IN THE CIRCUIT COURT OF PULASKI COUTY, ARKANSAS

FIRST DIVISION

NO. 60CR-23-207

STATE OF ARKANSAS

VS.

JUSTIN DAVIS

OBJECTION TO THE APPOINTMENT OF THE PUBLIC DEFENDER'S OFFICE FOR THE 6TH JUDICIAL DISTRICT ON CAPITAL CASES

COMES NOW the Public Defender for the 6th Judicial District, Mac Carder, and for his Objection to the Appointment of the Public Defender's Office for the 6th Judicial District on Capital Cases, and states:

1. The Office of the Public Defender for the 6th Judicial District currently has sixteen (16) staff attorneys capable of handling a felony case load. Of these attorneys, one (1) is death penalty certified. It is worth noting that within the Office there are currently four (4) unfilled attorney vacancies. Pursuant to Governor Sanders's Executive Order 1 there is currently a hiring freeze within Arkansas State Government. As such, the Public Defender's Office is restrained from hiring much needed attorneys.

2. The National Advisory Commission on Criminal Justice Standards and Goals, Standard 13.12 outlines that the caseload of a public defender office should not exceed one hundred and fifty (150) felony cases per attorney per year. [Ex. 1].

3. As of January 2023, the breakdown of cases by Division for the Public Defender's Office for the 6th Judicial District is as follows: (i.) First Division: there are currently five attorneys handling one-thousand-four-hundred-eighty-eight (1,488) felony cases and fifteen (15) murders; (ii) Third Division: there are currently four (4) attorneys handling one-thousand-three-hundred-thirty-seven (1,337) felony cases and twelve (12) murders; (iii) Fifth Division: two (2) attorneys handling six-hundred-sixty-three (663) and three (3) murders; and Seventh Division: five (5) attorneys handling one-thousand-three-hundred (1,300) felony cases and seventeen (17) murders.

4. On January 06, 2022, Stark Ligon issued a formal advisory opinion outlining that current

public defender workloads are so voluminous that it is unethical for public defenders to accept new appointments. [Ex. 2].

5. For all reasons outlined above, the Public Defender's Office for the 6th Judicial District respectfully objects to appointment on capital cases.

WHEREFORE, Public Defender's Office for the 6th Judicial District respectfully objects to appointment on capital cases.

Respectfully Submitted,

//s// MAC J. CARDER, AR91031
CHIEF PUBLIC DEFENDER
6th Judicial District of Arkansas
201 Broadway, Suite 210
Little Rock, AR 72201
(501) 340-6120
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Mac Carder, do herby certify that a copy of the foregoing motion has been served electronically, and will be served on the Prosecuting Attorney, 224 S. Spring Street, Little Rock, AR 72201

//s:// Mac Carder

EXHIBIT 1

NLADA
National Legal Aid & Defender Association

National Advisory Commission on Criminal Justice Standards and Goals, The Defense (Black Letter)

Tabbed Content Commentary Printer-friendly

Standard 13.1 Availability of Publicly Financed Representation in Criminal Cases

Public representation should be made available to eligible defendants (as defined in Standard 13.2) in all criminal cases at their request, or the request of someone acting for them, beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect. The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction.

Defendants should be discouraged from conducting their own defense in criminal prosecutions. No defendant should be permitted to defend himself if there is a basis for believing that:

1. The defendant will not be able to deal effectively with the legal or factual issues likely to be raised;
2. The defendant's self-representation is likely to impede the reasonably expeditious processing of the case; or
3. The defendant's conduct is likely to be disruptive of the trial process.

Standard 13.2 Payment for Public Representation

An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost.

The test for determining ability to pay should be a flexible one that considers such factors as amount of income, bank account, ownership of a home, a car, or other tangible or intangible property, the number of dependents, and the cost of subsistence for the defendant and those to whom he owes a legal duty of support. In applying this test, the following criteria and qualifications should govern:

1. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting, bond.
2. Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.
3. The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.
4. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

Standard 13.3 Initial Contact with Client

The first client contact and initial interview by the public defender, his attorney staff, or appointed counsel should be governed by the following:

1. The accused, or a relative, close friend, or other responsible person acting for him, may request representation at any stage of any criminal proceedings. Procedures should exist whereby the accused is informed of this right, and of the method for exercising it. Upon such request, the public defender or appointed counsel should contact the interviewee.

