



**Lancaster County Public Defender's Office**  
**Response To The 2008 Workload Assessment**

**Presented By: Lancaster County Public Defender Dennis R. Keefe**

**Presented To: Lancaster County Board of Commissioners**

**Date: September 4, 2008**

**Response of the Lancaster County Public Defender's Office To The  
"Lancaster County Public Defender Workload Assessment" (July 2008)**

In the report prepared by the University of Nebraska Public Policy Center entitled "Lancaster County Public Defender Workload Assessment" (July 2008), recommendations were made by the advisory committee regarding a number of issues relating to public defender workload, including the establishment of workload standards. The advisory committee consisted of the Lancaster County Indigent Defense Advisory Committee Members (Andrew Strotman, Sean Brennan, Randall Goyette, Jeanelle Lust, and Brad Roth), Kerry Eagan from the Lancaster County Board of Commissioners, as well as judges from each of the courts in Lancaster County. Although all of the recommendations related to the public defender workload generally, only one of the recommendations was directed at the Lancaster County Public Defender's Office as an entity.

In Recommendation number one, the advisory committee states that "Lancaster County Public Defender annual caseloads should not exceed the recommendations provided in the table [in the report]. Cases surpassing the recommended caseload standards should be appointed to privately assigned counsel."

On behalf of the Lancaster County Public Defender's Office, I hereby adopt recommendation number one from the report and I hereby declare it to be the policy of the Lancaster County Public Defender's Office. However, in this response I will outline for you how I intend to implement this policy in our office over the next twelve months, what the alternatives may be for providing counsel in the various cases, and what the potential fiscal impacts may be for the various alternatives. Prior to outlining our plan for meeting the caseload standards, I would like to again note several important points regarding the role of the Lancaster County Public Defender's Office:

- The Lancaster County Public Defender's Office does not pass laws creating new crimes and enhancing penalties for existing crimes.
- The Lancaster County Public Defender's Office does not decide when to file a case nor how many cases to file.
- The Lancaster County Public Defender's Office does not determine indigency nor otherwise decide which defendants are entitled to court appointed counsel.

In other words, we have no control over how many cases are filed or assigned to us. We do, however, have ethical obligations not to accept more cases than we can reasonably handle in a competent manner and we have the legal responsibility to provide each client with the constitutionally mandated effective assistance of counsel. Knowing where to draw the line in terms of cases is not always an easy task. Fortunately, with this recent report, based upon scientific methodology and data which has been determined to be reliable over time, we now have a clear roadmap.

The Lancaster County Public Defender's Office will implement the caseload standards contained in the Workload Assessment in the 12 month period beginning September 1, 2008 for new incoming cases assigned while keeping all of the cases already assigned absent a conflict of interest. During that time, the office will agree to accept 105% of the recommended caseload standards for the various divisions within the office. We will also work with the judges, the City and County Attorneys, and others to identify options for some types of cases to see if we cannot reduce the number of cases which require appointed counsel. Beyond that, we will ask for the courts to appoint private attorneys (or contract attorneys in some juvenile matters) for excess cases.

I also intend to keep the Board of Commissioners advised regarding the costs

and options available to them, at a minimum with a report to the board for their midyear budget meeting in January of 2009. It would also be my intent to offer to the board options regarding how to handle the excess cases from the Lancaster County Public Defender's Office in the next budget cycle as the County prepares its FY10 budget. To begin this reporting, I offer you information regarding the standards and our caseloads, division by division.

## **Felony Division**

- **Recommended Workload Standard** – The report recommends not more than 1007 Core Felonies (Drug, Property, Sex, Violent, Other) and not more than 223 Ancillary Felony cases (Appeals, Fugitive From Justice, Drug Court, Probation Revocations) for this ten attorney division. This is exclusive of major cases such as first degree murder, second degree murder, child abuse resulting in death, and other such crimes. If appointed to these major type offenses, adjustments will be made internally to lower the number of the other types of cases that we will accept.
- **105% of the Workload Standard** – 105% of the standard would be **1048** core felonies per year or 87 per month and 234 Ancillary felonies or approximately 20 per month.
- **Projected 2008 Cases** – Based upon cases opened and closed through July 25, 2008, I would project that in 2008 we will open **1079** core felony cases, which would exceed our 105% figure by 31 cases. If these figures hold for the twelve month period of our implementation, we would need to decline 2-3 felony cases per month (more if we are appointed to the more serious cases). The average cost of assigned counsel in these types of felony cases is \$850 per case based upon figures from 2006 and 2007.
- **Recommendation For Felonies** – Use the 105% figure for the workload standard for the next 12 months to see how many cases are actually sent to the private bar because of case overload. We should then be able to tell, based upon the number of cases, if it is more cost effective to hire an additional staff attorney or continue with the assignment of private counsel. There are other considerations here also. If we ultimately decide that it is more cost effective to add a staff attorney than to assign private attorneys, it will put pressure on the existing support staff and an additional paralegal would be needed also. That brings the total first year cost to around \$100,000. For that same amount of money, we could probably contract out the Child Support/Paternity cases and the Mental Commitment cases,

thereby freeing up a staff attorney position and lessening the pressure on the support staff, so that an additional paralegal would not be needed.

