in this particular instance, and hopefully for this one time, DPA must cut services because simply put the General Assembly failed in its obligations to fund fundamental constitutional services.”

— Ernie Lewis, Public Advocate

PUBLIC ADVOCACY COMMISSION RESOLUTION

Whereas the Public Advocacy Commission has the duty pursuant to KRS 31.015(6)(c) to review the performance of the public advocacy system;

Whereas the Public Advocacy Commission has the duty pursuant to KRS 31.015(6)(e) to provide support for budgetary requests to the General Assembly;

Whereas the Governor's budget request as contained in House Bill 406 would cut \$1 million out of the Department of Public Advocacy's \$40 million base budget in FY09 and restore the base budget to \$40 million in FY10 resulting in no growth during the biennium;

Whereas House Bill 406 would result in the loss of 50 of DPA's positions, including 30 trial level public defenders, in FY09;

Whereas the loss of 50 positions would result in trial attorney caseloads of almost 500 cases per lawyer in FY09;

Whereas overall public defender caseloads have increased 52% since 2000 at a rate of 8% per year, from 98,000 to 148,000, and thus can be expected to continue increasing during the upcoming biennium;

Whereas American Bar Association Opinion 06-441 has explicitly stated that public defenders do not have an exemption from ethical rules regarding excessive caseloads, that they have an ethical responsibility to provide competent representation, that they have an ethical obligation not to accept excessive caseloads when they cannot provide competent representation, and that their supervisors likewise have ethical responsibilities to ensure that those they supervise can provide ethical and competent assistance of counsel;

Whereas ABA Opinion 06-441 also affirmed that national caseload standards are to be considered among other factors in determining whether caseloads are excessive;

Whereas the National Advisory Commission set maximum standards for public defenders at no more than 150 felonies, no more than 200 juvenile cases, or no more than 400 misdemeanors;

Whereas public defenders in Kentucky handled 436 new open mixed cases per lawyer in FY07, 23% of which were felony cases in circuit court;

Whereas 436 cases constitute 140% of national standards;

Whereas under House Bill 406 DPA would lose 50 positions, including 30 trial attorneys, resulting in caseloads of almost 500 cases per lawyer;

Whereas caseloads of 500 cases per lawyer are clearly excessive and cause the Commission to question whether public defenders in Kentucky are handling unethical caseload levels;

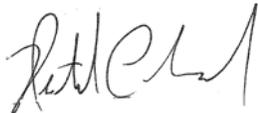
Whereas the Public Advocacy Commission is convinced that under these circumstances, service cuts of some kind are required;

Whereas the Public Advocate has informed the Commission of a plan to cut services in a way that would minimize impact on the liberty interests of most of DPA clients. This plan includes cost containment, no longer funding conflict cases and utilizing the savings to restore 20-25 positions, no longer accepting appointments in status offender, family court, Class B misdemeanor, some Class A misdemeanors, parole violations, and other similar cases;

Be it hereby resolved that the Public Advocacy Commission believes that if the DPA budget is cut as it currently is in HB 406, that the Public Advocate has no choice but to implement some or all of his service reduction plan.

Be it further resolved that the Public Advocacy Commission encourages Kentucky policy makers to fund the Department of Public Advocacy sufficiently to ensure that public defenders do not carry excessive caseloads;

This the 26th day of March, 2008.



Robert Ewald, Chairman
Public Advocacy Commission

**CRIMINAL JUSTICE LEGISLATION OF THE
2008 GENERAL ASSEMBLY**
By Mary Ann Palmer, General Counsel

The following is a summary of the criminal justice legislation passed during the 2008 General Assembly. For specifics, consult the statutory language.

The effective date of the new legislation is the "first moment of Tuesday, July 15, 2008," according to OAG 08-001.

This legislative session the Department Of Public Advocacy monitored approximately 213 bills affecting criminal justice. Of those, only a very few were passed. And, a very few were even heard before a committee. The session was significant more for what was not accomplished than for what was. Legislators had proposed legislation seeking to place tighter controls on immigration, regulating abortion, enhancing penalties, ("boating under the influence," "timber theft," "aviation security," "robbery 2d of bank as violent felony," "theft by deception/bad checks for rent, auction goods/ and real estate deposits," "assault 3d elected officials," "failure to return to custody," are but a few examples), and adding new offenses. For the most part, these efforts failed.

