

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 08-CI-1094

ERWIN W. LEWIS, et al.

PLAINTIFF

VS.

AFFIDAVIT OF RODNEY J. UPHOFF

TODD HOLLENBACH, IV, et al.

DEFENDANT

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Before me the undersigned authority, personally appeared Rodney J. Uphoff, who upon first being duly sworn, deposes and says as follows:

1. My name is Rodney Uphoff. I am licensed to practice law in the states of Wisconsin and Missouri. I was also licensed to practice law in Oklahoma from 1990-2006.

2. My resume is attached to this affidavit and it accurately summarizes my educational background, legal experience, teaching history, publications, and professional service.

3. My address is 213 Hulston Hall, Columbia, Missouri, 65211. My telephone number is (573) 882-3035.

4. I received my J.D. from the University of Wisconsin School of Law in 1976. Most of my early legal career focused on indigent criminal defense. In 1978 I was employed as a trial attorney for the Legal Aid Society of Milwaukee, Wisconsin, handling both felony and misdemeanor cases on behalf of indigent clients. I then became an attorney, and later chief staff attorney with the Wisconsin State Public Defender's Office. In 1984 I took a position as an associate clinical professor and director of the University of Wisconsin Law School's Legal Defense Project. After a brief period in

private practice in 1989-90, I returned to clinical teaching as an associate professor (and later professor) and associate director (and later director) of clinical legal education at the University of Oklahoma College of Law. In 2001 I became the Elwood Thomas Missouri Endowed Professor of Law at the University of Missouri, Columbia.

5. In my various positions as a public defender in Wisconsin I represented numerous indigent defendants charged with felonies and misdemeanors. I personally handled over a thousand criminal cases during that period of time. I also supervised and observed countless other trials. In my position as chief staff attorney, I supervised over 40 trial lawyers, trained all the new staff attorneys, and developed training programs for the entire staff. I also consulted with all of the attorneys in the office regarding ethical matters, trial strategies, legal issues, and pretrial strategies.

6. In my clinical teaching at the University of Wisconsin and at the University of Oklahoma, my primary responsibility was to teach criminal litigation skills, ethics, and trial advocacy to law students, who worked under my supervision and the supervision of other clinical instructors to provide representation to indigent defendants. In addition to directing clinical programs at the University of Wisconsin Law School and the University of Oklahoma College of Law, I have also taught courses in professional responsibility, criminal procedure, trial techniques and criminal litigation skills at the University of Missouri School of Law and the University of Florida College of Law.

7. In 1995, I was appointed by Oklahoma Governor Frank Keating to the board of the Oklahoma Indigent Defense System ["OIDS"]. The OIDS board oversees the operation of the indigent defense system in all Oklahoma counties except for Tulsa and Oklahoma County. I have also served as Vice Chair of the American Bar Association's

Defense Services Committee. At the request of the ABA Defense Services Committee, I edited a book published by the ABA entitled *Ethical Problems Facing the Criminal Defense Lawyer*. This was a book concerning the ethical dilemmas which many criminal defense lawyers face, with a special emphasis on the ethical challenges facing public defenders. I have been a speaker or presenter at numerous conferences and workshops across the country on criminal practice, trial advocacy, and a variety of ethical topics, especially those involving the ethical duties of defense lawyers and prosecutors.

8. Much of the work of the ABA Defense Services Committee focuses on funding issues and other problems with the delivery of defense services in jurisdictions across the country. The heads of a number of public defender programs and other experts dealing with indigent defense representation have been on this committee. Based on my teaching responsibilities and my scholarly writing, I have remained current on the literature and caselaw dealing with indigent defense services. Much of my work on the OIDS board also revolved around funding issues as we attempted to allocate the limited funding provided the agency as effectively as possible.

9. I have been qualified as an expert witness in both state and federal courts to address a variety of ethical issues raised as a consequence of the representation provided by a criminal defense lawyer.

10. Counsel for the Department of Public Advocacy has asked me to review historical and other information concerning the caseloads of the Department's attorneys in order to address the following issues: whether, consistent with the Kentucky Rules of Professional Conduct, ethical norms, and relevant national standards, those attorneys are providing ethical representation to their clients in all cases assigned to them and, second,

whether the Department can continue to accept appointments when excessive caseloads make ethical representation of those additional clients impossible.

11. In the preparation of this affidavit, I have received and reviewed the following documents from the Kentucky Department of Public Advocacy: the Department's definition of a case found in the Department's Policy and Procedure manual; the affidavit of NLADA's David Carroll on Kentucky public defender caseloads; the Department's fiscal year 2007 Annual Caseload Report; and the affidavits of individual Kentucky public defenders and their supervisors.

12. It is my opinion, based on my review of those materials and on all of my professional experience, including serving as a public defender supervisor and as a law professor specializing in ethics and indigent defense representation, that public defenders in Kentucky are in an untenable ethical situation. As a result of excessive workloads, these defenders do not have the time to meet their ethical obligations to all of their clients and to consistently provide them competent representation.

13. Both the ABA Model Rules of Professional Conduct (Model Rules) and the Kentucky Rules of Professional Conduct (Kentucky Rules) set out the ethical obligations of a lawyer defending a client charged with a criminal offense. Those duties are the same regardless of whether the lawyer is privately retained or an indigent defender paid for by the state.

