

Committee for Public Counsel Services

FY 2012 Budget

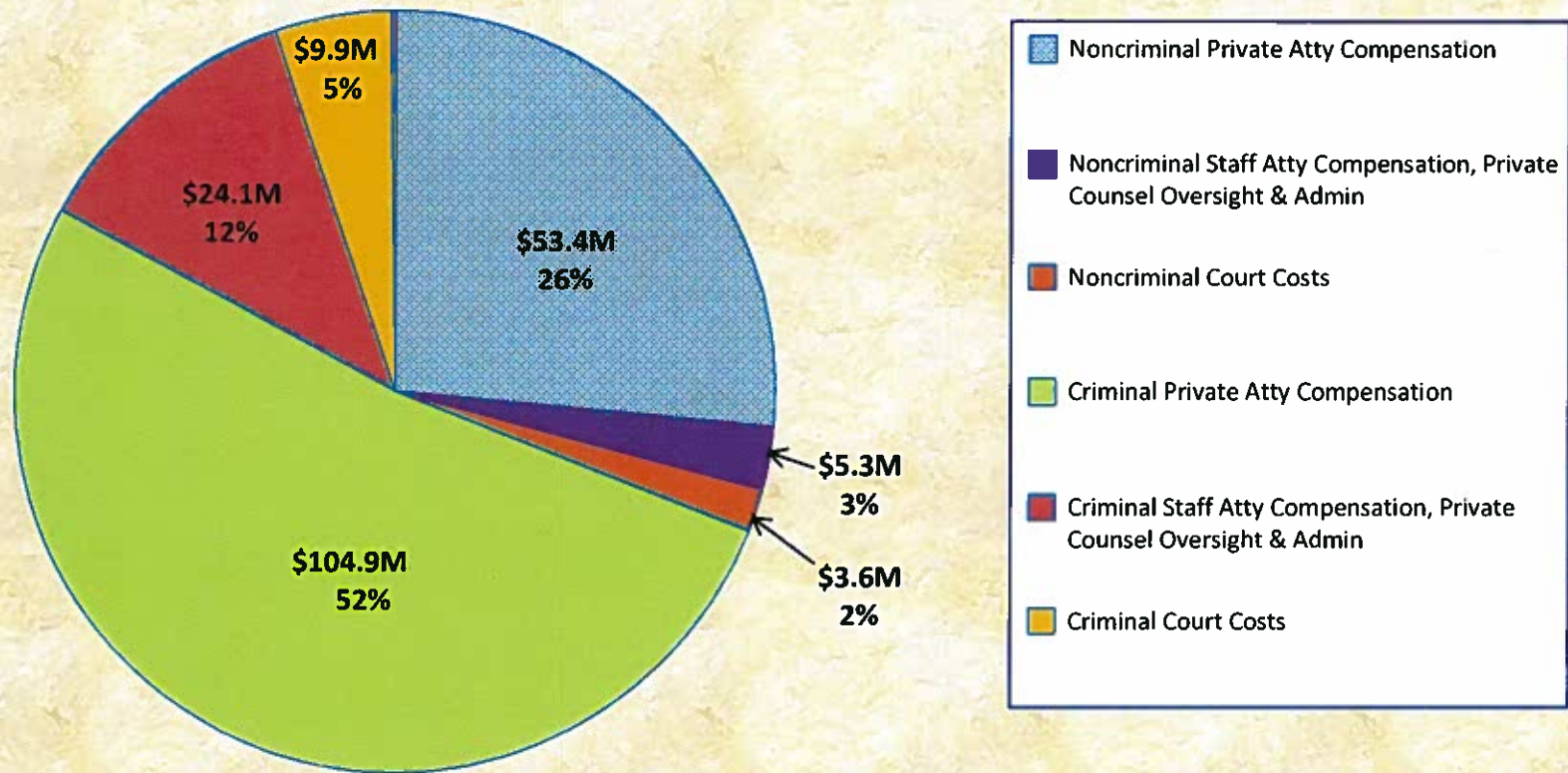
Total CPCS Budget FY 2010

TOTAL BUDGET - \$201.7M

- **Noncriminal Cases: \$62.3M** [Civil cases related to Children & Families, Civil Commitments, Mental Health, and other noncriminal matter.]
 - Private Attys: **\$53.4M** [Compensation]
 - Staff Attys: **\$5.3M** [Also, Private Counsel Oversight and Administration]
 - Court Costs: **\$3.6M** [Experts Witnesses, Investigators, Interpreters, and other]
 - Grants: **\$0.1M**
- **Criminal Cases: \$139.4M**
 - Private Attys: **\$104.9M** [Payments]
 - Public Defenders: **\$24.1M** [Also, Private Counsel Oversight and Administration]
 - Court Costs: **\$9.9M** [Expert Witnesses, Investigations, Interpreters, and other]
 - Grants: **\$0.5M**

Total CPCS Budget – FY 2010 – In Millions

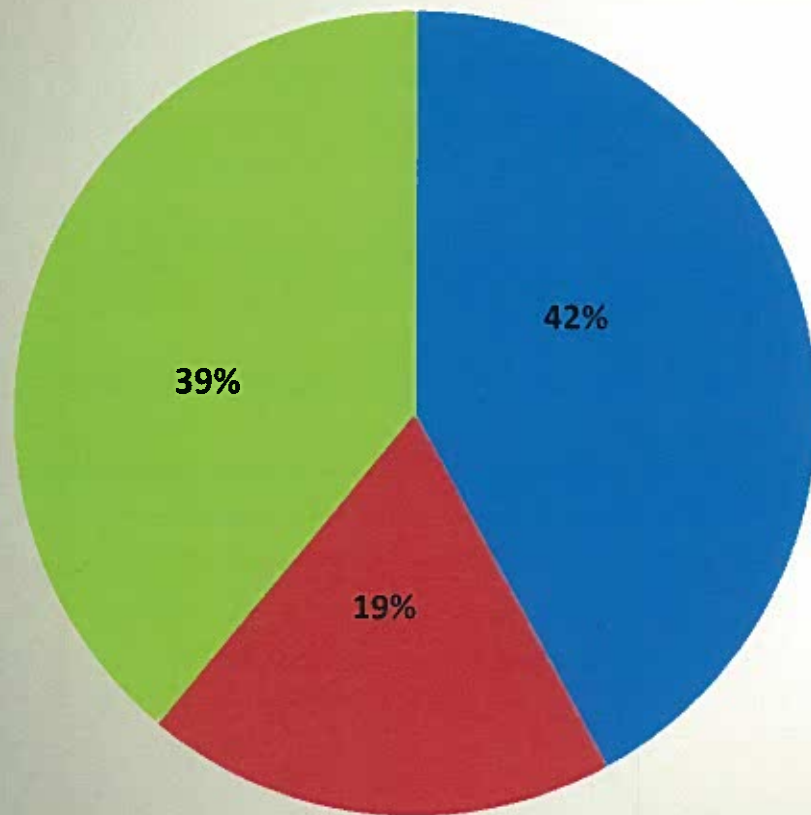
----Noncriminal v Criminal----



The total CPCS Budget is **\$201.7M**. Noncriminal cases account for a total of **\$62.3M** of this amount. These cases include Civil cases, proceedings related to Children and Families – Care and Protection, Mental Health proceedings, and other noncriminal matters that CPCS is constitutionally and statutorily mandated to represent. Criminal cases account for **69.1%** of CPCS's total spending, which equals **\$139.4M**. CPCS also receives criminal and noncriminal grants. Criminal grants represent **\$0.5M** of the total budget, and noncriminal grants make up **\$0.1M** of the budget.

CPCS Overall Spending

Percentage of Activity



■ District Court 42%

■ Care & Protection 19%

■ All Others 39% [Includes Superior Court, Murder, Juvenile Delinquency, Appeals, CHINS, Mental Health, Sex Offender Registry, etc.]

Constitutional and Statutory Noncriminal Indigent Rights Specific to Massachusetts

In Massachusetts there exist certain constitutional and statutory indigent rights that require the appointment of counsel in proceedings that do not involve District Attorneys, or do not require such appointment in other states.

