



**OFFICE OF THE PUBLIC DEFENDER
SIXTH JUDICIAL DISTRICT OF ARKANSAS**

201 Broadway St., Suite 210
Little Rock, AR 72201-2338
Phone: (501) 340-6120
Fax: (501) 340-6133
bsimpson@pulaskicounty.net

January 7, 2022

EMAIL

Gregg Parrish, Executive Director
Arkansas Public Defender Commission
101 E. Capitol Ave., Ste. 201
Little Rock, AR 72201-3826
gregg.parrish@arkansas.gov

APPOINTMENTS IN PULASKI AND PERRY CIRCUIT COURTS

As a result of the ongoing Covid-19 pandemic, our caseloads in the Sixth Judicial District have nearly tripled. And there is no end in sight: the current spike in Covid-19 infections has led the criminal divisions in Pulaski County Circuit Court to again suspend in-person proceedings, including trials.

Yesterday our office received the enclosed advisory opinion from Stark Ligon, Ethics Counsel, on the subject of the ethical implications of high caseloads.

Among his conclusions is that "the trial attorney confronted with a caseload or workload producing or reasonably likely to produce ethical violations by the attorney should refuse or decline to accept additional court appointments or assigned clients from the public defender office until the trial attorney's caseload or overall workload is reduced to the level the trial attorney can ethically and effectively handle." Op. at 5.

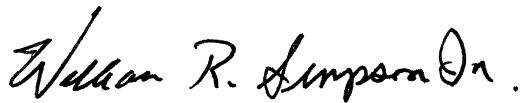
We have concluded that our current caseload in the circuit courts of the Sixth Judicial District results in ethical violations. Specifically, we find that our office's current caseload prevents competent, diligent, and prompt resolution of clients' cases in compliance with the rules of professional conduct. Any further increase will only result in additional ethical violations.

Mr. Ligon also writes that supervisory attorneys like ourselves "have an ethical obligation to make sure that subordinate attorneys do not continue to carry an excessive caseload or overall workload and incur ethical conflicts or rule violations." *Id.* (citing Ark. R. Prof'l Conduct 5.1).

Page 2
Gregg Parrish
January 7, 2022

To that end, we will instruct our deputies to object to any further appointments in the circuit courts of the Sixth Judicial District beginning March 1, 2022. We will also instruct our deputies to reduce their current caseloads to ethically appropriate levels.

By copy of this letter we are informing the Honorable J. Leon Johnson, Administrative Judge of the Sixth Judicial District. Closer to March 1, we will inform all of the circuit court judges in whose courtrooms our deputies appear.



WILLIAM R. SIMPSON, JR. – CHIEF PUBLIC DEFENDER



KENT C. KRAUSE – CHIEF DEPUTY PUBLIC DEFENDER

Enclosure: 1/6/22 Letter from Stark Ligon, Ethics Counsel

cc: Honorable J. Leon Johnson, Administrative Judge
Sixth Judicial District of Arkansas
jljohnson@pulaskimail.net

Lisa Ballard, Executive Director
Office of Professional Conduct
lisa.ballard@arcourts.gov

SUPREME COURT of ARKANSAS
OFFICE of ETHICS COUNSEL
Justice Building
625 Marshall Street, Suite 0100
Little Rock, Arkansas 72201

Stark Ligon, Ethics Counsel

Phone 501-683-4014
Fax: 501-683-4013
Email: ethicscounsel@arcourts.gov

CONFIDENTIAL

(See Arkansas Supreme Court Per Curiam of September 30, 2021, at 2021 Ark. 169)

January 6, 2022

Via mail & email: athornton@pulaskicounty.net

Andrew P. Thornton
Attorney at Law
Office of the Public Defender
Sixth Judicial District
201 Broadway Street, Suite 210
Little Rock, AR 72201-2338

Re: OEC file No. 21-026 - Informal Advisory Opinion

Dear Mr. Thornton:

In response to your initial inquiry received on December 6, 2021, for the Office I respond as follows:

Topic(s):

1. Excessive caseloads and probably also excessive overall workload requirements have for some time and currently compromise the ability of public defender staff lawyers to provide all appointed clients competent and timely legal services as required by the rules regulating attorney ethical conduct.
2. Action options for a public defender attorney or unit when she or it reasonably determines that accepting new court-appointed clients will negatively and substantially impact the involved lawyer's ability to provide appropriate, competent, effective, timely, and diligent legal services and representation to all existing clients, plus any new clients, under the rules of regulating attorney ethical conduct, here the Arkansas Rules of Professional Conduct ("ARPC").

Summary: The main ethics issues in your inquiry appear to be:

1. As an individual public defender staff trial lawyer, you have made or may be about to make

what you consider to be a reasonable determination that your caseload, plus other duties and responsibilities that go into your overall workload, leave you unable to comply with the Rules requiring you to provide competent (effective) and diligent (timely) legal services to each of your current clients, especially given the negative impact of the COVID pandemic since March 2020 on the Arkansas criminal justice system.

2. Consistent with your ethical obligations to each of your current clients, you have determined that acceptance of any additional appointed clients for some period of time into the future will likely cause you to violate one or more of the ARPC Rules, violations which can likely be avoided if your caseload and/or overall workload are at least not further expanded.

3. You ask for an informal advisory opinion on whether you, other similarly-situated public defender attorneys, or maybe even the public defender office where you work can properly take the position that you can decline new court appointments, and how to ethically do so.

Arkansas Rule(s) of Professional Conduct involved - Nos. 1.1, 1.2, 1.3, 1.4, 1.7, 1.13, 1.16, 3.4(c), 5.1, 5.4, 6.2(a), 8.4(d)

Your Facts: You state that in Arkansas the public defender in each judicial district has the duty to represent all indigent defendants in all felony, misdemeanor, juvenile, guardianship, and mental-health cases, and all traffic cases and contempt proceedings punishable by incarceration. Ark. Code Ann. § 16-87-306(1)(A); *see also* Ark. R. Crim. P. 8.2(a) (judge shall appoint counsel at first appearance following arrest unless defendant waives right to counsel or judge determines there is no possibility of incarceration). This statute and rule effect the Sixth Amendment guarantee of counsel in any proceeding in which the defendant is vulnerable to imprisonment. *Alabama v. Shelton*, 535 U.S. 654, 674 (2002). Our caseloads were already high before the COVID-19 pandemic. But the pandemic shut down trials, and without trials, many cases do not resolve. (Even if most cases do not resolve by trial, the prospect of trial forces the parties finally to negotiate.) So we have observed our caseloads double and triple since the pandemic began.

Your question presented. If I reasonably conclude that my existing caseload prevents competent and diligent representation of another client, must I object to appointment in the new case?

Your proposed answer and authorities. Yes. A lawyer cannot represent a client if the representation will result in violation of the rules of professional conduct. Ark. R. Prof'l Conduct 1.16(a)(1); *id.* cmt. 1 ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."). In every case a lawyer must provide competent representation to the client. *Id.* Rule 1.1. This requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to the case. *Id.* In every case a lawyer must also act with reasonable diligence and promptness. *Id.* Rule 1.3 & cmt. 2 ("A lawyer's work load must be controlled so that each matter can be handled competently."). And in every case a lawyer must spend time communicating with the client about the representation. *Id.* Rule 1.4. "The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide

competent and diligent representation to existing or potential clients, the lawyer should not accept new clients.” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-441, at 9 (2006).