2. If, at the initial appearance, no request for publicly provided defense services has been made, and it appears to the judicial officer that the accused has not made an informed waiver of counsel and is eligible for public representation, an order should be entered by the judicial officer referring the case to the public defender, or to appointed counsel. The public defender or appointed counsel should contact the accused as soon as possible following entry of such an order.

3. Where, pursuant to court order or a request by or on behalf of an accused, a publicly provided attorney interviews an accused and it appears that the accused is financially ineligible for public defender services, the attorney should help the accused obtain competent private counsel in accordance with established bar procedures and should continue to render all necessary public defender services until private counsel assumes responsibility for full representation of the accused.

Standard 13.4 Public Representation of Convicted Offenders

Counsel should be available at the penitentiary to advise any inmate desiring to appeal or collaterally attack his conviction. An attorney also should be provided to represent: an indigent inmate of any detention facility at any proceeding affecting his detention or early release; an indigent parolee at any parole revocation hearing; and an indigent probationer at any proceeding affecting his probationary status.

Standard 13.5 Method of Delivering Defense Services

Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction to supply attorney services to indigents accused of crime. Cases should be divided between the public defender and assigned counsel in a manner that will encourage significant participation by the private bar in the criminal justice system.

Standard 13.6 Financing of Defense Services

Defender services should be organized and administered in a manner consistent with the needs of the local jurisdiction. Financing of defender services should be provided by the State. Administration and organization should be provided locally, regionally, or statewide.

Standard 13.7 Defender to be Full Time and Adequately Compensated

The office of public defender should be a full-time occupation. State or local units of government should create regional public defenders serving more than one local unit of government if this is necessary to create a caseload of sufficient size to justify a full-time public defender. The public defender should be compensated at a rate not less than that of the presiding judge of the trial court of general jurisdiction.

Standard 13.8 Selection of Public Defenders

The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person. The most appropriate selection method is nomination by a selection board and appointment by the Governor. If a jurisdiction has a Judicial Nominating Commission as described in Standard 7.1, that commission also should choose public defenders. If no such commission exists, a similar body should be created for the selection of public defenders.

An updated list of qualified potential nominees should be maintained. The commission should draw names from this list and submit them to the Governor. The commission should select a minimum of three persons to fill a public defender vacancy unless the commission is convinced there are not three qualified nominees. This list should be sent to the Governor within 30 days of a public defender vacancy, and the Governor should select the defender from this list. If the Governor does not appoint a defender within 30 days, the power of appointment should shift to the commission.

A public defender should serve for a term of not less than four years and should be permitted to be reappointed.

A public defender should be subject to disciplinary or removal procedures for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice. Power to discipline a public defender should be placed in the judicial conduct commission provided in Standard 7.4.

Standard 13.9 Performance of Public Defender Function

Policy should be established for and supervision maintained over a defender office by the public defender. It should be the responsibility of the public defender to insure that the duties of the office are discharged with diligence and competence.

The public defender should seek to maintain his office and the performance of its function free from political pressures that may interfere with his ability to provide effective defense services. He should assume a role of leadership in the general community, interpreting his function to the public and seeking to hold and maintain their support of and respect for this function.

The relationship between the law enforcement component of the criminal justice system and the public defender should be characterized by professionalism, mutual respect, and integrity. It should not be characterized by demonstrations of negative personal feelings on one hand or excessive familiarity on the other. Specifically, the following guidelines should be followed:

1. The relations between public defender attorneys and prosecution attorneys should be on the same high level of professionalism that is expected between responsible members of the bar in other situations.

2. The public defender must negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in his relations with law enforcement officials, remaining at all times aware of his image as seen by his client community.

3. The public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the criminal justice system, and to assist them in developing their own professionalism. In the course of this educational process he should assist in resolving possible areas of misunderstanding.

4. He should maintain a close professional relationship with his fellow members of the legal community and organized bar, keeping in mind at all times that this group offers the most potential support for his office in the community and that, in the final analysis, he is one of them. Specifically:

    a. He must be aware of their potential concern that he will preempt the field of criminal law, accepting as clients all accused persons without regard to their ability or willingness to retain private counsel. He must avoid both the appearance and fact of competing with the private bar.

    b. He must, while in no way compromising his representation of his own clients, remain sensitive to the calendaring problems that beset civil cases as a result of criminal case overloads, and cooperate in resolving these.

    c. He must maintain the bar's faith in the defender system by affording vigorous and effective representation to his own clients.

    d. He must maintain dialogue between his office and the private bar, never forgetting that the bar more than any other group has the potential to assist in keeping his office free from the effects of political pressures and influences.