- **\$62.3M** of the CPCS budget is devoted to:
 - Children and their parents, custodians or guardians in care and protection or related proceedings
 - Persons in mental health proceedings, including civil commitment, medical treatment, sex offender registry, and sexually dangerous person cases
 - Elderly and disabled persons in care and protection proceedings, who have the right to counsel.
- Annually, CPCS pays for representation of **25,000+** probation revocation hearings at which District Attorneys play no role.
- Unlike most other states, in Massachusetts the court provides a hearing on the issues of detention and bail for each juvenile arrested and not released.
- Jury trials for the adjudication of delinquency and juvenile transfer hearings are the law in Massachusetts. This is not so in many other states.

Transparency and Accountability

•**All monies spent on constitutionally and statutorily required indigent representation appears in the CPCS budget and is *published* on the state website [mass.gov].**

•**CPCS has been subjected to numerous audits.** In February 1996, the Inspector General completed a successful review of its finances. The Office of the *State Auditor* has on numerous occasions inspected the CPCS account; completing the most recent audit on October 17, 2007, which was filed with the Massachusetts House and Senate. *Report No. 2006-1104-3A.*

•**The CPCS *in-house audit department* conducts random audits of private attorneys each year** to take a snap shot of the number of hours billed by private attorneys, and the amount and type of work that is being performed.

•**The number of prosecutions defended by CPCS is *much larger* than the number of CPCS case assignments** due to the bundling of multiple cases against each defendant as one case assignment for that client. This is the court's practice when it electronically transmits assignments to CPCS.

•**Since 2004, 40% of the growth in the CPCS budget represents the Legislature's response to the 2005 Roger's Commission Report.** The Legislature changed the statutorily set rate paid to private counsel of \$30/hour (then the lowest in the nation) to \$50/hour for district court, \$60/hour for superior court, and \$100/hour for murder cases.

FY 10 Average Costs and Hours

- The average cost/case for CPCS representation in all criminal proceedings is **\$594.00**.
- The average cost/case of a civil case is **\$927.00**.
- The average cost of a district court criminal proceeding is **\$493.00**.
- The average cost of a superior court criminal case is **\$1,638.00**.
- The average hour/case is **10.95** hours for criminal cases and **18.45** hours for civil cases.
- The annual average hour/attorney is **873.6** for criminal cases and **525.2** for civil cases.
- The balance of public to private counsel in Superior Court is **50/50**.

Factors for Consideration

Explanation of Increase in Costs

In addition to the 2005 statutorily mandated increase in the hourly rate provided private attorneys who contract with CPCS, there are other factors that have had an impact on the rise in the annual cost of the assignment of counsel.

Prominent among these factors are the specific changes in the practice affecting the length and complexity of legal work in Massachusetts. During the last decade (2000 to 2011) there have been more than **28** statutory changes and court decisions that have directly impacted the duties of defense counsel and they have resulted in an increase in the cost per case.

•Explanation of Increase in Costs (continued)

•To understand the changes that impact the present work of defense counsel, five of the most prominent are outlined below:

•**“Dangerousness Hearings”** – Filed in many district court cases by prosecutors and calling for additional work by defense counsel for required evidentiary hearings at the beginning of effected cases.

•**“Collateral Consequences”** – Such consequences in criminal convictions have multiplied affecting all offenders, which has made it more difficult to resolve cases by plea. Two examples of such consequences are eviction from public housing of defendant’s innocent family members, and deportation including deportation of minors without parents.

•**“Stricter Immigration Laws”** – These new laws have resulted in longer time to disposition and more trials.

•**“Explosion in Volume of Discovery Due to New Technology”** – The increased use of new technology such as computer hard drive dumps, use of surveillance cameras by cities and private businesses, use of experts to clarify and interpret video evidence, cell phone records, and much more has led to an increase in the amount of work necessary to pose challenges by the defense to these evolving technological tools.

•**“Revolution in Forensic Evidence”** - Advances and increased frequency of the use of DNA and more cold case DNA hits require defense counsel to master relevant science and consult experts, which adds time and effort to certain cases.

