



**Department Of Public Advocacy
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For Immediate Release

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The Department of Public Advocacy Notifies Local Judges of Service Reduction

FRANKFORT, KY (May 28, 2008) - - - The following letter was mailed to local judges on Friday, May 23, by Public Advocate Ernie Lewis. This letter gives notice to local judges of the DPA's plan for reducing services necessary to achieve ethical caseloads beginning July 1, 2008. This is the first time since 1991 that the Department has had to reduce services. Cuts are necessary because of the 2008 Kentucky General Assembly's failure to fully fund the Department in FY09.

"Dear Judge X,

It is with considerable disappointment that I write this letter to you announcing service reductions by the Department of Public Advocacy. This is a follow-up to the letter I wrote to you in March encouraging you to contact your legislator regarding the budget for indigent defense. Unfortunately, after I sent you that letter, the budget situation for DPA only worsened. The General Assembly failed to pass a budget that would fully fund indigent defense in Kentucky. My only choice now as an executive branch administrator is to tailor service delivery to the enacted budget. I will be doing so knowing that the Kentucky and United States Constitutions mandate that we provide virtually all of the

services that I will be cutting. As someone who has devoted almost 31 years of my legal practice to indigent defense, that is my most profound regret as I announce these actions.

DPA is a statewide public defender system committed to implementing the mandates of the U.S. Supreme Court in *Gideon*, *Argersinger*, and *Shelton*. KRS Chapter 31 established the Department of Public Advocacy as a statewide public defender program. DPA is responsible for representing all indigents accused of a crime or mental state for which their liberty is threatened. Today, all of the counties except for Jefferson County have chosen to have the Commonwealth fund indigent defense in its entirety. DPA does so through the most cost-effective model known—delivering services through 30 full-time offices at approximately \$254 per case. The private bar is involved through the provision of conflict services in approximately 3000-4000 cases. Overall, DPA handled over 148,000 cases in FY07. DPA has a model enabling statute, an active and conscientious oversight board, an excellent training program, and a cost-effective delivery system. Unfortunately, DPA has been starved for resources historically; a history that now threatens the full provision of the right to counsel for indigents.

DPA requested a budget that would have allowed its attorneys to handle all appointed caseloads. DPA requested a budget that would have been sufficient to provide competent legal representation over the next biennium. Had the budget passed it would have allowed DPA to comply with caseload standards consistently recommended over the past three decades. The basis for the budget was the reduction of caseloads to no more than 350 new cases per lawyer in our rural offices and no more than 450 cases per lawyer in our four urban offices. In addition, DPA's budget request contemplated a 3% increase in caseloads over the biennium, a conservative request and estimate given the 8% annual increase in caseloads since 2000. DPA based its funding request upon historical caseload data.

The General Assembly slashed DPA's budget. In FY08, DPA's amended budget is \$40.1 million. Even at that level, it is estimated that the FY08 budget did not fund 30 of DPA's positions. The Governor and the House agreed to fund DPA at \$39 million in FY09, a \$1.1 million decrease. The Senate cut DPA's budget to \$37.2 million. The General Assembly, after the free conference committee made its decisions, funded DPA at \$37.8 million for FY09. This cut \$2.3 million from DPA's amended FY08 budget.

DPA can only deliver \$37.8 million in legal services. In FY07, lawyers for DPA carried caseloads 40% above the upper limits set by the National Advisory Commission for public defenders. DPA lawyers have handled excessive caseloads for many years. Most DPA lawyers work significant numbers of hours of overtime. DPA cannot deliver unlimited legal services and cannot be expected to deliver the same services for \$37.8 million that it was able to deliver for \$40.1 million. Rather, DPA can only deliver the legal services for which it is funded. For FY09, the General Assembly has funded indigent defense services in the amount of \$37.8 million. Like all other Executive Branch agencies, DPA must reduce its service levels consistent with the enacted budget.