14. Both the Model Rules and the Kentucky Rules require that counsel be competent, render diligent service, and avoid conflicts of interest. Additionally, counsel is to communicate with the defendant so that the client is adequately informed about the case and consulted to the extent that the defendant is able to make all of the critical

decisions concerning his or her case. Neither the Model Rules nor the Kentucky Rules specify all of the tasks that counsel must perform to render ethical representation in a criminal case. Nevertheless, the ABA Standards for Criminal Justice Defense Functions (ABA Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., 1993) and the National Legal Aid and Defender Association (NLADA) *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995; 4th Printing, 2007) are relevant national standards reflecting what is generally expected of a lawyer defending a criminal case. In fact, I have used these standards to train law students, practicing lawyers at CLE events, and public defenders as to the tasks a criminal defense counsel must undertake if counsel is to fulfill her duty to provide competent, ethical representation.

15. Among the tasks identified in the ABA Standards and the NLADA *Guidelines* to be performed if counsel is to provide ethical representation of a criminal client are: educating one's self about the law, conducting an initial interview, advocating for the client's pretrial release, handling the arraignment and preliminary hearing, responding to prosecution requests for non-testimonial evidence from the client, thoroughly investigating the case, seeking all discoverable material, developing a theory of the case, identifying legal issues, deciding which motions to file, filing and arguing the motions, seeking reconsideration of the motions, filing interlocutory appeals if warranted, conducting effective plea negotiations, discussing any plea with the client and assisting the client in making an informed plea decision, taking the client through a guilty plea, preparing for trial, conducting meaningful voir dire, making an opening statement, objecting in a timely fashion, presenting the defense case, advising the defendant regarding testifying and preparing him or her to testify should the client make that choice,

making a closing argument, preparing the client for sentencing, engaging in effective sentencing advocacy, reviewing presentence reports, preparing sentencing memoranda and a motion for a new trial, advising the client regarding the right to appeal, seeking bail pending appeal, and expunging the record if warranted.

16. Based on my experience as a supervisor of public defenders, my scholarship, and my work on the OIDS board and the ABA Defense Services Committee, I know that when the number of lawyers in a public defender office is inadequate to handle the volume of cases assigned to that office, the individual attorneys may be asked to cover more cases than they ethically can handle. In other words, if funding is inadequate to enable a defender office or program to hire the requisite number of lawyers and the support staff needed to handle a particular volume of cases, there comes a point where the caseloads become excessive such that it is no longer possible for the defenders to continue to provide ethical representation to every client. This is a recurring problem that a number of public defender organizations across the country have confronted as a result of the funding authority's failure to provide adequate funding to that defender organization.

17. When an underfunded public defender program attempts to cope with excessive caseloads by asking its lawyers to handle more cases than they can manage without rendering incompetent representation to at least some of their clients, the defenders' ethical failings tend to manifest themselves in predictable ways.

18. Attorneys with excessive caseloads find that maintaining adequate communication with every client is a constant problem. Yet, under both the Model Rules and the Kentucky Rules, communication is essential to maintaining an ethical

relationship with a client. In fact, one of the most common sources of bar complaints is lack of communication between the attorney and the client. A lack of communication creates the impression of a neglectful attorney and leads to client discontent.

19. Many indigent clients are reluctant to be appointed a public defender but would prefer a “real lawyer.” Indigent clients have heard or have seen how busy public defenders are and they fear that they will not get the same degree of attention from their overworked public defender as they would from a member of the private bar. Unfortunately, excessive caseloads tend to exacerbate communication problems. Nonetheless, even though counsel may be totally deficient in communicating with her client, her lack of communication may never be brought to the attention of the court. Thus, counsel may appear to have been effective in court despite the fact that she failed to adhere to her ethical duties.

20. Initial interviews are also an important aspect of client communication inasmuch as they lay a foundation of honesty, trust, and confidence between the attorney and the client. Defenders with excessive caseloads are often unable to get to the jails and detention centers to conduct a prompt initial interview. Failing to meet promptly with a client not only delays counsel’s investigation, but it frequently makes the relationship with the client harder to manage.

21. Defenders with excessive caseloads also find it extremely difficult to provide timely representation. Although criminal defense lawyers are expected to act promptly to protect their clients’ rights, keep their clients informed of case developments and take appropriate action on their clients’ behalf including seeking bond reductions and moving to suppress evidence, defenders with excessive caseloads are unable to perform these

responsibilities. As the number of cases a defender is handling rises, counsel's motion practice usually dwindles. Rather than argue every legitimate motion the client might have legally available, overworked defenders start to argue only the motions they think that they are most likely to win. Excessive caseloads also lead to other shortcuts. For example, I have been informed that some Kentucky defenders in offices with excessive caseloads do not even appear at the arraignments of their clients. The arraignment is a critical stage in a criminal case and the absence of counsel can result in a client making a damaging statement to the police or to the court, or languishing in jail because no one advocated for a bond reduction.

22. Additionally, defenders with excessive caseloads find it impossible to conduct thorough investigations in all of their cases. Frequently, defenders begin a case with only limited information and then have to guess whether that case will be serious enough to warrant the time of the single investigator in their office who has to conduct investigations for a half-dozen or more attorneys. Although prompt and thorough investigation of all the facts and witnesses relevant to a case is a necessary part of ethical representation, the reality is that, when caseloads are excessive, a very small percentage of defender cases are ever thoroughly investigated. Thus inadequate funding not only limits the amount of time a defender can spend investigating any one case given the number of cases to be investigated, but it also severely restricts the number of investigators the public defender can employ thereby significantly limiting attorney access to investigative assistance.