Standard 13.10 Selection and Retention of Attorney Staff Members

Hiring, retention, and promotion policies regarding public defender staff attorneys should be based upon merit. Staff attorneys, however, should not have civil service status.

Standard 13.11 Salaries for Defender Attorneys

Salaries through the first 5 years of service for public defender staff attorneys should be comparable to those of attorney associates in local private law firms.

Standard 13.12 Workload of Public Defenders

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 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 postjudgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.

Standard 13.13 Community Relations

The public defender should be sensitive to all of the problems of his client community. He should be particularly sensitive to the difficulty often experienced by the members of that community in understanding his role. In response:

1. He should seek, by all possible and ethical means, to interpret the process of plea negotiation and the public defender's role in it to the client community.

2. He should, where possible, seek office locations that will not cause the public defender's office to be excessively identified with the judicial and law enforcement components of the criminal justice system, and should make every effort to have an office or offices within the neighborhoods from which clients predominantly come.

3. He should be available to schools and organizations to educate members of the community as to their rights and duties related to criminal justice.

Standard 13.14 Supporting Personnel and Facilities

Public defender offices should have adequate supportive services, including secretarial, investigation, and social work assistance.

In rural areas (and other areas where necessary), units of local government should combine to establish regional defenders' offices that will serve a sufficient population and caseload to justify a supporting organization that meets the requirements of this standard.

The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:

1. Sufficient funds to provide quarters, facilities, copying equipment, and communications comparable to those available to private counsel handling a comparable law practice.

2. Funds to provide tape recording, photographic and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.

3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense.

4. Sufficient funds or means of transportation to permit the office personnel to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.

Each defender lawyer should have his own office that will assure absolute privacy for consultation with clients.

The defender office should have immediate access to a library containing the following basic materials: the annotated laws of the State, the State code of criminal procedure, the municipal code, the United States Code Annotated, the State appellate reports, the U.S. Supreme Court reports, Federal courts of appeal and district court reports, citators governing all reports and statutes in the library, digests for State and Federal cases, a legal reference work digesting State law, a form book of approved jury charges, legal treatises on evidence and criminal law, criminal law and U.S. Supreme Court case reporters published weekly, loose leaf services related to criminal law, and, if available, an index to the State appellate brief bank. In smaller offices, a secretary who has substantial experience with legal work should be assigned as librarian, under the direction of one of the senior lawyers. In large offices, a staff attorney should be responsible for the library.

Standard 13.15 Providing Assigned Counsel

The public defender office should have responsibility for compiling and maintaining a panel of attorneys from which a trial judge may select an attorney to appoint to a particular defendant The trial court should have the right to add to the panel attorneys not placed on it by the public defender. The public defender's office also should provide initial and inservice training to lawyers on the panel and support services for appointed lawyers, and it should monitor the performance of appointed attorneys.

Standard 13.16 Training and Education of Defenders

The training of public defenders and assigned counsel panel members should be systematic and comprehensive. Defenders should receive training at least equal to that received by the prosecutor and the judge. An intensive entry-level training program should be established at State and national levels to assure that all attorneys, prior to representing the indigent accused, have the basic defense skills necessary to provide effective representation.

A defender training program should be established at the national level to conduct intensive training programs aimed at imparting basic defense skills to new defenders and other lawyers engaged in criminal defense work.

Each State should establish its own defender training program to instruct new defenders and assigned panel members in substantive law procedure and practice.

Every defender office should establish its own orientation program for new staff attorneys and for new panel members participating in provision of defense services by assigned counsel.

Inservice training and continuing legal education programs should be established on a systematic basis at the State and local level for public defenders, their staff attorneys, and lawyers on assigned counsel panels as well as for other interested lawyers.

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EXHIBIT 2

SUPREME COURT of ARKANSAS
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CONFIDENTAL
(*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
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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

Stark Ligon

Stark Ligon, Ethics Counsel

IAO No. 21-026 – OEC LITIGATION APPENDIX

1. The right of counsel for indigent defendants in federal criminal cases has been recognized since *Johnson v. Zerbst*, 304 U.S. 458 (1938). After the *Gideon v. Wainwright* decision in 1963, Congress passed the Criminal Justice Act ("CJA") in 1964. The CJA was amended in 1970 to create what has become the current federal defender system consisting of a combination of Federal Defender Offices and private appointed attorneys from the CJA panels in now 91 of the 94 federal districts. *See* 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (the "Cardone Report") at XV-XVI.

