

MO PUBLIC DEFENDER CASELOAD RELIEF EFFORTS TIMELINE

The following timeline sets forth the variety of efforts undertaken to address the public defender caseload crisis above and beyond annual requests to the governor & legislature for more attorneys.

2005 MO Bar Task Force on the Public Defender was created in response to years of increasing caseload and turnover rates with no corresponding increase in staff

Chaired by incoming MO Bar President, Doug Copeland, and made up of state and local bar leaders, judges, legislators, prosecuting attorneys, public defender commissioners, and members of the private bar, both criminal and civil. The Task force hired The Spangenberg Group to do an outside assessment of the Public Defender System. Concluded that MO PD funding was the lowest *per capita* expenditure of all statewide public defender systems and described the system as ‘struggling to survive’ with attorneys ‘practicing triage’ in violation of ethical and constitutional requirements.

2006 ABA Ethics Advisory Opinion on Public Defender Caseload Issued

ABA Ethics Opinion 06-441 clarified that public defenders enjoy no exemption from the duty of every attorney not to take on more cases that s/he can effectively handle and are subject to disciplinary actions for failure to comply with this obligation. Sara Rittman, MO Legal Ethics Counsel, testified before the Senate Appropriations Committee that MO Rules of Professional Responsibility impose the same ethical duties and limitations on public defenders as the ABA Advisory Opinion.

MO Bar Volunteer Attorney Program Instituted

MO Bar offered free CLE to attorneys who would volunteer to take minor traffic matters for the overloaded public defender offices. A little over 100 attorney volunteers stepped forward statewide to take a case or two each.

Senate Interim Committee on the Public Defender

Chaired by Sen. Jack Goodman and made up of Sens. Mike Gibbons, LuAnn Ridgeway, Chuck Graham, and Joan Bray. The committee held hearings in the Fall of 2006, taking testimony from Robert Spangenberg re the study conducted above, defenders, private bar members, bar leaders, judges and academics on the state of public defense in MO. Issued report in January, 2007 recommending reductions in caseload and increases in both attorney and support staff.

2007 \$1.15M to contract case overload was added to PD budget by legislature.

At average cost of \$1500 per case to contract, this covered the cost of contracting approx 750 of MSPD’s 85,000 cases. No new FTE were a possibility due to the then-governor’s prohibition on increasing the number of state employees.

Exploration of Court Operating Rule to Limit Public Defender Appointments

A draft operating rule was developed, in consultation with Supreme Court Chief Justice Laura Stith and Associate Justice Michael Wolff, to limit appointment of public defenders who were already carrying excessive caseloads. The Supreme Court sought input on the proposed rule from the state’s trial judges, both via an advisory committee and a group discussion at the judicial college. Most agreed that, in theory, there had to be some ceiling to the caseloads public defenders could carry, but could not agree on what that cap should be or who should decide it, and as a group exhibited strong opposition to the idea of a court operating rule on the issue. Justices Stith and Wolff then suggested to MSPD leadership

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that the responsibility for determining case overload for public defender offices more rightly rested with the Public Defender Commission and not through Supreme Court operating rule.

2008 Senate Bill 767 filed by Sen. Jack Goodman

Missouri Senate Bill 767 clarified that the Public Defender Commission had both the authority and the obligation to set maximum caseload standards for public defender offices. It also moved court cost money from several funds unrelated to the operation of the court system to the public defender, and prohibited the appointment of public defenders to probation revocation and non-capital post-conviction cases, two areas in which appointment of counsel is not constitutionally required. The court costs transfer and probation revocation provisions were dropped in committee. The revised bill passed in the Senate and House Judiciary Committee, but never reached the House Floor.

PD Commission Enacts Administrative Rule re Excessive Caseload: 18 CSR 10-4.010

The Public Defender Commission took the advice of the Supreme Court and enacted an administrative rule. It established a protocol for determining the maximum allowable caseload for each office – comparing the number of hours required to handle the cases coming in the door against the attorney hours available to handle those cases -- and authorized the director to place an office on limited availability once it had exceeded that maximum for three consecutive months. The rule became effective July 31, 2008 and MSPD began placing offices on limited availability in the fall of 2008.

Springfield Metropolitan Bar Association Initiates Volunteer Attorney Project

The Springfield Public Defender office was placed on limited availability under the Commission's administrative rule due to its excessive caseload. Springfield Metro Bar developed a program to cover all probation revocations in 31st Circuit and had approximately 80 volunteers taking appointments as part of the program. The Bar's commitment was to run the program for one year's time in the hopes of longer term relief having been resolved by that time. At the end of that year, no longer term relief had been obtained, but the Bar phased the program out nonetheless because of its commitment to the volunteers that it would be only a one-year project.

2009 MO Legislature Adopts – and Governor Vetoes – Caseload Limit Legislation

Senate Bill 37, sponsored by Senator Jack Goodman, once again attempted to statutorily clarify that the Public Defender Commission had the authority to establish and enforce caseload limits for public defender offices. Under the legislation, cases in excess of those maximum caseload limits would go on a waiting list for public defender services to be prioritized by the courts. SB 37 was voted Do Pass unanimously out of every committee in both the Senate and House, approved unanimously by the Senate, and approved in the House by a vote of 139 – 16. The governor vetoed the legislation. His veto message said that he did not believe SB 37 would fix the caseload crisis and that he was committed to getting the justice system the resources it needed instead. *May, 2009*

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Legislature Authorizes Conversion of Contracting Funds to Hire 12 New Attorneys