Your additional authorities. Restatement (Third) of the Law Governing Lawyers § 16(2) & cmt. d (2000) (lawyer must “act with reasonable competence and diligence”; “The lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications. The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client’s objectives, including appropriate factual research, legal analysis, and exercise of professional judgment.”); ABA Standards for Criminal Justice: Defense Function § 4-1.3(e) (3d ed. 1993) (“Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client’s interest in the speedy disposition of charges, or may lead to the breach of professional obligations.”); ABA Standards for Criminal Justice: Providing Defense Services § 5-5.3 & cmt. (3d ed. 1992) (defender organizations and appointed counsel should not accept workloads “that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations” and they “must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments”); ABA, Ten Principles of a Public Defense Delivery System § 5 cmt. (2002) (“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.”); ABA/BNA Lawyers’ Manual on Professional Conduct §§ 31:201.20.70.10 and 31:1001.20.50.10 (2021); John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice* §§ 9.2, 9.14 (3d ed. 2005 & 2020–2021 supp.).

OEC Discussion and Analysis:

1. This opinion is intended to address only your specific question - what options do you have to decline a future additional court-appointed case and client if you have reasonably determined that your existing caseload prevents your competent, diligent, and ethical representation of another client.

2. The opinion will not discuss or opine on the issues of resources to support the provision of legal services to indigent criminal defendants. Cases and literature reviewed by Ethics Counsel indicate those are public policy decisions involving more than one branch of government, and especially the legislative branch that is constitutionally empowered to act in the area of appropriation of public funds, areas outside the scope of this office and this opinion.

3. The tension presented here is between and among: (a) the Sixth Amendment constitutional right of an indigent criminal defendant to effective assistance of appointed counsel; (b) the obligation in State law on the public defender system and its attorneys to represent nearly all court-appointed criminal defendant clients; and (c) the individual appointed or assigned attorney’s obligation to comply with the Arkansas Rules of Professional Conduct in representation of each client, in particular Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication with client), Rule 1.7 (conflicts), Rule 3.4(c) (obeying all court orders except in limited situations, Rule 6.2(a) (accepting appointments), and other Rules.

4. The literature in the field reviewed by Ethics Counsel suggests that overall attorney “workload,” rather than “caseload,” may be the more appropriate measurement of the total obligations and effort of any single public defender attorney or any public defender office or unit. However the cases and literature also point out the expense and difficulty of obtaining persuasive professional studies and surveys that will pass court scrutiny.

5. In this opinion letter, the status or determination of “excessive workload” or “excessive caseload” of any public defender or at any public defender office of unit will not be attempted, made, or offered, as that is a matter of factual proof to be established under some protocol or rules other than attorney rules of professional conduct.

6. American Bar Association Formal Op. 06-441 (May 13, 2006) is still authoritative ethical guidance on your topics, does not appear to have been withdrawn or revised, and is widely-cited. A sample of other state ethics opinions before and since ABA 06-441 was issued that agree with its holdings are State Bar of Arizona Op. 90-10 (9/17-90), State Bar of Wisconsin Op. E-91-3 (10/15/91), South Carolina Op. 04-12 (2004), and Oregon State Bar Op. 2007-178 (9/07). Virginia Op. 1798 (8/3/04) addresses high caseloads for assistant prosecutors, in footnote 2 comparing the workload and ethical issues there as being the same as for public defenders and other appointed counsel.

7. None of the informal ethics advisory opinions issued by the Professional Ethics Committee of the Arkansas Bar Association appear to address the issues involved here.

8. OEC has not found or been directed to any Arkansas cases that address the ethics issues covered in this opinion.

9. I researched and reviewed litigation histories since 1980 of these “excessive caseload” issues in several other states, particularly Florida, Louisiana, and Missouri, and have provided you my research separately from this opinion. The results I found are mixed.

OEC Conclusions:

1. A lawyer’s primary ethical duty is owed to existing clients. ABA Formal Op. 06-441, fn 14. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in the lawyer’s workload becoming excessive. *See also* ABA Formal Op. 96-399 (ethical obligations of lawyers whose employers receive funds from the Legal Services Corporation for their existing and future clients when such funding is reduced and resources for clients are strained).

2. In presenting the following conclusions and options, OEC recognizes that whether an individual public defender attorney’s “workload” is excessive is a more complicated and multi-factored calculation than a consideration just involving “caseload,” and the two terms are not used interchangeably here.