CPCS Recent Cost Reductions

<u>1510 Cost Reductions</u>	<u>FY 09</u>	<u>FY 10</u>
• Eliminate CLE compensation	\$424,770	\$753,105
• Eliminate Bail Only assignments	\$153,119	\$137,025
• Reduce waiting time billable hours	\$830,992	\$707,906
• Eliminate travel/mileage for <30miles	\$531,626	\$530,525
• Reduce mileage rate from \$0.40 to \$0.30	<u>\$ 93,349</u>	<u>\$253,854</u>
• Total 1510 savings	\$2,033,856	\$2,382,415
<u>1520 Cost Reductions</u>	<u>FY 09</u>	<u>FY 10</u>
• Reduce maximum hourly rate by 5% for most vendors	\$198,978	\$369,035
• Limit maximum hourly rate for travel to attorney rate	\$ 81,550	\$163,100
• Require prior approval for travel >100 miles	<u>\$167,520</u>	<u>\$335,040</u>
• Total 1520 savings	\$448,048	\$867,175
<u>Total Cost Reduction Savings</u>	\$2,481,904	\$3,249,590
<u>Legislative Change to Billing Deadlines</u>	<u>FY 09</u>	<u>FY 10</u>
• Bills required to be submitted no later than 9/30	\$502,228	\$426,894
<u>TOTAL SAVINGS</u>	\$2,984,132	\$3,676,484

The Experts



•“The best statewide indigent defense program in the country.”
Praise of the Massachusetts Committee for Public Counsel Services by Dean Norman Lefstein, who served for nine years as chair of the American Bar Association’s Indigent Defense Advisory Group.

•“Massachusetts is one of only four states whose public defender system’s caseloads meet the standards of the U.S. Department of Justice’s National Advisory Commission on Criminal Justice.”
U.S. Department of Justice Report, 2010.

•“[T]he picture of CPCS that emerges is one of a program that is operationally sound...The areas of concern that must be addressed, if CPCS is to carry out its mission are:

- (i) The imbalance in the ratio between CPCS staff attorneys and private bar advocates
- (ii) The incredible burden imposed on the judicial system by the number of misdemeanor offenses that currently require the appointment of counsel
- (iii) The low hourly compensation rates paid to private attorneys
- (iv) The need to ensure that funds devoted to providing indigent representation are spent only on those persons who are truly indigent.” *Rogers Commission, April 2005.*

Governor of Massachusetts Deval Patrick



“We are indeed fortunate here in Massachusetts to have a bar so actively engaged and so actively supportive of the right to counsel. We are lucky to have you good men and women, public and private, who serve CPCS...I know that we, as citizens, owe you more than we can do in the current budget, but I want you to know that I appreciate you and what you do, every one of you.”
Governor Deval Patrick, July 1, 2009.



**Former Massachusetts Supreme Judicial Court
Chief Justice Margaret Marshall**

CPCS staff attorneys and bar advocates are “remarkable lawyers” who “really do bring to life the dream of *Gideon versus Wainwright*....CPCS is doing an extraordinary job.”

Chief Justice Margaret Marshall, July 1, 2009.

The Cost to Taxpayers

Existing CPCS Private Bar Cost to Commonwealth

- Average Annual CPCS Compensation/Attorney= **\$51,195**
- Fringe Benefits [health care, pension, vacation pay out, sick time, Medicare tax, and universal health care] = **0**
- Space/Equipment/Mileage = **0**
- **TOTAL/ATTORNEY = \$51,195**
- Future salary increases: Only by **legislative action** that changes statutorily mandated rates.

Governor's Public Defender Proposal Cost to Commonwealth

- Average Annual Salary/Attorney = **\$55,853**
- Fringe Benefits [health care, pension, vacation pay out, sick time, Medicare tax, and universal health care] = **33.73%/salary**
- Space/Equipment/Mileage = **19%/salary**
- TOTAL/ATTORNEY = \$85,304.28**
- Future salary increases: Possibly negotiated annually through **union collective bargaining**.