The successful legislation did very little to increase penalties which is a drastic change from prior sessions. Instead, a task force was created to study the penal code and proposed reform. There was quite a bit of focus during the committee meetings on the fact that in recent sessions the legislation had increased penalties, having the effect of placing Kentucky at the top of the list of the nation's fastest growing prison populations. Consequently, very few bills increased penalties. Instead, some of the legislation seeks alternatives to incarceration, such as House bill 683.

The Justice and Public Safety Cabinet is touting House Bill 683 as the most significant bill this session. It is an omnibus criminal justice bill that requires DNA samples be taken from all felons, including juveniles ages 13 and older who are convicted of violent or felony sex offenses. According to the press release issued by the Cabinet, "Kentucky State Police Forensic Lab estimates the legislation could yield an additional 15,000 samples per year for the state database, with the potential to solve an additional 250 cases." The bill also includes additions to the Parole Board and permits file review of Class C felons eligible for parole. The legislation also provides the method for monitoring of inmates completing their sentence on home incarceration—permitting GPS tracking (in-home video surveillance) of certain felons.

**Summary of 2008
Legislative Session**

HB 683 Parole Board

This bill is an omnibus criminal justice bill. Section 1 of the bill increases the membership of the Parole Board from 7 members to 9. The board is no longer required to conduct an interview and conduct a



Mary Ann Palmer

hearing before considering parole for Class C felons, not included in the definition of "violent offenders." Previously only Class D felons were not guaranteed an interview and hearing before consideration of parole. An upside of this change is that due to prison overcrowding some Class C inmates may be paroled sooner than previously.

This bill raises several fees which have added an increased financial burden on persons accused or convicted of criminal offenses. Probation and parole supervision fees are increased by \$10.00. Bail bond fees are increased from \$4.00 to \$25.00. DUI Service Fees are increased from \$325.00 to \$375.00. Expungement fees are increased from \$25.00 to \$100.00.

Section 8 of the bill was introduced with the intent to permit GPS tracking device use as referenced earlier; but the version passed was poorly written and needs to be challenged. This section allows the Department of Corrections to use a variety of monitoring devices on inmates who are serving confinement on home incarceration. The problem with the section is included in subsection (5). A person who comes in contact with the inmate, converses with him or works or lives with him can be recorded by audio or video recording without that person's knowledge. Only the person wearing the monitoring device is entitled to know of the recording device.

Section 8 vastly increases the collection of DNA. All persons convicted of felonies and juveniles 13 years of age or older, who are adjudicated as a public offender for offenses identified in KRS 439.340(1) or 530.020 shall have a DNA sample collected. This includes all persons incarcerated for such offenses as of the effective date of this statute. It also includes persons granted felony diversion. All sex offenders not previously required to submit to DNA collection, including persons convicted of sex offenses in other states,

Continued on page 10

Continued from page 9

and living in Kentucky, are now required to provide a sample. Refusal to submit to DNA collection is a Class A misdemeanor.

A person who successfully completes felony diversion or has his conviction vacated or reversed and dismissed may request expungement and destruction of his sample.

HB 211 Sexual Abuse

HB 211 amends KRS Chapter 510. It creates new offenses for sexual abuse that were not previously criminal acts. Under existing law any adult could legally engage in consensual sexual acts with a person who was at least 16 years of age. There are now exceptions.

A person who is “in a position of authority or position of special trust” (see KRS 532.045) cannot engage in sexual acts with a person less than 18 years of age. These acts include sexual contact or masturbation in the presence of the minor or while communicating with a minor via the internet, telephone or other electronic communication device.

A person who is “in a position of authority or position of special trust” is defined in KRS 532.045 as

“Position of authority” means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility, a holding facility as defined in KRS 600.020, or a detention facility as defined in KRS 520.010 (4), staff or volunteer with a youth services organization, religious leader, health-care provider, or employer;

(b) “Position of special trust” means a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor;

This bill is aimed at school teachers and coaches but is not that limited. It could include other members of a household. An example would be where a 17 year old resides in the same house as a 21 year old non-relative. One of the individuals may be a family friend staying in the home.