3. A public defender trial attorney may not undertake or maintain a caseload or overall

workload that results in the attorney violating ethical obligations of competence (AR 1.1), diligence (AR 1.3), and communication with the client (AR 1.4). In deciding if the attorney's caseload or workload is resulting in or reasonably likely to result in ethical violations, national caseload standards are a significant factor to be considered but are not solely determinative. Instead, the attorney should decide whether the attorney's caseload or overall workload is interfering with basic functions ethically required of lawyers, such as communication, investigation, and research. If the attorney reasonably concludes that the attorney's caseload or overall workload is producing ethical problems, the attorney must take appropriate and timely action to remedy the situation.

4. The trial attorney should first raise the issue with the attorney's supervising lawyer or the chief or managing public defender of the unit or office. Supervisory attorneys have an ethical obligation to make sure that subordinate attorneys do not continue to carry an excessive caseload or overall workload and incur ethical conflicts or rule violations. See AR 5.1.

5. If the trial attorney does not receive a satisfactory response from supervisory attorneys, the trial attorney should go up the chain of command and raise the issue with either the state director of the defender program or the state defender commission, seeking an ethically-satisfactory response. See AR 1.13(b).

6. When confronted with a prospective overloading of new appointed cases or reductions in agency resources that may cause such an overloading that may cause many lawyers in the public defender agency to exceed an ethical workload capacity, the agency director or commission may be ethically required to refuse new appointed clients until the agency's attorneys have ethically-manageable caseloads and workloads.

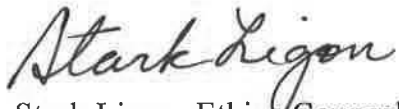
7. In the last analysis, the trial attorney confronted with a caseload or workload producing or reasonably likely to produce ethical violations by the attorney should refuse or decline to accept additional court appointments or assigned clients from the public defender office until the trial attorney's caseload or overall workload is reduced to the level the trial attorney can ethically and effectively handle.

8. If the trial attorney is unable to handle current matters competently and in compliance with applicable attorney ethics rules, and if the attorney has exhausted other reasonable means for dealing with his or her problem, the trial attorney should move to withdraw from representation in that case or enough cases to reach caseload levels the trial attorney can competently and ethically handle. See AR 1.16(a)(1) and AR 6.2(a).

9. If the court denies the motion(s) to withdraw or denies the refusal to accept new appointments, the trial attorney should continue to client representation to the best of the attorney's ability. See AR 1.16(c). Refusal to obey such an order and not continue the client representation may place the attorney in a direct contempt position with the trial court. *See Utah State Bar Ethics Op. 107 (1992)*. The attorney should consider seeking review of a denial order by appeal or other possibly available special proceeding, such as petition for certiorari, mandamus, or prohibition.

Disclaimer: This confidential informal opinion relies on the accuracy of the facts presented by you to ethics counsel plus any other information obtained from public records or sources; has not been approved by any committee or the Supreme Court; is not binding on any court, tribunal, or attorney disciplinary office; and is intended only as assistance to the attorney to whom it is addressed for use in making an informed decision regarding compliance with the Arkansas Rules of Professional Conduct in future conduct of the inquiring attorney or an attorney in the same law firm with the inquiring attorney. If you desire clarification of or disagree with the contents of this opinion letter, you must contact this office within five days of the date of the letter. As the inquiring attorney, you solely have the privilege of confidentiality regarding your contact with this office and use of any response to you from this office. This office may use a redacted, anonymous, or hypothetical version of this informal opinion letter as a publicly posted ethics office opinion, as provided by Rule 8 of the Per Curiam of September 30, 2021, at 2021 Ark. 169.

Respectfully submitted,
Arkansas Supreme Court
Office of Ethics Counsel

A handwritten signature in cursive script that reads "Stark Ligon".

Stark Ligon, Ethics Counsel