23. Not surprisingly, trial preparation is another area adversely affected by excessive caseloads. A defender with an excessive caseload generally does not have

adequate time to prepare all of his or her cases for trial given limited investigative assistance and the volume of cases warranting the defender's attention. It is not uncommon for defenders with excessive caseloads to have multiple trials set for the same day without knowing which one will actually go to trial that day. In a worst case scenario, unprepared counsel may have had little to no contact with the client before the day of trial.

24. When a defender does not have sufficient time and resources to do a competent investigation or adequately prepare for trial in a sizeable number of cases, counsel too often engages in other unethical shortcutting in an attempt to manage an uncontrollable caseload. For example, excessive caseloads can lead to defenders urging clients to plead guilty before the attorney knows enough about the case to adequately counsel the client concerning the plea. They can lead defenders to conducting preliminary hearings without having spoken to the client or reviewing the file, or simply waiving the hearing. Overburdened defenders may review important documents like presentence reports or notices of probation revocation in court on the day of the hearing without any prior research or investigation. Even worse, the defender with too many clients and too little time may meet and talk with clients for the first time on the day of the client's trial or fail to show up to represent a client at all because counsel is in another court representing a different client at the same time. Defenders with excessive caseloads may unduly pressure clients to accept plea bargains rather than go to trial simply because they only have the time to prepare a handful of their cases. In fact, overburdened defenders rarely take many cases to trial and when they do go to trial, they too often are woefully underprepared.

25. Excessive caseloads often force defenders to prioritize work on their cases in the manner of an emergency room doctor performing triage. Since defenders do not have the time to give adequate attention to every single case, defenders choose to give defendants with serious felony charges primary attention whereas defendants facing lesser felonies, misdemeanors, or juvenile charges get much less attention. Admittedly, all attorneys know that some cases require more work than others and all lawyers must prioritize their work. When caseloads become excessive, however, the difference between a serious charge and one which is not so serious may often mean the difference between some attention and almost none at all. Thus, a defender may concentrate all of her efforts for a month on several serious trials – and render those clients very good representation – while the vast majority of her clients receive little or no attention despite their own pressing needs.

26. In many respects, the most pernicious aspect of the excessive caseload problem is that forces defense counsel into the conflicted position of sacrificing some clients in order to have sufficient time to adequately serve other clients. Numerous courts have recognized the ethical dilemma created by this aspect of the excessive caseload problem. As the Supreme Court of Florida acknowledged, “when excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is invariably created.” *In re Order on Prosecution of Criminal Appeals by 10th Circuit Judicial Circuit Public Defender*, 561 So. 2d 1130, 1135 (Fla. 1990) Similarly, the Louisiana Supreme Court observed, the fact that some defender clients receive effective assistance while others do not, “reflects the fact that indigent defenders must select certain clients to whom they give more attention

than they give to others.” *State v. Peart*, 621 S0. 2d 780, 785 (La. 1993). The *Peart* court also noted that effective assistance of counsel means, “that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.” *Peart*, at 789. Unfortunately, the problem that a defender with an excessive caseload faces is that “an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective. Some defendants must receive inadequate representation in relation to those who do, in fact, receive adequate representation.” *State v. Smith*, 140 Ariz. 355, 362 (Ariz. 1984).

27. Excessive caseloads also raise ethical problems for supervisors facing the challenge of matching the complexity and seriousness of a case with an attorney experienced enough to properly handle the case. When caseloads are excessive, office supervisors may have no other choice but to turn serious cases over to attorneys who do not have enough experience to properly handle the cases. Public defenders in underfunded offices often do not have the luxury of working their way up to more serious cases, but instead are required to handle whatever type of case they are assigned. Defender supervisors have the responsibility to ensure that inexperienced attorneys are not assigned cases that are too complex for them to handle. See, e.g., *State v. Felton*, 329 N.W. 2d 161, 177 (Wis. 1983) (Steinmetz, J., concurring). Defender supervisors have been disciplined for allowing inexperienced attorneys to handle cases too complex for them to handle. See, e.g., *Matter of Yacavino*, 494 A.2d 801 (N.J. 1985).

28. Excessive caseloads not only lead to unethical representation, but they contribute to defender burnout and a high rate of turnover within the defender

organization. I have been informed that the Department lost 40 attorneys during FY 2007, which was 12% of the Department's total number of attorneys. That is a disturbing but not surprising number in light of defender caseloads in Kentucky and the pressure that excessive caseloads put on defenders and their supervisors. Moreover, high turnover rates exacerbate an already bad situation because a reduction in the number of experienced lawyers in the office forces the remaining defenders to cover more cases while vacant positions are filled.

29. I have read the affidavits of public defenders across the Commonwealth of Kentucky which have been filed in this case and the affidavits repeatedly describe the defenders inability to provide all of their clients competent representation as required by ethical rules and professional norms, including the NLADA Performance Guidelines for Criminal Defense Representation. Each one of the affidavits contains an example of at least one of the ethical failures, shortcuts, or dilemmas I have previously mentioned. Most of them give examples of multiple failures to provide adequate representation to every client, and virtually all of them cite excessive caseloads, combined with a chronic lack of staff and investigative support, as the dominant factors in causing these failures.