This activity becomes a Class D felony under KRS 510.110.

Additionally, KRS 510.110 is amended to raise certain acts that were previously Class A misdemeanors to Class D felonies. Any sexual contact by a person 21 years of age or older with a person under age 16 will become a felony. Additionally, masturbating in the presence of a person under 16 or through electronic communication will become a Class D felony.

KRS 510.120 is also amended by this bill. Sexual Abuse, 2nd degree now includes sexual contact between a person 18 to 20 years old and a person less than 16. Previously, the victim had to be under age 14.

There are also changes in the age exceptions under KRS 510.130, Sexual Abuse, 3rd degree. The bill further criminalizes failure to report incidents of child dependency, neglect or abuse. A first offense remains a Class B misdemeanor, but a second offense becomes a Class A misdemeanor and a third and subsequent offense becomes a Class D felony.

Spousal privilege, doctor/patient privilege and other counseling privileges are not applicable. Only attorney/client privilege and clergy/penitent privilege may be raised.

Probably the most far reaching change brought about by HB 211 is the amendment to KRS 500.050, which extends the statute of limitations for misdemeanor offenses under KRS Chapter 510. It changes the language so that the statute no longer begins to run from the time of the offense when the victim is under 18. Instead, it begins five years after the victim’s 18th birthday.

HB 170 Driver Fleeing Accident

This bill creates a new felony for a driver involved in an auto accident who leaves the scene of an accident, when he knows or should have known that the accident resulted in serious physical injury or death to someone. The intent of the new law is to prevent drunk drivers from leaving the scene so evidence can be gathered before it is “gone.” The worrisome part of this new law is the effect it will have on the person who has no reason to believe a serious injury has been caused and leaves the scene, when due to some pre-existing condition, the injury results in death or disability. *Mens rea* will be key in defending cases under this statute. Serious physical injury could include a back or neck injury that may not be apparent at the accident scene.

HB 91 Bullying Bill

This is the so-called “bullying” bill which resulted from compromise between the two Chambers of the Legislature. It is designed to prevent intimidation and harassment of students by other students. The first three sections of the bill establish reporting requirements for school officials to report student on student criminal behavior to state or local law enforcement agencies, if the behavior occurs on school premises, school sponsored transportation or at a school related activity. The Kentucky Department of Education will be required to compile annual statistical reports of these incidents. The last two sections of the bill may be broadly interpreted to include a wide range of conduct. Section 4 of the bill expands “harassment” under KRS 525.070 to add a subsection that applies only to students of a local school district while on school premises, school sponsored transportation or at a school related activity. The prohibited behavior includes damage or theft of property of another

student, disrupting the operation of the school or creating a hostile environment by gesture, written or oral communication or physical acts reasonably expected to cause fear or embarrassment. KRS 525.080 is amended to add similar provisions to the offense of “harassing communications” where this type of behavior is communicated between students by telephone, internet, mail or other written or electronic communication.

SJR 80 Kentucky Penal Code

This resolution created a commission to study and reform the Kentucky Penal Code. The work is to be done by a subcommittee of the Interim Judiciary Committee and a first report is due by December 2008.

SB 13 Videotaping Testimony

This bill amends KRS 421.350 and expands the provisions regarding videotaping of testimony of minor victims. It now permits child victims or witnesses to be exempt from attendance at trial when the charges are sexual in nature or violent as defined in KRS 439.3401.

HB 168 Expired License for Active Military

This legislation creates a defense to a charge of driving on an expired license if the license expired while the person served on active military outside of Kentucky.

HB 202 Alcohol Vaporizing Devices

This bill criminalizes possession, use, sale or other transfer of alcohol vaporizing devices. These are machines used to inhale vapors from alcoholic beverages. A first offense will be a Class B misdemeanor and second and subsequent offenses will be a Class A.