### **County Attorney Misdemeanors**

- **Recommended Workload Standard** – The standard recommends not more than **1562** cases for this 3 attorney division (130 per month or 30 per week).
- **105% of the Workload Standard** – 105% of the standard would be **1640** cases (137 cases per month or 32 per week).
- **Projected 2008 Cases** – We project that the office will be assigned to **1417** cases in 2008, which is within our ability to manage consistent with the standard.
- **Special Note** – There has been a 22% decline in this docket in 2008 when compared to the same time period in 2007. Part of that decline is due to one of the County Court judges who has taken it upon himself to closely monitor the appointment of counsel. This judge will not appoint counsel unless there truly appears to be the possibility of jail if the client is convicted. We have not been appointed in a number of cases where we were previously appointed and we have had the same judge withdraw our appointment in certain cases.

A second possible reason for the decline in this docket is that the Legislature has made many of the drunk driving and domestic violence cases felonies, thus reducing the number of misdemeanors here. To demonstrate what an impact these two factors have had, in 2007, we would have had 266 cases in excess of the standard. With an average cost of \$320 per case we would have paid private assigned counsel \$85,120. This year, we should be within the standard unless the judge or the judges' practices change.

- **Recommendation For County Misdemeanors** – Monitor the caseload over the next 12 months and send any excess cases (over the 105% standard) to the private bar.

### **City Misdemeanor Cases**

- **Recommended Workload Standard** – According to the Workload

Assessment, an attorney representing clients in city misdemeanor cases should be able to represent clients in **1349** cases per year (approximately 112 new cases per month and approximately 26 new cases per week).

- **105% of the Workload Standard** – . If we agree to accept 105% of the standard, the number of cases we would accept for the first 12 months would be **1416** (or 118 per month and 27 per week).
- **Projected 2008 Cases** – Based upon new cases through July 31, 2008, we would project a total of **1892** City Attorney Filed Misdemeanor cases by the end of this year. Using the 105% figure, there would be approximately 40 cases per month that we would send to the private bar. The average cost per City Misdemeanor case is \$200. Therefore, even if we accept 105% of the standard for the first 12 months, and **nothing else changes in this docket, the cost in assigned counsel would exceed \$95, 000 in a 12 month period.**
- **Special Note** – I have noted for this Board on a number of occasions over the past several years, the problem of ever increasing City Misdemeanor cases for this office. This situation should come as no surprise to anyone.

Let me be clear about what I am saying. The number of cases that we are being assigned to in this one attorney docket is unworkable and jeopardizes both the client's right to effective representation and the attorney's professional responsibilities . I am not saying that the City Attorney files too many cases, I am saying that we are appointed in too many cases. I am certainly not advocating a shift of these cases from the City Attorney to the County Attorney because, as our own caseload standards show (based upon real experience), that would only increase the amount of work for our agency and the overall costs to the county.

The reasons for the increase in our appointments are probably as varied as the number of judges who appoint us. It is true that the drunk driving and suspended license cases have shown significant increases recently but so do some of the "lesser" charges such as Disorderly House and Disturbing the Peace. Regardless of the causes, this is too many cases for one attorney.

- **Recommendations For City Misdemeanors**
  - The first place I would start in trying to reduce our appointments by

approximately 500 cases per year is to visit with the County Court judges to see if we could not come up with an informal agreement regarding the types of cases that absolutely require appointment of counsel **if the defendant is indigent**. I would certainly assume our office should be appointed in driving while intoxicated cases, suspended license cases (if the judge is likely to impose jail upon conviction), assault cases, 3<sup>rd</sup> offense possession of marijuana cases, and Motions To Revoke Probation. Based upon our 2008 projections, this would bring us within 150 cases of the recommended standard. Given that number, we would not be able to accommodate all of the anticipated cases of Disorderly House, Disturbing the Peace, and Theft cases. With the City Attorney's cooperation, which has been promised, we could try to develop a scheme that would only result in our appointment in the most serious of those cases up to our maximums. Obviously, any informal agreement reached with the judges in this regard will last only as long as the same judges are appointing.