30. Poor communication with clients due to excessive caseloads undoubtedly represents a significant ethical problem for some of Kentucky's public defenders. Many of the affidavits give examples of the way in which a lack of communication has a negative effect on the attorney-client relationship. B. Scott West, a regional supervisor for the Department in Madison County, says:

"The number of complaints to judges and to me about my attorneys from clients and family members of clients has greatly and steadily increased in the last couple of years. The complaints are that we are not available, we do not return calls and we do not visit with them enough. I would say, on

average, the time I spend with clients has decreased by two thirds over the last five years. Meeting with clients in jail is a casualty of our lack of resources. When I do get to jail, I spend about the same amount of time I used to spend but I have to see three times as many clients. Therefore, I spend 15 minutes instead of the 45 minutes I used to spend with each client per visit. Without time to properly prepare and gather facts and information, I cannot ethically perform my responsibilities. When I settle a case on the courthouse steps because both the prosecutor and myself are overworked (not because we know the facts and are prepared to get the best possible compromise) I do not believe I have fulfilled my ethical obligations to the client.”

Tera Cozart, in Perry County, says:

“My clients are frustrated because they must stalk me outside the courthouse, courtroom or office just to have 5 minutes of my time. ... I hate that I must tell a client that they need to remind me of the conversation we are having because I will forget his or her name and face before their next court date. With so little time spared to meet with clients, it is impossible to speak with everyone; in jail or out.”

Melanie Lowe, in LaGrange, echoes those words:

“I was prepared to have so many files that the facts sometimes ran together. I did not plan to ask clients over and over who they were and why they were in court. I could not have imagined the look of disappointment induced by that question each time.”

Chris McCrary, in Elizabethtown, says:

“There are many clients who want to see me more than I am able to see them – and they’re not shy about telling that to me, my directing attorney, other inmates or those involved in the judicial process.”

And Jim Cox, the directing attorney in the Somerset field office, says this about communicating with clients:

“We hold rushed conversations with people from the jail out in the hallways of the courthouses, with just a few seconds to speak to each defendant about his charges and his bond, before he gets up before the judge. ... [I]t is increasingly difficult to lay a foundation of honesty, trust, and confidence with each client.

31. Another effect of excessive caseloads is very obvious in the affidavits which provide examples of defenders who are in court too much, who cover too many courts at the same time, or who have too many cases set for trial at the same time. In each case, the ethical problems are caused by the fact that there are simply not enough defenders to handle the caseloads.

32. Having to spend too much time in court can itself be the cause for inadequate representation. When a defender has to spend too much time in court, the source of ethical concern becomes all the things the defender also has to do outside of court in order to provide adequate representation. B. Scott West gives an example:

“Our attorneys cover courts in rural counties that take as long as 45 minutes to reach (each way). For example, our attorney in Madison County who covers Jackson County cannot come back and forth between court appearances to help with the Madison docket because of the distance. It is not practical to return to the office if there is a case in the morning and a case in the afternoon so the attorney is unable to accomplish much work on behalf of other clients.”

33. Many of the things an attorney must do to adequately represent a client have to be done outside of court. Legal research, writing and filing motions, preparing alternative sentencing plans, setting up competency evaluations and in-patient treatment, reviewing discovery, client communication, and basic trial preparation are all examples of things an attorney must have time to do if he or she is going to provide adequate representation to each client. In the affidavits, many of the defenders reported having no more than one or one-and-a-half days a week to spend in the office. Chris McCrary says:

“I could get caught up on all the motions I need to do, but that would require refusing to answer the phone when my clients call. I cannot do both; I am not in the office enough.”

34. Another version of this same problem can be seen in the affidavits of defenders who have to cover too many courts at the same time. David Farley, in Owensboro, gives an example of being required to cover cases in three to four courtrooms at the same time. Eva Hager, in Kenton County, gives an example of the type of harm that can be done to a client:

“I can remember looking at a file and seeing pre-trial after pre-trial that I missed because I was expected to be someplace else entirely, or because even though I was one floor away from the courtroom, the judge did not wait to call my client’s case.”

Some of Ms. Hager’s clients show up to court only to find out that their attorney is not even there. After reviewing a typical day covering two different courts, Angela Darcy, in Pikeville, says:

“All in all, I have little-to-no time to be a good attorney in the sense that I should be filing suppression motions, researching procedural issues, and meeting with my clients in the jail, but I do not.”

35. The form of the problem that causes the greatest ethical dilemmas, though, can be seen in the affidavits in which a single defender has multiple cases set for trial on the same day. This practice can cause serious ethical difficulties in a variety of ways. First, the defender may not be able to adequately prepare all the cases. Eva Hager says about this:

“Often I have had several trials set for the same day in different divisions – or on overlapping days in different divisions. It becomes impossible to be an effective attorney when I am forced to prepare multiple felony trials in the same week.”

Tom Griffiths, in Maysville, who is a Regional Supervisor for the Department in charge of seven field offices, said this about one of his cases:

“My most recent trial resulted in a conviction. My 19 year old client was sentenced to six years in prison. I attempted to prepare four jury trials for the same day. The result for this client was an attorney who was not familiar with the facts of the case. I had not been to the crime scene until 8:00 a.m. the morning of trial. I had not spent adequate time with the client to prepare him for testifying. While on the witness stand he made several simple mistakes, which would not have occurred if I had spent more time with him.”

