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Resolution Concerning Excessive Public Defender Caseloads in the Commonwealth of Kentucky

July 22, 2008

The American Council of Chief Defenders (ACCD) is a national organization whose membership includes the leaders of state and county public defender and assigned counsel agencies throughout the United States. The ACCD is dedicated to the preservation of the constitutional right to counsel for poor people charged with criminal offenses, as enunciated by the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The ACCD furthers this goal by providing support and assistance to its member programs, particularly when a program's lack of adequate resources threatens the provision of competent representation in accordance with constitutional norms.

Excessive public defender caseloads are of particular concern to the ACCD, because it is well known and frequently stated that a reasonable caseload is the sine qua non of effective public defender representation of indigent clients. No lawyer, no matter how capable or how experienced, can provide effective representation to *any* client when he or she is saddled with the responsibility of representing far too many clients.

In August 2007, the ACCD completed a comprehensive review of the caseload standards established by the National Advisory Commission (NAC) on Criminal Justice Standards and Goals in 1973. The NAC standards called for the caseloads of public defenders providing representation: in felony cases not to exceed 150 per year; in juvenile court cases not to exceed 200 per year; and in misdemeanor cases not to exceed 400 per year. On August 24, 2007, after full discussion among its membership, our organization issued its **ACCD Statement on Caseloads and Workloads**, which reads in pertinent part:

The ACCD recommends that public defender and assigned counsel caseloads not exceed the NAC recommended levels of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year. 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 more than one category of cases, these standards should be applied proportionally. (For example, under the NAC standards a lawyer who has 75 felony cases should not be

assigned more than 100 juvenile cases and ought to receive no additional assignments).

It bears emphasis that the 2007 ACCD Statement redefines the 1973 NAC caseload standards as a maximum number; in other words, an outer limit. The ACCD Statement describes a number of dramatic criminal law changes since 1973 which argue powerfully for lower caseload maxima than the NAC standards would allow. These changes include: the drastic increase in the frequency of incarceration as a consequence of conviction; the burgeoning of harsh minimum mandatory sentences; the plethora of collateral consequences attendant to criminal convictions even for misdemeanor offenses; the greatly increased inclusion of forensic science as part of the prosecution, and therefore the defense, in criminal trials; the increased complexity of juvenile delinquency representation and capital case litigation; and the development of professional performance standards by public defender agencies and national bar organizations.

The Executive Committee of the ACCD has reviewed and considered the Petition for Declaratory Judgment which has been filed by the Department of Public Advocacy and Public Advocate Ernie Lewis and the Louisville and Jefferson County Public Defender Corporation and Chief Public Defender Dan Goyette, and likewise the detailed Affidavit in support of the Petition signed by Attorney Lewis. The Executive Committee has also reviewed the June 17, 2008 Resolution filed by the Kentucky Bar Association and the Resolution signed the previous day by the Chairman of the Public Advocacy Commission.

Furthermore, the ACCD Executive Committee has reviewed and considered the *ACCD Ethics Opinion 03-01* (April, 2003), which, pursuant to ethical strictures established by the American Bar Association (ABA) and by the National Legal Aid and Defender Association (NLADA), sets forth the ethical responsibility of the chief executive of a public defender agency where, as here, the appropriation for a public defense agency is reduced without any concomitant decrease in its caseload. A copy of the ACCD Ethics opinion is attached hereto. The ACCD Executive Committee has also considered ABA Formal Opinion 06-441, issued by the ABA Standing Committee on Ethics and Professional Responsibility on May 13, 2006, and entitled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation." A copy of this ABA Ethics Opinion is also attached hereto.

Finally, the ACCD Executive Committee is aware that Attorneys Lewis and Goyette reviewed with care the vacancy levels in each of their offices against the anticipated caseloads with which each of those offices would be confronted.

In consideration of this information, the American Council of Chief Defenders hereby RESOLVES :

- (1) That the caseloads currently being borne by Kentucky's public defenders, being far in excess of long-established caseload limits established by the NAC Standards in 1973 and reaffirmed by the ACCD Statement on Caseloads and Workloads in 2007, are so excessive as to frustrate the provision of adequate legal representation to each indigent client, as required by the *Gideon* decision and its progeny; and moreover that these caseloads pose a significant risk of representation which would constitute ineffective assistance of counsel;
- (2) that the Public Advocate for Kentucky and the Chief Public Defender for Louisville and Jefferson County have a profound professional and ethical obligation, under both the ACCD Ethics Opinion 03-01 and the ABA Formal Opinion 06-441, to ensure that their attorneys' caseloads do not exceed the caseload limits established by the 1973 NAC Standards and the 2007 ACCD Statement;
- (3) that Public Advocate Lewis and Chief Public Defender Goyette, by presenting their Petition for Declaratory Judgment on behalf of their agencies, their staffs, and their clients, have acted in strict compliance with their ethical responsibilities under the ACCD Ethics Opinion 03-01 (4), "**Special duties of the chief executive officer of a public defense agency**", (April, 2003) ("[T]he chief executive of a public defense agency is required to decline excessive cases."), and with the Conclusion thereof, which states that:

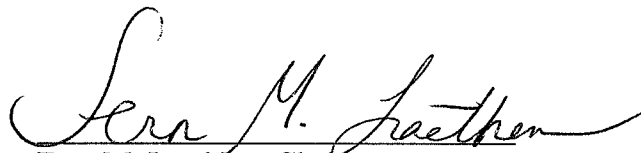
A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case

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.

- (4) that Attorneys Lewis and Goyette are also acting in strict compliance with the American Bar Association Formal Opinion 06-441 (2006), which further establishes the ethical responsibility of a Public Defender to seek judicial relief whenever excessive caseloads threaten the provision of competent and diligent representation to every client;

- (5) that by carefully assessing the vacancy levels in each of their offices against anticipated caseload demands, and by setting caseload levels for each individual office which permit the provision of competent representation for every client, Attorneys Lewis and Goyette are fulfilling their ethical responsibilities as set forth in the ABA Formal Opinion, the ACCD Ethics Opinion, and the ACCD Statement on Caseloads and Workloads;
- (6) that the ACCD is aware that many jurisdictions have authorized the establishment of caseload limits, in order to provide a mechanism by which cases that simply cannot be handled competently by overworked public defenders are assigned to private attorneys who are paid with public funds. [See, for example, Massachusetts General Laws chapter 211D, section 9 (c), which authorizes the state Committee for Public Counsel Services to establish “specified caseload limitation levels” for its public defender and private counsel divisions]. The ACCD recommends that every state and jurisdiction have such an overload mechanism, in order to ensure that public defenders maintain ethical caseload levels and that indigent persons charged with criminal offenses have competent counsel to represent them;
- (7) that the American Council of Chief Defenders, whose members understand through their own individual experiences the complexity and difficulty of case overload situations, offers its continuing availability as a resource upon which the Court may wish to draw as it undertakes to address the very serious issues presented by the Petition for Declaratory Judgment which has given rise to this Resolution.

RESOLVED this 22nd day of July, 2008



Fern M. Laethem, Chair
American Council of Chief Defenders