DPA has a responsibility to ensure ethical caseloads for its attorneys. In order to

perform its statutory duties in compliance with state and constitutional requirements, DPA has a professional responsibility not to impose unethical caseload levels on its lawyers. ABA Formal Opinion 06-441 was issued on May 13, 2006 by the American Bar Association Standing Committee on Ethics and Professional Responsibility. It states with clarity that 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.” It adds that a “lawyer’s workload ‘must be controlled so that each matter may be handled competently.’” It cites with approval the *ABA Ten Principles of a public defense delivery system* (2002) which require that defense counsel’s workload be controlled “to permit the rendering of quality representation.” The 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.” As the Public Advocate and chief administrator of the statewide public defender system, I and the leadership of DPA have the responsibility to control the workloads of our lawyers.

Based upon budgeted funding, the caseloads of trial attorneys in many DPA offices will reach unethical levels if appropriate action is not taken. As mentioned above, even the amended budget for FY08 failed to fund approximately 30 positions. The enacted budget for FY09 fails to fund 54 positions at a minimum and perhaps as many as 70 positions. **30-40 trial attorney positions will have to remain vacant during FY09 for the budget to balance.** Positions presently vacant will for the most part have to remain unfilled, and newly vacated positions will in all likelihood remain unfilled throughout FY09. I hope to avoid layoffs. In FY07, trial lawyers (at full staffing) carried an average of 436 new cases per lawyer. Under the enacted budget for FY09, trial attorneys’ caseloads would soar near or above 500 cases per lawyer, far above the national standards. While a few of our offices will maintain ethical caseload levels with no services cut, most of our offices have vacancies that cannot be filled and action must be taken to control caseloads or ethical limits will be breached.

The Post-Trial Division is Equally Affected by this Cut: In addition to its trial clients, DPA also has a legal duty to represent clients on appeal, in post-conviction proceedings, and in juvenile post-dispositional actions. Unfortunately, our funding for these services has been cut significantly. This would result in significant staff shortages in most years, but this year it is a particular challenge because approximately 10% of the post trial division is scheduled to retire this year. In light of budget language directing the Finance Cabinet to recapture the salary of retiring employees, we cannot say at this time whether the Post-Trial Division will have its budget further reduced as a result of these retirements. Regardless, it is a certainty that the Post-Trial Division will be facing critical staffing shortages throughout the year. These shortages will have the following impacts

on post trial clients in the trial and appellate courts:

Appeals Courts: Appellate courts currently expect, in general, that a brief be filed within 180 days of assignment. Existing resource shortages make it difficult to meet those deadlines. As staff is reduced further, it will no longer be possible for an attorney to practice ethically before the appellate courts and meet those deadlines. In the coming weeks, the Post Trial Division Director will be communicating with the appellate courts to determine whether they would prefer that DPA withdraw from excessive cases altogether, or authorize that those cases be filed later than 180 days from the date of assignment.

Circuit/District Courts: The Post Conviction and Juvenile Post Disposition Branches have statewide responsibilities but are located primarily in Frankfort. Both branches will be more closely scrutinizing cases to determine whether they meet the criterion for representation under KRS 31.110(2)(c), 31.110(4), and 15A.065.(6). In order to facilitate that decision, the branches will be seeking extensions of time to review those records and file appropriate pleadings. Counsel will also be seeking to conduct routine motions, such as scheduling motions, telephonically in order to reduce travel costs.

DPA must live within its budget. DPA has few choices. Unlike universities, DPA cannot raise tuition. Unlike the prison system, DPA cannot delay capital projects. All DPA can do is reduce the size of its staff, since our budget consists entirely of personnel and the operating expenses to support the personnel.