Cameron Adams, in Hazard, relates this ethical horror story:

“Our judge sets nine to ten cases for jury trial on any particular Friday, and usually intends to try at least two of those cases. With ten cases set for trial and no time to prepare for them due to being in court the whole rest of the week, Tera (Cozart) and I walk into court and seek out the prosecutor to find out which cases he would like to try that day, since the choice is almost exclusively his. Once the case to be tried is decided on, we then have to call the name of the defendant in question, since we haven’t met with them to know their face. We inform the person they are having a jury trial, and then we take our seats and begin voir dire. When we retire to a small room to do our pre-emptive strikes, our client then tells us her story. Based on that story, we have perhaps five minutes to formulate a defense.”

36. Apart from the problem of adequate preparation, setting multiple cases for trial on the same day can easily also result in a conflict of interest for a defender. Chris McCrary, in Elizabethtown, mentions clients “having jury trials continued several months down the road since their attorney was in the middle of another person’s jury trial.” This places the defender in the position of sacrificing one client’s right to a speedy trial for the purpose of ensuring that same right for another, and is a direct conflict of interest. See, e.g., *People v. Johnson*, 606 P.2d 738 (Cal. 1980).

37. The affidavits also reflect a lack of staff and investigative support, which is an important factor to consider when estimating an attorney’s workload. Tera Cozart explains all the administrative work she has to do which takes away from the time she could spend functioning as an attorney:

“I do all of my own motions, client interviews and meetings, investigation, research and case work ups for trial. I must personally pull citations, gather jury forms and discovery which must be organized and read. Creating and maintaining a filing system alone is almost impossible when I have a minimum of 40 clients a day, some of whom I have never met. ... A private practitioner could never survive the conditions under which I work.”

38. David Farley notes that his office has one investigator for twelve attorneys.

B. Scott West says:

“In Lexington, our attorneys are meeting their clients far too often for the first time in court. There is no time to go to the jail for visits. There is no time to meet witnesses or investigate. This results in forcing a case to trial when there is insufficient information with which to plea bargain – hoping the prosecutor is just as overworked and will settle on the courthouse steps. The Lexington office only has one investigator, while at the same time the office handled almost 11,000 cases in fiscal year 2008.”

Eva Hager says:

“Our two staff investigators are absolutely swamped and I often find myself running by a crime scene on my own time after work. I don’t have time to run down every witness or even to speak with them after my investigator has found them. This hurts my clients’ cases.”

Casey Holland, in Scott County, tells of advising a client to plead guilty in the mistaken belief that it was his ex-wife who had identified him in a photograph taken from a surveillance camera. He relates the troubling aftermath of the plea in this way:

“*After* the plea, I was contacted by the client’s ex-wife, who categorically denied having identified my client to the police. Had I known that before entering the plea, I would have advised my client differently. However, with my crushing caseload I was unable to fully investigate the case and speak with the ex-wife before advising my client. Thus, I have a client now sitting in prison who might very well be innocent, because I didn’t have the time to give his case the investigation it deserved.”

39. The affidavits reflect the practice, caused by excessive caseloads, of defender supervisors sending new defenders to handle cases too serious or complex for their level of experience. John Delany, the Directing Attorney in Covington, says:

“The office has several attorneys with two years of experience or less. A large part of my job is to train and closely supervise the less experienced attorneys. Due to the budget and shortage of staff I have been unable to appropriately execute this job duty. Inexperienced attorneys have had to represent clients in legal proceedings that they did not have enough experience to handle.”

David Farley gives an example of the harm this can cause to clients. He relates the story of a client charged with a felony for Driving while on a DUI-Suspended License, 3rd or Subsequent Offense. The problem was that a quick check of the man’s driving record showed that the man had been improperly charged when he had pleaded guilty on three previous occasions. Mr. Farley notes that, “The third time he had a public defender who had been sworn in only three days prior to handling this case.” The man’s inexperienced previous public defender had pleaded him guilty to an offense of which he was not guilty.

40. The affidavits also reveal the effects of excessive caseloads in the form of defender burnout and high turnovers. The affidavits of Matthew Browning and Donald Morehead, both now private attorneys, indicate that they left the Department due in part to excessive caseloads. Mr. Browning notes that, “since leaving the DPA and practicing criminal defense in private practice, affiant would never intentionally assume such a high caseload because of ethical considerations.” Perhaps the most disconcerting affidavit is that of Rebecca Murrell, the Directing Attorney for the Bullitt County trial office. In her affidavit, Ms. Murrell describes how excessive caseloads have led to her decision to resign from DPA.

41. Lastly, at least two affidavits show that DPA appellate attorneys are having serious ethical problems due to excessive caseloads. Mr. Morehead, just mentioned, was an appellate attorney for DPA. It was his appellate caseload which was excessive. Kathleen Schmidt, the Appeals Branch Manager for DPA, says the ethical problems facing DPA appellate attorneys include: a huge backlog of cases, routine filing delays, delays in subsequent pleadings requiring repeated requests for extensions of time, delays in thorough review of the record, and the loss of the right to appeal a conviction to federal court. Ms. Schmidt also details the effect of an acute shortage of support staff in an area of criminal practice which, by its nature, requires intensive staff support.