2. It appears generally accepted in American jurisprudence that the Sixth Amendment constitutional right and guarantee to assistance of appointed counsel has been constitutionally required of the states since 1963 by *Gideon v. Wainwright*, 372 U.S. 375 (1963). This right also means the right to "effective assistance" of appointed counsel. In the pre-*Gideon* case of *Glasser v. United States*, 315 U.S. 60 (1942), Glasser's conviction was set aside and remanded for new trial where an attorney was required to represent two co-defendants whose interests were in conflict. *Glasser* also cited *Powell v. Alabama*, 287 U.S. 45, 53 (1932), the "Scottsboro Boys" case, for the proposition that the Sixth Amendment right to assistance of counsel means assistance unimpaired, for example, by any trial court order that one lawyer shall simultaneously represent clients with conflicting interests, which would substantially impair the valued constitutional safeguard. *Glasser*, 315 U.S. at 70. *See Holloway v. Arkansas*, 435 U.S. 475, 482 (citing *Glasser* on a criminal defendant's Sixth Amendment right to the effective assistance of counsel); *Strickland v. Washington*, 466 U.S. 668 (1984) (on effective assistance of counsel at trial); *United States v. Cronic*, 466 U.S. 648, 649 (1984); *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 435 (1988); *Luis v. United States*, 578 U.S. 5, 136 S. Ct. 1083, 1095 (2016) (stating public defenders are "overworked and underpaid ….[.] (omitting here studies and recommendations from DOJ and others for public defender caseloads). The upshot is a substantial risk that accepting the Government's views would – by increasing government-paid-defender workload – render less effective the basic right the Sixth Amendment seeks to protect." *Luis*, 136 S. Ct. at 1095. (Emphasis added by OEC.)

3. It appears that public defender programs have been instituted in some form in most, if not all, states, since *Gideon* in 1963, either on a local, regional, or statewide basis. A statewide public defender agency was legislatively created in Arkansas by Act 1193 of 1993. By Act 1341 of 1997, the State of Arkansas began taking over the funding of the public defender system, especially salaries for public defender attorneys, some support staff, and all private attorneys appointed to represent indigent criminal defendants. Excessive and increasing public defender caseloads have been an issue in Arkansas since at least 2001, especially representation of defendants in death penalty cases and post-conviction relief efforts in such cases. Over the years since its creation, the public defender system has been assigned additional duties, including representation of children in state custody, including foster children, who are subject to police interrogation; adult protective services cases in which DHS seeks to take custody of an elderly person; alcohol and mental commitments, as needed; persons committed to the Arkansas State Hospital; children in truancy proceedings; and person charged with failure to pay child support. The addition of full-time district judges across the state is also cited as a factor in a substantial increase in public defender caseload.

(*See* Arkansas Public Defender Commission (Agency 0324) FY 2014-2015 budget request document available online.)

4. In February 2002, the ABA House of Delegates approved recommendations in Resolution 107 titled, "Ten Principles of a Public Defense Delivery system, " at http://www.abanet.org/legalservices/downloads/sclaid/resolution107. Principle #5 states: "Defense Counsel's workload is controlled to permit the rendering of quality representation." Commentary to Principle #5 states that "National caseload standards should in no event be exceeded...." The principles refer to the maximum caseload standards adopted in 1993 by the National Advisory Commission on Criminal Justice Standards ("NAC standards"), being 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals, or a proportional combination thereof. (*See* NAC Report at fn 42.) Subsequent caseload studies may use different numbers, but in principle all attempts at caseload standards appear to agree that caseloads above some numbers interfere and conflict with the lawyer's ability to provide effective and timely legal services to indigent clients, rendered in compliance with attorney ethics rules, and usually listed as in conflict with or violating Rules 1.1, 1.3, 1.4, 1.7, 6.2, and the duty of loyalty to each client.