DPA has no money to pay for conflict counsel. As previously mentioned, 145,000 or so cases are handled each year by full-time staff. In another 3000-4000 cases, DPA is obligated by legal and ethical requirements to obtain private counsel to represent persons with whom DPA has a conflict of interest, usually in situations involving codefendants. DPA spends approximately \$1.2 million each year to contract with private attorneys to handle conflict cases. This has proven grossly insufficient over the years. Private attorneys are handling conflict cases on a nearly *pro bono* basis for approximately \$300-500 per case for mostly felony representation. DPA has no money to pay even this small amount in FY09. DPA has been cut \$2.3 million in FY09, and thus **will not fund conflict cases in FY09.**

That does not mean that DPA is not responsible for providing conflict counsel. DPA will continue to identify private attorneys willing to handle conflict cases. DPA will simply not be able to provide compensation for those attorneys willing to take cases.

DPA will be asking the courts to order the Finance Cabinet to pay for conflict counsel as well as other counsel as a necessary governmental expense. The dilemma that now exists is that the Commonwealth of Kentucky is obligated to provide counsel to poor people charged with crimes, but the legislature has failed to fund that obligation. DPA will assert that the solution to this is for courts to enter orders requiring the Commonwealth to pay for private counsel. DPA will provide to you names of counsel

willing to take conflict or other service reduction cases.

Another solution is for courts to decide in advance that a person charged with a crime is not subject to a loss of liberty. The provision of counsel is mandated when a person is charged with a “serious crime” as defined in KRS 31.100 (4). However, there is no constitutional right to state funded counsel where a person charged with a crime is not facing jail time and where there will be no other consequences later if counsel is not provided. Courts and prosecutors can explore the possibility of dismissal and diversion for numerous low level misdemeanor offenses where jail time is not intended or appropriate.

Many offices will reduce services in additional cases. Reducing the funding for conflict cases will not necessarily be the only reduction in services. In order to maintain ethical caseloads while being unable to fill present and future vacancies, DPA will have to reduce caseloads in additional categories of cases in some offices. I have written you previously regarding the possible categories of cases involved in these service reductions. They include family court cases, status offender cases, probation and parole revocation cases, and some Class A and B misdemeanors. In addition, DPA will not be providing services in involuntary commitment cases under KRS 202A. 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.

Some offices will not be affected by service reductions other than in the area of conflict cases. As mentioned, each office will be treated differently outside of the conflict arena. Some offices with lower caseloads and no vacancies may not have any other services reduced. All offices (outside of Louisville) will be affected by the elimination of funding for conflict cases or attorneys in involuntary commitment cases.

The Trial Division Director, Damon Preston, will be sending letters to each directing attorney ordering specific service reductions for each defender office outside of Louisville Metro. The directing attorney for each office serving your courts will then meet with you and provide you a copy of the letter and give you advance notice of the service reductions in your courts. The Director of the Louisville Metro Public Defender’s Office, Dan Goyette, is currently reviewing the budget and evaluating the workload of his office, and, after conferring with his board of directors, will determine the nature and extent of any service reductions that may be necessary. He intends to meet with the Chief Judges of the Jefferson District and Circuit Courts before the commencement of the new fiscal year to discuss his office’s unique situation and whatever decisions are made with respect to the provision of services. We will keep you informed at every step of this process and have no intention of taking any action for which you are not given advance notice.

Vacancies have the potential to change the service reduction plans of individual offices. DPA has approximately 4 attorneys leaving the organization each month. If this turnover rate continues during FY09, and if DPA remains unable to fill vacancies due to

the budget cuts, the offices affected by the service reduction plan may change. If a change occurs, you will be notified.

The Public Advocacy Commission supports this service reduction plan. The service reduction plan as outlined above was presented to the Public Advocacy Commission at its February 29th meeting. The Commission is a 12 member oversight board, 7 of whom are appointed by the Governor, 3 by the Deans of the law schools, and 2 by the Court of Justice. The Commission thereafter passed unanimously a resolution supportive of this plan. In essence, the Commission resolved 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.”