The Governor and Legislature concur that hiring more public defenders is more cost-effective than contracting case overload to the private bar and authorize MSPD to convert a little over \$800,000 of the \$1.15 million previously provided for hiring contract counsel to hire 12 new lawyers, reducing MSPD's attorney shortage from 176 to 164. Also, for first time in 20 years, MSPD receives full funding for its payroll rather than relying on a certain amount of vacancy savings to make payroll. Legislature also allocates \$2 million in Federal Stimulus funds for contracting case overload. The Governor withholds all but \$500,000 of those funds due to falling state revenues. *July, 2009*

Second Mo Bar Study Completed

The MO Bar Foundation hired George Mason University & The Spangenberg Group to conduct a follow-up study of the Missouri Public Defender System in the hopes of developing an objective Missouri-specific public defender caseload standard that could be used to determine staffing needs. The study was completed, but was unable to determine a Missouri-specific caseload standard because Missouri's public defenders are spending an inordinate percentage of their time doing non-lawyer, administrative tasks due to the critical shortage of support staff in their offices and their models, rendering their method of determining how many cases an attorney should be able to handle invalid as applied to Missouri's Defenders. *November, 2009*

U.S. Attorney General Cites Missouri as Example of a Broken Indigent Defense System

Eric Holder, the U.S. Attorney General, in a speech at the Justice Legacy Awards Dinner in Washington, D.C., discussed the problems plaguing indigent defense systems around the country. In that speech, he specifically mentioned Missouri as an example of an indigent defense system in crisis. *November, 2009*

Mo Supreme Court Rules Public Defenders Can Refuse Cases, but Not by Category

In *State ex rel. Mo Public Defender Commission, et al. v. The Honorable Kenneth Pratte*, the Missouri Supreme Court held that public defenders cannot identify certain categories of cases to turn away due to case overload, but— if efforts to reduce caseload through informal cooperation with the courts and prosecuting attorneys are not successful – their proper remedy is to 'make the office unavailable for any appointments until the caseload falls below the commission's standard' in order to *December, 2009*

2010 MSPD receives \$250,000 in additional funds to hire support staff

The Governor initially recommended \$2 million in new funds for MSPD to utilize in the best way possible to address its caseload crisis. Falling state revenues led to the legislature reducing that recommendation to \$500,000 and the Governor then withholding all but \$250,000. Given the critical shortage of support staff that requires the public defender attorneys to spend up to 13% of their time doing tasks that should be done by support staff personnel, the Public Defender Commission determined that the best use of the funds would be to hire 6-7 more support staff. *May, 2009*

Notice of Impending Defender Unavailability Given to 22 Judicial Circuits

The Director of the State Public Defender System gave notice to 22 Judicial Circuits, covering 43 counties, that the 14 Public Defender Offices serving their courts are at risk of having to close their

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doors to additional cases unless steps can be taken to drastically reduce the numbers of cases in need of indigent defense services. In response, some courts began appointing private attorneys to handle juvenile cases. Others increased pre-screening of probation violation reports, only referring those at actual risk of revocation to the public defender. A number of prosecuting attorneys did begin waiving jail time on traffic and some misdemeanor offenses to eliminate the constitutional trigger for a right to appointment of counsel. These efforts reduced caseload slightly in a number of areas, but none sufficiently to bring the designated public defender office within its maximum allowable caseload as set by the Public Defender Commission. *June, 2010*

First Public Defender Offices are closed to new cases. Courts appoint them anyway. Litigation ensues.

The Springfield Office was the first office to attempt to close to new cases under the administrative regulation as revised by the Supreme Court's ruling. The office reached its maximum allowable caseload for the month on July 21 and notified the courts it served that the office would not be able to accept any new incoming cases for the remainder of the month. Judge Waters, Associate Circuit Judge in Christian County, appointed the office to a new case despite the closure, saying he had no place else to go with the case. MO State Public Defender contested the appointment in writ. *July, 2010*

The Missouri Supreme Court appointed a special master to determine whether the caseload protocol being used by the State Public Defender System to draw the line on maximum allowable caseloads for its office was accurate and appropriate. *October, 2010*

2011 Special Master Issues Findings on Public Defender Maximum Caseload Protocol

After a day-long hearing and a waiting period of several months, the Special Master issued his report, concluding that MSPD's Caseload Protocol was "not inaccurate" but that he couldn't say it was 'accurate enough' to justify the burden it placed on the rest of the Criminal Justice System. *February, 2011*

Case Briefed & Argued, Decision Pending

The case returned to the Missouri Supreme Court. Briefs were filed in May, 2011 but due to a vacancy on the Supreme Court, the matter was not set for oral argument until December. As of this writing, the decision is still pending.

Current Status

Seven defender offices, serving 22 counties, remain certified. Each month, when they hit their maximum capacity of new cases for the month, they notify their courts that they are unavailable to accept additional cases. For the most part, courts continue to overrule their notices of unavailability and appoint them, pending the outcome of the current writ litigation.

Eight more offices, serving another 33 counties, continue to be 'pending certification' meaning that notice has been given to the courts and prosecutors under the rule that they are at risk of having to close their doors to cases if changes are not made. They are technically in the 'meet & discuss solutions' stage of the certification process, but in reality all movement has been put on hold pending the outcome of the current writ litigation.

One office, serving one county, was certified and has since been 'de-certified' due to the court's success in bringing their caseload down below their maximum for two consecutive months. The court did this by taking over the responsibility of triaging the cases being assigned to the public defender and ensuring that they were not assigned numbers that would move them above protocol. Most misdemeanor cases were disposed of without lawyers and, in theory, without jail time. There was, however, also a

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noticeable increase in the number of indigent defendants waiving right to counsel in return for a probation offer, which still backs jail time should they be found to violate in the future.