- If the number of cases exceeds 105% of the standard for the first 12 months, appoint private assigned counsel at \$200 per case up to the point where the cost of a new attorney and paralegal (approximately 500 cases) would be the same and then add a new attorney and paralegal to the misdemeanor division seeking reimbursement from the city through the interlocal agreement.
- The Workload Assessment also recommended that the County Board urge the City Council to review the City Ordinances and the penalties provided to see if the penalties in some of these instances may be changed to eliminate jail as a possible sentence thus not trigger the right to appointed counsel. We are not advocating restrictions on the right to counsel, but we are recognizing that, with limited resources, we cannot represent everyone charged with a City Ordinance violation

There are a large number of City ordinance violations for which we never receive appointments, which may indicate that a potential jail sentence is not needed (e.g. Spitting on sidewalks, Smoking and Spitting in buses, Minors Using Tobacco). However, I will concentrate here on misdemeanors where we do now receive some appointments and where gradation of sentencing might work to keep our appointments down while still providing for public safety.

I understand that there is Supreme Court case law indicating that a city ordinance cannot be inconsistent with a state statute on the same subject. I am not sure that I agree with the position that a lower penalty in a City Ordinance makes that ordinance inconsistent. I say that because the city ordinance on assault contains all of the language of the state statute on 3<sup>rd</sup> degree assault but carries a lesser possible jail sentence (6months v 12 months). On the other side of the issue, the city ordinance on Disturbing the Peace contains all of the language of the state statute plus additional language and then carries a possible greater sentence than the state statute (6 months jail v. 3 months). In any event, this issue will have to be dealt with if a review is going to go forward and have any impact.

There are a number of ordinances where our office does receive appointments that I would suggest for a review. I believe that ordinances relating to Disorderly House, Disturbing the Peace, Shoplifting, Consuming Alcohol In Public, Minor In Possession of Alcohol, Trespass, and False Reporting, could be changed to make the first, second, and, in some instances, third offenses, "fine only" cases with an increasing fine for each subsequent conviction. Community service could also be added as part of the penalty. This would eliminate the need for appointment of counsel until later when a jail sentence is a real possibility. I fully understand that these are political judgments that others must make and individual opinions will vary about appropriate punishment in specific cases. As long as everyone understands that the status quo is not without costs, the review will be worthwhile.

## Juvenile Cases

- **Recommended Workload Standard** – According to the Workload Assessment, the two non-supervising attorneys in the juvenile division should be able to handle 410 new cases per year (approximately 34 new cases per month) and the supervising attorney should be expected to handle 308 cases per year (approximately 26 new cases per month) . This would equal a total of 1128 new division wide cases per year.
- **105% of the Workload Standard** – If we accepted a 105% of the recommended caseload standards, we would accept 1184 case per year, 430 per non supervisory attorney and 324 for the supervisor.

- **Projected 2008 Cases** – Based upon new open cases through July 25, 2008, we would anticipate a 4% overall increase in new cases this year. Using a 4% factor for new open cases and assuming we continue closing for conflicts, retained private counsel, and other early withdraw reasons at the 20% rate, we would anticipate a division wide total of 1302 new cases in 2008. Using the 105% standard, we need to declare excess caseload in approximately 118 cases. The judges would have to use contract attorneys or private assigned counsel for these cases at \$360 per case.
- **Recommendations For Juvenile Cases**
  - One of the advisory committee’s recommendations echos a recommendation from a previous report that the Lancaster County Attorney’s office use more second time diversion services instead of filing formal charges in order to reduce the number of overall filings in law violation cases in Lancaster County. If this is impemented, some reduction in caseload would occur. We would encourage the Board to encourage the County Attorney to follow through on this recommendation.
  - The juvenile court judges recently agreed that they would follow Judge Ryder’s example and not appoint the public defender in all status offense cases as they currently do. Judge Heideman believes that this would significantly reduce the number of status offense cases requiring counsel, perhaps by as much as 80%. However, recently we have learned that DHHS is apparently advising families to ask for attorneys in status cases, so it is not clear how much of an impact this would be.
  - Increase the number of contract appointments in a law violation or status offense case to accommodate our overload.
  - Use more private attorney assignments when the public defender’s caseload exceeds its standards.

### **Child Support/Paternity and Mental Commitments**

- **Recommended Workload Standard** – According to the Workload Assessment, the civil attorney in the juvenile division should be able to

handle 859 new Child Support/Paternity and Mental Commitment cases per year (approximately 72 new cases per month).

- **105% of the Workload Standard** – 105% of this standard would be 902 cases per year or approximately 75 new cases per month).
- **Projected 2008 Cases** – Based upon the first 7 months of 2008, we would project a total of 862 of these civil cases in 2008, which is only 3 cases over the new standard and is within 105% of that standard.
- **Recommendations** – Depending on how the other dockets sort out over the first 12 months implementing these new workload standards, it may be in Lancaster County's best interest to contract out these dockets again. If the figures show that an attorney (and thus, a paralegal) will be needed in the felony division, it would be more efficient and cost effective to contract out these cases and move the attorney to the felony division without adding a paralegal. We should be able to make such a determination by the time the FY10 budget process begins.