5. Extensive case law is available on the efforts of public defender systems, especially in Florida since at least 1980, to deal with your issues. The "Florida public defender excessive caseload/workload experience" (OEC's term) is detailed chronologically in the following selected cases:

a. *Escambia County v. Behr*, 384 So.2d 147 (Fla. 1980) (faced with ethical issues and an excessive case load, the First Circuit public defender sought to withdraw from a number of felony cases that precluded the performance of effective representation for clients. The Florida Supreme Court adopted an appeals court judge's dissent that excessive case load is a proper ground for a trial judge to use in deciding whether to appoint the public defender or private counsel in lieu of the public defender).

b. *State of Florida v. Meyer et al.*, 430 So.2d 440 (Fla. 1983) (ineffective assistance of appointed appellate counsel found in many cases where timely notices of appeal from convictions were not filed, and all attorneys are under the professional duty not to neglect any legal matters entrusted to them).

c. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1132 (Fla. 1990) (found circuit public defender office had a backlog of appellate briefs estimated at between 1,005 and 1,700 cases; discussed the defender's workload, which was found to be a clear violation of the indigent state defendant's constitutional right to effective assistance of counsel on appeal citing to *Behr*: and directed trial courts to appoint private sector lawyers on a "one-shot" basis to resolve the appeals backlog, while hoping the legislature would appropriate sufficient funds to help the counties pay for these private counsel).

d. *Order on Motion to Withdraw filed by the Tenth Circuit Public Defender*, 622 So.2d 2 (1993, Second District Court of Appeals) (circuit public defender office filed to withdraw from representation of 382 appellant clients whose initial briefs were

overdue, to compel appointment of private sector counsel for each client appeal, and for appointment of a commissioner to conduct an evidentiary hearing on the public defender's claim of excessive caseload conflict).

e. *In re Certification of Conflict in Motions to Withdraw filed by Public Defender of the Tenth Judicial Circuit*, 636 So.2d 18 (Fla. 1994) (the Florida Supreme Court considered the Second District Court of Appeals 1993 decision on the 382 pending appeals cases, reviewed the workload measurement system called the Florida Funding Formula and other standards and studies, commented on the Commissioner's Report (undated but apparently in late 1993 after a four-day hearing) and the district (appellate) court's granting of the motions to withdraw, and approved that order and procedure).

f. *In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus*, 709 So.2d 101 (Fla. 1998) (upholding the appellate district court order granting public defender motions to withdraw from 248 cases due to excessive caseload, to not accept further appellate cases due to significant problem of constitutional magnitude concerning delays in representation, and directed chief judges in five circuits to appoint qualified private sector attorneys to represent indigents in appeals in their circuits, to be paid by the counties. The Supreme Court stated that delays in representation of indigents had been an issue before that court for the last eighteen years.).

g. *State of Florida v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d 798 (2009, Third District Court of Appeals) (PD-11 sought to withdraw from 21 noncapital felony cases citing excessive caseload and conflicts; the district appellate court held such aggregate case withdrawals on the basis solely of excessive caseload were specifically prohibited by a state statute; the rules of professional conduct are only meant to apply to individual attorneys and not to the public defender office as a whole; and that an assistant public defender must prove prejudice or conflict separate from excessive caseload to be allowed to withdraw in a particular case). A two judge concurrence stated the case was nothing more than a political question masquerading as a lawsuit, and should be dispatched on that basis, because policy determinations like this were really political decisions and the legislature constitutionally controlled the appropriation process.

h. *State of Florida v. Bowens*, 39 So.3d 479 (2010, Third District Court of Appeals) (claim of individual public defender Kolsky that excessive caseload prevented him from diligently and competently representing defendant client Bowens was insufficient to establish conflict of interest and permit his withdrawal from the one case, where there was no determination of "actual prejudice" to defendant's constitutional rights. 39 So.3d at 481.

i. *Public Defender, Eleventh Judicial Circuit v. State of Florida*, 115 So.3d 261 (Fla. 2013) (citing the Third District's opinion at 12 So.3d 798 and *Bowens*, 39 So.3d 479, the Florida Supreme Court found the circuit public defender office demonstrated to the trial court cause for withdrawal in 21 non-capital felony cases based on underfunding