42. It is my opinion, based on all of my professional experience, including serving as a public defender supervisor and as a law professor specializing in ethics and indigent defense representation, that public defenders in Kentucky are in an untenable ethical situation. As a result of excessive workloads, these defenders do not have the time to meet their ethical obligations to all of their clients and to consistently provide them competent representation.

43. The fact that Kentucky defenders undoubtedly are providing competent representation to some of their clients - and doing the best they can for their other clients in the face of staggering caseloads - is not the same as providing ethical representation to all of their clients. Indeed, attorneys can be disciplined for the kinds of ethical violations which occur as a result of excessive caseloads, and which are discussed in the Kentucky defender affidavits. Trying to cope with too many cases is not a defense to the charge of failing to adequately communicate with a client. See, e.g., *Martin v. State Bar*, 575 P.2d 757 (Cal. 1978). Nor is juggling a heavy caseload an excuse to the charge of failing to

familiarize oneself with the appropriate law concerning the case. See, e.g., *Nebraska State Bar Association v. Holscher*, 230 N.W.2d 75 (Neb. 1975). Failure to make use of discovery processes, file motions to suppress, or subpoena favorable witnesses can be grounds for disciplinary action. See, e.g., *Florida Bar v. Morales*, 366 So.2d 431 (Fla. 1978). Attorneys can also be disciplined for failure to conduct an independent investigation and for failure to contact or interview witnesses. See, e.g., *Matter of Lewis*, 445 N.E.2d 987 (Ind. 1983). Nor is burnout an excuse for neglecting one's ethical obligations to a client. See, e.g., *In re Conduct of Loew*, 642 P.2d 1171 (Ore. 1982).

44. To say that an attorney is providing unethical representation is not the same as saying that he or she is being "ineffective" under *Strickland v. Washington*, 467 U.S. 267 (1984). The *Strickland* standard of ineffectiveness is a test for determining whether a conviction must be reversed, and requires a showing that the conduct of counsel was unreasonable given the prevailing norms of practice and that the conduct prejudiced the client. The prejudice to be shown is that the outcome of the trial may have been different but for the ineffectiveness of the attorney. Although the courts have turned to ethical guidelines such as the ABA standards to determine the reasonableness of attorney conduct, "reasonableness" has been interpreted in such a way as to require more than just proof of unethical conduct. The result has been that many types of conduct which were clearly unethical have nevertheless failed to meet the *Strickland* standard of ineffective assistance.

45. Nevertheless, the 6th Amendment right to counsel is the right to effective assistance. The right attaches to a defendant whether or not the case ever goes to trial, and encompasses every aspect of the legal representation the attorney provides the

defendant, from the beginning of the case to the end. A defendant may be deprived of that right by inadequate representation, whether the inadequacy ever rises to the level of *Strickland* ineffectiveness.

46. Many of the Kentucky Rules of Professional Conduct address interactions between the attorney and the client. In some instances, a client may be painfully aware of counsel's ethical lapses, but often neither the client nor anyone else really knows if defense counsel is fulfilling all his or her ethical obligations. Because so much of ethical representation concerns the attorney-client relationship, courts are not usually in a good position to identify whether an attorney is providing ethical representation to his or her clients unless some complaint is made or some other obvious breach of ethics occurs. The effects of excessive caseloads, therefore, frequently are hidden from the courts.

47. In *State v. Smith*, 140 Ariz. 355 (Ariz. 1984), one of the leading decisions on defender workloads, the Arizona Supreme Court said just that. It noted that the, "insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads." *Smith*, at 362. The Arizona Supreme Court also said that, since this is the case, it is the individual defender who is in the best position to know if he or she is failing to provide ethical representation. *Ibid*. See also ABA Standards for Criminal Justice Providing Defense Services Standard 5-5.3, commentary (3d ed. 1992) ("only the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take.")

48. According to ABA Standards for Criminal Justice Providing Defense Services Standard 5-5.3(a), it is the defender and the defender organization who must

determine if the defender's caseloads are to the point where counsel cannot render quality representation to all of her existing clients or accept new clients without breaching her ethical responsibilities. So too, the ABA Model Rules and the Kentucky Rules demand that an attorney not accept representation "unless it can be performed competently, promptly, without improper conflict of interest and to completion." ABA Model Rules of Professional Conduct 1.16(a)(1) 1983, Commentary Rule 1.16(a)(1) also admonishes a lawyer not to represent a client if "the representation will result in violation of the rules of professional conduct..." Once a defender concludes that her workload is such that she can no longer provide ethical representation to all of her existing clients, she is ethically required to act. The ABA Model Rules of Professional Conduct and Kentucky Rules of Professional Conduct place the same obligations on defenders faced with excessive caseloads. Both require that defenders decline additional appointments when caseloads become so high that defenders cannot provide adequate representation to existing clients.

49. Both also require an attorney supervisor to direct his or her subordinate attorneys to decline appointment to any more cases when the caseloads of those attorneys become so excessive that they can no longer adequately represent existing clients.