HB 384 Definition of Status Offense

This bill makes changes to the definition of status offense for juveniles and changes who may be placed in secure custody. Status offenses now include beyond the control of school or parent, habitual runaway or truant, minor tobacco and alcohol offenses. It does not include local curfew violations. Neglected, abused or dependent children and children who violate curfews shall not be held in a secure juvenile detention facility. The bill also makes some changes as to exclusivity of jurisdiction over minors. The bill also places time limits on secure detention in some cases. The bill is 45 pages long and anyone practicing in juvenile court should be aware of the changes.

HB 426 Fees for Bad Checks

This bill increases the fees that merchants and county attorneys may charge for bad checks from \$25 to \$50.

HB 406 Probation and Parole Credit

The budget bill contains several provisions designed to decrease the prison population. It contains a provision permitting probation and parole credit. Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner’s remaining unexpired sentence when it is used to determine a parolee’s eligibility for a final discharge from parole as specified or when a parolee is returned as a parole violator for a violation other than a new felony conviction. It also allows any person convicted of a nonviolent, nonsexual Class C or Class D felony who is serving a sentence in a state-operated prison, contract facility, or county jail, at the discretion of the Commissioner of the Department of Corrections, to be eligible to be considered to serve his or her sentence outside the walls of the detention facility under the terms of home incarceration using an approved monitoring device as defined in KRS 532.200, if the felon has 180 days or less to serve on his or her sentence or, at the discretion of the Commissioner and the approval by the Secretary of the Justice and Public Safety Cabinet, if the felon has more than 180 days to serve on his or her sentence. Class D felons will be eligible for parole after serving 15% of their sentence or two months, whichever is longer. There are also provisions relating to educational credit (90 days) and meritorious credit (7 days per month).

SB 46

This bill expands the definition of “victim” under KRS 421.500 to add additional family members of a deceased victim, who may present victim impact testimony. It also allows multiple family members to testify.

SB 58 Torturing a Dog or Cat

Commonly known as Romeo’s Law, this is one of the few bills with increased penalties this session. It becomes a Class D felony to torture a dog or cat. Previously a first offense was a Class A Misdemeanor and subsequent convictions were felonies. Cruelty and neglect are not covered by this statute. It applies to “torture.”

SB 92 Uniform Bail

This is a positive improvement for pretrial release. The Supreme Court can establish a uniform bail schedule for Class D felonies. This should result in pretrial release for many non-violent offenders who might otherwise not have been able to post bond.

SB 174 Uniform Deposition and Discovery

This bill amends KRS 421 adopting the Uniform Deposition and Discovery Act. It simplifies the process for taking out of state depositions. ■

KENTUCKY MISSED AN OPPORTUNITY TO SAVE MONEY AND LIVES!

By Dawn Jenkins, MSW

Kentucky Legislators missed an important opportunity during the 2008 Kentucky General Assembly to expand the Social Worker Pilot Program, which legislators approved in 2006. The University of Louisville provided the results of a study of the Pilot in a report to the 2008 Legislature that documented **a 325% return on investment and a 90% treatment success rate**, by diverting defendants to community treatment rather than incarceration.

Not only was the Pilot a proven success, but it was overwhelmingly supported by the public. In fact, the *Lexington Herald-Leader* printed more than four editorials on the Pilot's success and the value to the Commonwealth including a video editorial entitled, Kentucky's Addiction to Prison. Kentucky Public Radio featured it on their *State of Affairs Program*. The Council on State Government nominated the Pilot for its *2008 Innovative Government Award*.

This proposed solution to Kentucky's incarceration problem couldn't have come at a better time: when the number of persons in jails and prisons has grown to 23,000, up 634% since 1970. DOC projects this number to increase by 40% over the next decade, at a significant cost to Kentuckians. Today, Kentucky spends \$454 million annually or 5.2% of the General Fund, while incarceration costs were only \$7 million in 1970.

Legislators were fully briefed on this problem, and DPA's proposal to expand the Pilot, during the Session. In fact, the report from Pew Charitable Trust, ranking Kentucky #1 nation-wide in inmate growth last year, was front page headlines during the middle of the budget negotiations. The 2008 Legislative Research Commission, in its briefing paper to legislators, cited this as a chief problem. Finally, Public Advocate Ernie Lewis fully briefed key House and Senate Leaders and reported to House and Senate members about the Pilot's success.