that led to excessive caseloads, but upheld the state statute excluding excessive caseload as a lawful ground for withdrawal as not violating a defendant's right to effective assistance of counsel. The Court relied on its constitutional authority and exclusive control over the ethical rules governing lawyer conflicts of interest, stating the attorney has an independent professional duty to "effectively" and "zealously" represent his or her client, and every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case," citing *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So.2d 134, 147 (Fla. 2008) and *Wilson v. Wainwright*, 474 So.2d 1162, 1164 (Fla. 1985)). In addition, after reviewing the Florida litigation history of the caseload/workload issues and various standards for such, the Supreme Court stated it reaffirmed that aggregate/systemic motions to withdraw are appropriate in circumstances where there is an office-wide or wide-spread problem as to effective representation. *Public Defender, Eleventh Circuit*, 115 So.3d at 274. According to attorney Stephen Hanlon, the Supreme Court found relief from excessive caseloads was appropriate, and remanded the case to the trial court to determine if current circumstances warranted relief (after five years of litigation). Hanlon states no relief was subsequently sought, a fact he confirmed with the Miami Public defender. See Stephen Hanlon, "The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System," 61 St. Louis U. L.J. 625, 634 (2017). The Florida chapter of this long story appears to end with the 2013 PD-11 decision.

6. The ABA sponsored Louisiana "Delhi Method" defender caseload survey, *The Louisiana Project*, was completed in 2017, finding the Louisiana public defender system only had the lawyer capacity to effectively represent 21% of its workload in compliance with consensus opinions of needs. The chief defender for the urban parish including Baton Rouge then filed suit seeking relief, claiming underfunding was causing staff reductions and increasing attorney workloads which could potentially increase conflicts of interest. *State of Louisiana v. Covington*, 318 So.3d 21 (2020). The Louisiana Project study's expert witnesses testified on the motion in the trial court. The State raised *Daubert* objections, alleging the "Delphi Method" produced unreliable generalized conclusions about the state's public defender system and that *State v. Peart*, 621 So.2d 780, 783 (La. 1993) requires individualized findings as to whether there has been ineffective assistance of counsel in each specific case from which withdrawal is sought. The district appellate court found the defender's evidence sufficient on their inability to effectively represent their clients and basically granted the defender relief. The Supreme Court majority declined to overrule or reconsider *Peart*, found the defender's evidence insufficient under the *Peart* standard, reversed the appellate court, and reinstated the district court's ruling adverse to the defenders. The two-justice dissent stated the Court has been dealing with these issues for 27.5 years since *Peart*, the State had not come up with a sustainable way to pay for an effective system of indigent defenders, it was time to revisit *Peart,* and try to bring about systemic change to honor the constitutional guarantee of reasonably effective assistance of counsel to indigent defendants. *Covington*, 318 So.3d at 27-31. It appears the evidentiary sufficiency and persuasion value of the newer Delphi-based caseload studies cannot be taken for granted in defender cases.

7. In the context of the issues covered in this opinion, an interesting Louisiana appellate case

from the New Orleans district is *State of Louisiana v. Singleton*, 216 So.3d 985 (4th Cir. 2016), where the district appellate court reversed the personal appointment of the Orleans Parish chief public defender to a post-conviction relief case for an indigent defendant convicted of murder, finding "good cause" under LA Rule 6.2 existed to void the appointment, relying on testimony from the appointed local chief defender and also the chief public defender for the state system that the local chief defender's substantial defender office workload and his duties as head of the local office would prevent him from performing his duties "effectively." 216 So.2d at 994-996. The opinion and footnotes do not mention the use of any professionally-done caseload or workload studies in the matter.

8. Two of the foremost published authorities on the subject of right to counsel for indigent criminal defendants and public defender systems are Stephen F. Hanlon, Esq. of Missouri and the late Indiana Law School former Dean Norman Lefstein, who died in 2019. Hanlon's leading article is "The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System," 61 St. Louis U. L.J. 625 (2017). Lefstein's seminal work is his book Securing Reasonable Caseloads: Ethics Law in Public Defense (ABA 2011). Both were read by Ethics Counsel in full or in relevant part in preparation for this opinion letter.

9. In the aftermath of losing in *Covington* in 2020 in Louisiana, Hanlon published an article on May 1, 2021, entitled "The Long Game: Summing It Up" on his blog at www.lawyerhanlon.com. In it he states that the Louisiana defenders has intended to seek certiorari to the United States Supreme Court in *Covington*, but decided against it due to a justice there retiring in 2018, the uncertainty of gaining five votes with the new makeup of the Supreme Court, and not wanting an adverse national precedent. In the same article, Hanlon states the public defender forces now pin their hopes for systemic relief on the Equal Defense Act in the national Congress, where funding may be available and national numerical public defender caseload limits based on reliable data and analytics may be possible to achieve as federal law. (End)