50. In Formal Ethics Opinion 06-441 issued on May 13, 2006, the American Bar Association Standing Committee on Ethics and Professional Responsibility, the legal profession's most influential ethics body, specifically addressed the ethical obligations of indigent defenders and defender organizations coping with excessive caseloads. Formal Opinion 06-441 notes that the Model Rules require lawyers to provide clients competent representation including the duty to control one's workload to ensure that counsel can discharge all of the duties encompassed in the obligation to provide competent

representation. The Opinion explicitly spells out those duties and then, echoing a number of state ethics opinions and state court opinions, the ABA Ethics Committee states unequivocally that, “[t]he Rules provide no exception for lawyers who represent indigent persons charged with crimes.” (ABA Formal Opinion Op. 06-441 (May 13, 2006) (Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation), p. 3.) Although acknowledging that the question of whether a lawyer’s workload is excessive calls for a “difficult judgment,” the Opinion stresses that, “[i]f a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client, or if representation has not yet begun, she must decline the representation.” (*Ibid.*)

51. Formal Ethics Opinion 06-441 looked to a number of state ethics opinions and state court decisions to buttress its conclusions regarding the ethical obligations of public defenders and defender supervisors. As a professor who has taught professional responsibilities for many years and who has studied extensively issues of indigent defense representation and impact of adequate funding on the performance of criminal defense lawyers, it is not surprising that Formal Opinion 06-441 reached the conclusions it did because other ethics committees and state courts have consistently arrived at similar conclusions. See, e.g., South Carolina Bar Ethics Advisory Opinion 04-12 (Nov. 12, 2004) (all lawyers, including public defenders, have an ethical obligation not to undertake to handle a caseload that leads to violations of professional conduct rules); *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1138-39 (Fla. 1990) (if “the backlog of cases in the public defender’s office is so

excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw.”); *In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 612 So.2d 597 (Fla. App. 1992) (en banc) (holding that the public defender’s office was entitled to withdraw due to excessive caseload from representing clients in one hundred forty-three appellate cases); *Attorney Grievance Comm’n of Maryland v. Flicker*, 706 A.2d 1045, 1051-52 (1998) (a supervisory attorney disciplined for having violated Rule 5.1 of the Rules of Professional Conduct by assigning too many cases to a subordinate lawyer, by assigning cases the day before trial, and by assigning cases too complex for the subordinate lawyer’s level of experience and ability); Virginia Legal Ethics Opinion 1798 (Aug. 3, 2004) (duties of competence and diligence contained within the Rules of Professional Conduct apply equally to all lawyers and, in note 9, stating that supervisors who assign caseloads so large as to prevent a lawyer from ethically representing clients violate rule 5.1); Wisconsin State Bar Professional Ethics Committee Opinion E-91-3 (1991) (assigning a caseload that exceeds recognized maximum caseload standards and that would not allow a subordinate public defender to conform to rules of professional conduct “could result in a violation of disciplinary standards.”); Arizona Opinion No. 90-10 (Sept. 17, 1990) (“when a Public Defender has knowledge that subordinate lawyers, because of their caseloads, cannot comply with their duties of diligence and competence, the Public Defender must take action.”); Wisconsin State Bar Professional Ethics Committee Opinion E-84-11 (1984) (supervisors in a public defender’s office may not ethically increase workloads of a subordinate lawyer to the point that the subordinate lawyer

cannot, even at personal sacrifice, handle each of her client's matters competently and in a non-neglectful manner).

52. The Opinion also provides considerable guidance on the question of what constitutes an excessive workload. The true measure of a defender's workload is not determined simply by counting the number of cases a defender is handling, but by looking at the defender's entire *workload* in context, including counsel's other work responsibilities and access to support services. As the Opinion observes, "the Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association. Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties." (ABA Opinion 06-441, p. 5.)

53. I have reviewed the Department's actual policies and procedures regarding case counting and case tracking, as well as the affidavit of David Carroll in this case. Carroll's affidavit deals specifically with the caseloads of Kentucky public defenders, including the staff and investigative support available to Kentucky public defenders, and the non-representational work which has to be performed by them as well. I also have been informed that the emphasis on workload in ABA Formal Opinion 06-441 is one of the reasons the Department counts, in addition to cases themselves, such events as parole and probation revocations, and "three-strikes" sentence enhancements when they are trying to ascertain the number of case handled. The result is that the Department's

caseload figures capture most of the new appointments in a given fiscal year, but since the Department does not also count the cases carried over from the previous years, and does not do case-weighting, the Department's calculations concerning caseloads are fairly conservative. More importantly, for ethical purposes, it is appropriate that the DPA and its supervisors concentrate not simply on the number of new cases its attorneys are being appointed to each year, but the overall workload of those attorneys. Since workload is the appropriate ethical focus, the supervisors must take into account the staffing and investigative support available to its attorneys, and the amount of non-representational work the attorneys must perform, including such things as training events which must be attended, travel time to and from court, and administrative obligations. Simply put, it is obvious that Kentucky public defenders are doing much more work than the number of new appointments alone would indicate.

54. Unquestionably, then, if a defender honestly believes that her workload prevents her from providing competent and diligent representation to existing clients, then she must not accept new clients. At that point, Formal Opinion 06-441 counsels, “[i]f the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments.” In such a situation, judges should trust that defenders will not falsely claim their workloads are excessive. Indeed, defenders who make misrepresentations about their caseloads or workloads risk disciplinary sanctions. On the other hand, defenders ought to be assured that if they raise concerns regarding excessive caseloads when there is good cause to do so, defenders will not have to worry about being held in contempt in the process.