AOC and DPA are working together to ensure that only those eligible for a public defender are appointed a public defender. The *Blue Ribbon Group* encouraged the AOC and DPA to work together to ensure that eligibility decisions were made in a uniform, consistent and reliable fashion. Most recently, the Chief Justice initiated an Affidavit of Indigency Committee “to review the affidavit of indigency form utilized by our courts. It has been suggested that the current form requires too little information and results in the appointment of public defenders in circumstances that may not be entirely appropriate.” Public defender caseloads have increased by 8% annually since 2000, irrespective of the crime rate. It is hoped that the work of this committee will be that those who are eligible, but only those who are eligible, will be appointed a public defender in the future so that the diminishing resources of DPA can be used wisely and effectively.

The Lexington Public Defender’s Office will be severely affected by the service reductions. The service reduction plan will have its most significant impact in Lexington. DPA requested \$2.8 million annually for the Lexington Office. This office handles over 10,500 cases annually. DPA requested sufficient funds to hire 22 lawyers, thereby lowering caseloads to approximately 450 for this urban office. For comparison purposes, prosecutors in Lexington are funded at \$5.9 million with 37 prosecutors. The Governor and the House lowered the amount requested to \$1.8 million. The Senate budget zeroed the Lexington budget out entirely. The budget as enacted fixed the budget at \$1.5 million. That budget will allow for only 16-17 lawyers who would carry caseloads of over 600 cases per lawyer, a clearly unethical level. This budget is not in parity with the prosecution function in Lexington. Principle #8 of the *ABA Ten Principles of a public defense delivery system* (2002) is that “[t]here is parity between defense counsel and the prosecution with respect to resources...” That principle was violated by the budget as enacted by the 2008 General Assembly. As a result, DPA will be reducing significantly the number of cases handled by public defenders in the Lexington courts, with as many as 2000-3000 cases to be affected.

I understand that these actions will affect the lives of many. I do not take these actions lightly. In fact, as I end my third (and final) term as Public Advocate, I am

profoundly disappointed by having to take these steps. I am not unmindful of the effect this will have on the lives of the clients for which DPA is responsible. However, I do not believe that I have any choice. Without this action, our attorneys cannot properly represent their clients. I will not assign unethical caseload levels to our attorneys. The Commonwealth must live up to its responsibilities to provide counsel to the people it arrests and charges with criminal offenses for which they can be deprived of life or liberty.

The outlook for FY10 is guarded. The enacted budget for FY10 increases somewhat in FY10 from \$37.8 million to \$41.6 million. \$41.6 million is approximately \$1.5 million more than the amended FY08 budget of \$40.1, which did not have funding in it for full staffing. This increase depends upon an improving economy, and we will have to see what happens with caseloads. Whether the service reduction plan continues into FY10 remains to be seen.

This is an action for which I am ultimately responsible and any sanctions or retribution should be directed at me rather than a directing attorney or individual staff attorney. I fully anticipate that there will be some judges who attempt to put pressure upon our local lawyers to represent people outside of this service reduction plan. I would ask that courts respect the separation of powers and the independence of the Department of Public Advocacy. I am the person who serves as chief administrator and appointing authority of DPA, and I am ultimately responsible for these decisions. Any pressure placed upon DPA's local lawyers to represent people outside of this service reduction plan would be inappropriate. I will make every effort to be responsive and available to the judiciary as this service reduction plan is implemented.

Please contact me with any questions regarding these actions.

Sincerely,
Ernie Lewis
Kentucky Public Advocate

Cc: The Honorable Steven L. Beshear, Governor of the Commonwealth of Kentucky
Hon. Joseph E. Lambert, Chief Justice of the Kentucky Supreme Court
J. Michael Brown, Secretary of the Justice and Public Safety Cabinet
The Honorable Jack Conway, Attorney General
Robert C. Ewald, Chair of the Public Advocacy Commission
Ms. Mary Lassiter, State Budget Director
Damon Preston, Trial Division Director
Tim Arnold, Post-Trial Division Director
Dan Goyette, Executive Director of Louisville Metro Public Defender's Office
All DPA Directing Attorneys"

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