The success was researched and reported by University of Louisville. Researchers found that the Commonwealth could save \$3.1 million by implementing the program state-wide. This is enough money to fill the gap in DPA's FY09 budget and then some. Instead, DPA is preparing for a \$2.3 million reduction in General Fund dollars in FY09.

The Session was abuzz in its heightened awareness about the need for treatment and alternatives to incarceration. Many

legislators reported on how incarceration is not a long-term or sustainable solution for the mentally ill or addicts. With an estimated 288,000 Kentuckians using illicit drugs, incarceration as the only solution could bankrupt the Commonwealth. Senator Dan Kelly put it best when he said "we cannot incarcerate our way out of the problem 'and that' treatment is the answer."



Dawn Jenkins

The Social Worker Pilot Program should have been a welcome change in policies and practice because it provides an important and missing link for the mentally ill and addicted who wind-up in the criminal justice system. In these hard to serve cases, the legal complaint is only a symptom of a much larger problem whose root cause is medical. Instead, the Pilot became a missed opportunity, left unfunded this session, with only hope for funding in the coming session.

2006 Kentucky General Assembly

The 2006 Legislators had an understanding that a change in practice needed to be tested. They gave the Department of Public Advocacy \$200,000 to Pilot the program in hope that DPA could get better results for hard-to-serve defendants. The hope was to use a trained advocate, along with a social worker, to develop alternatives to incarceration for defendants at key interceptor points, where intervention is proven possible.

For one year, DPA used skilled, knowledgeable and professional social workers at these key points in every defendant's case — at arrest, initial detention, first court appearance, pretrial assessment in jail, sentencing, admittance into treatment, coming out of treatment, and reentry. The result was over 90% of defendants were referred to treatment, abstained from drug use, and stayed in treatment.

Diversion and Sentencing Alternatives Works with Skilled Advocates

UoL's study of the Pilot showed the Pilot to be an effective and efficient approach in finding community based solutions for defendants, who neither judges nor jailers knew what to

do with. The President of the Kentucky Jailer Association said at least 15% of people in Kentucky jails shouldn't be there because they are mentally or chronically addicted.

Persons entering the Kentucky Criminal Justice System are:

- 67% alcohol or drug dependant
- 54% show signs of mental health problems or illness
- 40 to 50% illiterate
- 5% mentally retarded
- Most are poor

The program works by assigning a social worker to each defendant with signs of mental illness or drug dependency whose prospect for rehabilitation is more possible through expert treatment providers in the community. Social workers have Master's Degrees with specialized training in the field of alcohol and drug treatment and/or assessing mental illness. Each has a wide range of knowledge about available state-wide treatment providers and community resources. DPA measured whether the social worker was successful based upon the success of each defendant to enter treatment, stay in treatment, and finish treatment.

What did the Pilot consist of? The DPA Pilot placed 4 social workers in four defender trial offices: Covington, Owensboro, Morehead, and Bowling Green. Each social worker served as an advocate for that defendant from the time the court appoints the case to DPA, until the defendant exits treatment and fully re-enters his community. Each social worker interviewed defendants multiple times to determine their health and mental health history. They collected every available record pertinent to determine the best course of action for the court to take including school, medical, criminal, treatment, and mental health records. They wrote prescribed plans for each defendant based on their unique needs and based on the available resources in the community. They provided findings to the defense counsel and the judge. They worked with drug court staff to make outcomes for defendants more successful. Letters from judges in each of the Pilot regions confirms the judiciary's belief in the program. Morehead's Circuit Judge Mains, in an interview with the *Herald-Leader* editorial board said DPA's social worker in Morehead "turned client's lives around while also informing the courts. I wish every judge had a DPA social worker to work with."

Each social worker worked at the front end of the case. The quicker courts can take action for treatment, the more money can be saved in pretrial diversion rather than detention. They work at the back end of the case after a guilty verdict to give sentencing judges the best alternatives to incarceration for each person. They have knowledge and understanding about juvenile and specialized treatment facilities for youth. They worked collaboratively with pre-trial officers, prosecutors, court social workers, comprehensive care treatment providers, clients' families, probation and parole officers, and re-entry specialists. A probation officer's job is to report

to the court when a defendant violates, whereas a social worker's job is to make the defendant's transition into the community successful. Working together, they can help make the client successful.