55. The ABA's *Providing Defense Services* Standard 5-5.3(b) declares that "[c]ourts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations." Nonetheless, Formal Opinion 06-441 implicitly recognizes that a court may require defense counsel to accept a new appointment or may refuse to permit counsel to withdraw despite a defender's claim of an excessive workload. Courts ought not, however, summarily reject such a claim as the trial judge did in *State v. Gasen*, 356 N.E.2d 505 (Crt. App. Ohio, 1976). There, the trial court appointed two public defenders to represent a man and his wife during a preliminary hearing. The defenders declined the appointments on the grounds that the defendants were already represented by attorneys and that neither had a copy of the file nor were familiar with the facts of the case. They specifically protested that to represent the defendants would violate the Ohio Code of Professional Responsibility. The trial judge held them both in contempt and sent them to jail. The appellate court reversed the court, stating that it was error as a matter of law for the trial court to refuse to recognize to the defenders' responsibilities under the Ohio Code of Professional Responsibility. ("We hold that the trial court erred as a matter of law in refusing to recognize the appellants' responsibilities under the Code of Professional Responsibility." *Gasen*, at 508.) Unquestionably, a court should take seriously any claim that ethical representation cannot be provided and only assign a defender a new case if the court is satisfied counsel can provide that new client ethical representation without compromising counsel's representation of her existing clients.

56. For years in a significant number of jurisdictions across the country, indigent defenders have struggled in the face of very high caseloads to do the best they could for

their clients. Many in the criminal justice system and in state legislatures have operated under the misconception that an indigent client is better off with an overworked public defender than having no attorney at all. This misconception - coupled with budget shortfalls and a general reluctance to allocate money for indigent defense services - has contributed to inadequate funding for indigent defense which in turn has led to excessive caseloads in a number of jurisdictions. The ABA Formal Opinion 06-441 makes it abundantly clear it is not enough to say that at least under resourced public defenders are helping their clients a *little* or that a client is probably better off with an overburdened defender than no lawyer at all. Rather, the Model Rules and the Kentucky Rules demand that a defender must be able to provide full and complete ethical representation to a client, or she must decline to accept new appointments.

57. It is critical, of course, that an individual defender consult with office supervisors about her workload if that defender feels she can no longer ethically handle her work assignments. Formal Opinion 06-441 states that “[a]s an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.” (ABA Opinion 06-441, p. 7.) The Opinion goes on to observe that “[w]hen a supervised lawyer’s workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer, and, if the lawyer’s cases come by assignment from the court, to support the lawyer’s

efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients.” (*Ibid.*, at. 8.)

58. The Opinion also concludes that “[i]f a supervisor knows that a subordinate’s workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c), the supervisor himself is responsible for the subordinate’s violation of the Rules of Professional Conduct.” (*Ibid.*)

59. Formal Opinion 06-441’s insistence that defender supervisors cannot shirk their ethical responsibilities by simply cajoling defenders to take more cases, reflects the conclusions reached by others who have addressed this issue. For example, the American Council of Chief Defenders (ACCD) Ethics Opinion 03-01 (April 2003) noted 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.”

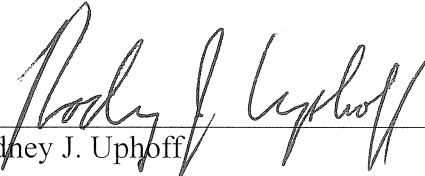
60. In my experience, public defenders often are reluctant to complain about excessive caseloads. Most are very committed to trying hard to provide zealous representation to their clients and to do their best to secure good results for their clients despite the difficulties they face. Thus, a defender in the Milwaukee office normally would come to a supervisor and ask that she not be assigned any new cases only if the defender felt that the number of cases she was handling left her without adequate time to

take on any additional clients. If the other office supervisor and I were satisfied that the defender's caseload was, in fact, at a breaking point, given her level of experiences and the complexity and seriousness of the cases she was already handling, then we would not assign her any new cases until she resolved some of her cases. New cases would either be assigned to other lawyers in the office or, when we were satisfied that all lawyers in the office were handling full caseloads, new cases would then be assigned by our office to private lawyers. Indeed, legislation in Wisconsin that created the public defender system specifically provided for a sizeable number of cases to be assigned to private lawyers willing to take on such cases for the fees prescribed by statute.

61. Based on my review of the affidavits and other material in this case, there is no question in my profession opinion that defenders such as Rebecca Murrell or Tom Griffith, both of whom are handling enormous caseloads and doing supervisory work, cannot possibly provide competent, ethical representation to all of their clients. When I was a supervisor in the Milwaukee office I handled only half of the caseload that we normally assigned to our felony defenders. The normal felony caseload was 100-150 felonies depending on the number of murder cases or other serious felonies the lawyer was handling. Staff attorneys such as those whose affidavits I reviewed previously also are not providing competent, ethical representation to all of their clients.

62. Given the workloads that the DPA lawyers are being asked to shoulder, they cannot ethically continue to accept new appointments unless and until they can do so without breaching their ethical duties to all of their existing clients.

FURTHER AFFIANT SAYETH NAUGHT


Rodney J. Uphoff

STATE OF WISCONSIN

COUNTY OF DANE

NOTARY STATEMENT

Sworn to me by Rodney J. Uphoff and subscribed by me this the 15th
day of January, 2009.


NOTARY PUBLIC

My commission expires on permanent.