There is no question about the Pilot's success. With only \$200,000, DPA hired four social workers who served 221 people. Each social worker saved 10,000 days of incarceration or 27 years each. 90% of the defendants went into treatment and accessed services. Kentucky saved \$100,000 per social worker. Only 8 defendants were rearrested during the Pilot on new charges or for violating conditions. Approximately 15% to 18% recidivated during one year compared to 34% in the Department of Corrections. Kentucky saved \$3.25 of incarceration costs for every dollar invested. The University of Louisville estimates that the Commonwealth of Kentucky will save approximately \$3 to \$4 million if we place a social worker in all 30 DPA trial offices, which will cover all 120 counties.

Joey's Story is a Story About Success and Hope

Judge Mains cited the story of a 20 year-old in Morehead, whose life was changed because of Sarah Grimes, MSW, DPA's social worker for that region. Joey was the youngest child in his family. While growing up, his mother and oldest brother were heroine addicts. Like them, Joey became an addict. Addiction was the world he was born into and he didn't know any other way, until Drug Court and Sarah Grimes. Joey started using marijuana and alcohol at an early age and worked his way up to using more serious drugs like Oxycodone, acid, and heroine. When he was only 10, his mother died of AIDS, which she contracted from intravenous drug use. His brother, who became his caretaker, shot himself in the head while high on acid. In the *Herald-Leader* Video editorial, Joey describes how he would, "steal, rob, assault, and do almost anything to get high and to forget the past." Today, Joey has been clean for more than a year. He give Sarah the credit for getting him into treatment, getting him into school and supporting him as he struggled to change his life. He is making all B's in school and has pride in himself and hope for the first time in his life.

So why did the General Assembly not fully fund the Program? No one really knows for sure.

While the 2008 Kentucky General Assembly missed a key opportunity to fund the Social Worker Program — to save money, restore lives, and decrease incarceration — the opportunity is available in the future. It is time for Kentucky to change our policy and practice and to adopt new ways to deliver services to defendants.

Social workers in public defender offices is advocacy worth considering — paring a skilled and trained advocate with the hardest to serve defendants from appointment to reentry will pay-off if fully funded. ■

THE ABA'S TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

On February 5, 2002 ABA House of Delegates adopted the following recommendation of its Standing Committee on Legal Aid and Indigent Defendants Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs Of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Service.

Recommendation

Resolved, that the American Bar Association adopts or reaffirms "The Ten Principles Of A Public Defense Delivery System," dated February 2002, which constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.

Further resolved, that the American Bar Association recommends that each jurisdiction use "The Ten Principles Of A Public Defense Delivery System," dated February 2002, to assess promptly the needs of its public defense delivery system and clearly communicate those needs to policy makers.

Report

Introduction

"The Ten Principles of a Public Defense Delivery System" is a practical guide for governmental official, policymakers, and other parties who are charged with creating and funding new, or improving existing, systems by which public defense services are delivered within their jurisdictions. More often than not, these individuals are non-lawyers who are completely unfamiliar with the breadth and complexity of material written about criminal defense law, including the multitude of scholarly national standards concerning the issue of what constitutes quality legal representation for criminal defendants. Further, they operate under severe time constraints and do not have the time to wade through the body of standards; they need quick and easy, yet still reliable and accurate, guidance to enable them to make key decisions.

As explained more fully in the sections that follow, "The Ten Principles of a Public Defense Delivery System" fulfills this need. It represents an effort to sift through the various sets of national standards and package, in a concise and easily understandable form, only those fundamental criteria that are absolutely crucial for the responsible parties to follow in order to design a system that provides effective and efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. By adopting "The Ten Principles of a Public Defense Delivery System," the ABA would create, for the first time ever, much-needed policy that is directed toward guiding the designers of public defense delivery systems.

Overview of National Standards on Providing Criminal Defense Services

The ABA was the first organization to recognize the need for standards currently relating to the provision of criminal defense services, adopting the *ABA Standards for Criminal Justice, Providing Defense Services* (now in its 3rd edition) in 1967. The *ABA Standards for Criminal Justice, Defense Function*, soon followed in 1971, and the *ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases* were adopted in 1989.

In addition, several other organizations have adopted standards in this area over the past three decades: the National Legal Aid and Defender Association adopted its *Performance Guidelines for Criminal Defense Representation* in 1995, *Standards for the Administration of Assigned Counsel Systems* in 1989, and *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* in 1984; the Institute of Judicial Administration collaborated with the ABA to create the *IJA/ABA Juvenile Justice Standards*, totaling 23 volumes adopted from 1979 through 1980; the National Study Commission on Defense Services adopted its *Guidelines for Legal Defense Systems in the United States* in 1976; and the President's National Advisory Commission on Criminal Justice Standards and Goals adopted Chapter 13, *The Defense*, in 1973. Collectively, these standards contain the minimum requirements for legal representation at the trial, appeals, juvenile, and death penalty levels and are a scholarly, impressive, and extremely useful body of work. However, they are written for the most part for lawyers who provide defense services, not for governmental officials or policymakers who design the systems by which these services are delivered. As the Introduction to the *ABA Standards for Criminal Justice, Defense Function* notes, "The Defense Function Standards have been drafted and adopted by the ABA in an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be. Hence, these are extremely useful standards for consultation by lawyers and judges who want to do 'the right thing' or, as important, to avoid doing 'the wrong thing.'" Further, the sheer volume of the standards make it impracticable for policymakers or others charged with designing systems to wade through them in order to find information of relevance to their duties. Indeed, even one of the smallest of the volumes, the *ABA Standards for Criminal Justice, Defense Function*, is 71 pages in length and contains 43 black letter standards with accompanying commentary. Thus, the standards do not address the particular need for ABA policy expressly directed toward those who are responsible for designing and funding systems at the state and local levels.

The Ten Principles of a Public Defense Delivery System

“The Ten Principles of a Public Defense Delivery System” fulfills this need. If adopted by the ABA, it would provide new policy targeted specifically to the designers and funders of public defense delivery systems, giving them the clear and concise guidance that they need to get their job done.

Conclusion

Through this resolution, the American Bar Association would fulfill a critical need by providing, for the first time ever, a practical guide (“The Ten Principles of a Public Defense Delivery System”) for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, systems to deliver effective and efficient, high quality, ethical, conflict-free legal representation to accused persons who cannot afford to hire an attorney.

Ten Principles of a Public Defense Delivery System

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter.

4. Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space

should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

5. Defense counsel’s workload is controlled to permit the rendering of quality representation. Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (*i.e.*, caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

6. Defense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

7. The same attorney continuously represents the client until completion of the case. Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. 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, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9. Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency. ■



Legislative Update

**Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601**

Address Services Requested

PRESORTED STANDARD
U.S. POSTAGE PAID
LEXINGTON, KY
PERMIT #1

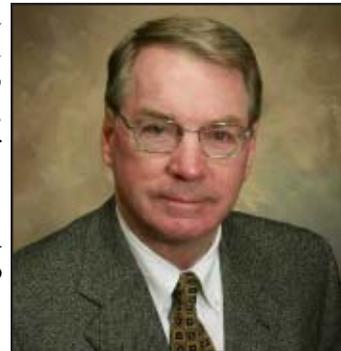
**Public Advocacy Commission Resolution
February 29, 2008**

....

Whereas the Public Advocate has informed the Commission of a plan to cut services in a way that would minimize impact on the liberty interests of most of DPA clients. This plan includes cost containment, no longer funding conflict cases and utilizing the savings to restore 20-25 positions, no longer accepting appointments in status offender, family court, Class B misdemeanor, some Class A misdemeanors, parole violations, and other similar cases;

Be it hereby resolved that the Public Advocacy Commission believes that if the DPA budget is cut as it currently is in HB 406, that the Public Advocate has no choice but to implement some or all of his service reduction plan.

Be it further resolved that the Public Advocacy Commission encourages Kentucky policy makers to fund the Department of Public Advocacy sufficiently to ensure that public defenders do not carry excessive caseloads;



*Robert Ewald, Chairman
Public Advocacy Commission*

— Public Advocacy Commission Resolution 2008