Separation of Powers

Massachusetts

- There is a **Separation of Powers** clause within the *Massachusetts Constitution*.
- *Article 30 of the Declaration of Rights*: “In the government of this commonwealth,...the executive shall **never** exercise the legislative and judicial powers, or either of them;...to the end it may be a government of laws and not of men.”
- Oversight of assigning counsel has **always** been an “*inherent power*” of the judiciary to administer justice.
- **Separation of branches** operates to prevent “*gross conflict of interest.*”

Other States

- There are of *seventeen* (17) states with Public Defender Offices within the Executive Branch.
- Of the seventeen (17), **no separation of powers** clause exists in *three* (3) of the states.
- Of the seventeen (17), the **separation of powers clause is weakened** by a qualifying clause in *nine* (9) of the states.
- Of the seventeen (17), **no explicit requirement of separation** between branches of government exists in *one* (1) of the states.
- At least *two* (2) states that include their Public Defender Offices within the Executive Branch provide for **gubernatorial appointment or appointment by commission of their district attorney/prosecutors**.

Public Opinion

- ***Boston Herald***, January 27, 2011. “[I]n his attempted power grab at CPCS, Patrick has really gone over the edge, proposing to add 1,000 new staff attorneys and as many as 500 support staff to the state payroll at a time when his budget also proposes cutting about 900 other state jobs...Does the governor think people are stupid – or does he simply not care.”
- ***The Lowell Sun***, February 8, 2011. “We’re skeptical of any plan that increases the size of government while being billed as a cost saving – and you should be too...The Legislature should be wary of the governor’s proposal. Nothing adds up except the growth of the public sector.”
- ***The Worcester Telegram & Gazette***, January 30, 2011. “Gov. Deval L. Patrick’s plan to revamp the way the state provides legal services to indigent criminal defendants drew sharp criticism this week from some area lawyers who do the work. ‘I just don’t see how it’s cost-effective,’ said Lynne S. Martin, a private lawyer who does bar advocate work in Central District Court and Worcester Superior Court. ‘Salaries, overhead, office expenses, support staff, pensions, benefits, we cost them nothing for all of that.’”

Public Opinion

- ***Patriot Ledger***, *January 25, 2011*. “If the governor were in the trenches and in the courts every day he may have a different opinion of the viability of his proposal...It [the governor’s proposal] is going to short-change the quality of representation. It’s going to be overloaded.” said Milton lawyer, Robert Jubinville”
- ***Taunton Daily Gazette***, *January 25, 2011*. “Bristol County lawyers have a simple challenge to Gov. Deval Patrick, who wants to abolish the current system of hiring private lawyers to represent indigent defendants...Lawyers say: ‘Show Me the Money.’”

Suggestion # 1

Indigency Verification

Indigency verification is an important piece of the cost saving measures that the Commonwealth must pursue. As early as 1991 CPCS has been a participant in the discussions surrounding how best to verify indigency. In the FY 99 Budget a CPCS proposal was initiated, which established an Indigency Verification Commission; resulting in a temporary reduction in criminal case intake and reversed eight years of increases.

The Rogers Commission highlighted indigency verification as one of the four “areas of concern that must be addressed.” It proposed amending indigency verification statutes and requiring additional reporting from the Commissioner of Probation.

Governor Patrick, in House 1, also proposes changes to indigency verification. CPCS agrees that in this time of fiscal pressure measures must be taken to ensure that only those who are entitled to publically funded defense counsel benefit from such appointments. Although we may differ on the method of producing a viable resolution, we are nonetheless dedicated to finding, once and for all, a solution to this ongoing problem.

Suggestion # 2

Reducing the Need for Appointment of Counsel

Another area of concern submitted by the Rogers Commission was the “incredible burden imposed on the judicial system by the number of misdemeanor offenses that currently require the appointment of counsel.” It is a well established fact that the number of non-serious misdemeanor offenses that require the assignment of counsel is placing excessive strains on limited resources, not only at CPCS, but on other budgets within the judicial system.

Research done by The Spangenberg Group [a national think tank on indigent defense systems] shows that Massachusetts appoints counsel to represent indigent defendants charged with misdemeanor offenses far more frequently than any other state.

Suggestion # 2 Continued

Reducing the Need for Appointment of Counsel

- Typical misdemeanors for which counsel is being assigned include disorderly conduct/disturbing the peace, trespass, shoplifting, and operating a motor vehicle without a license. These minor offenses not only cost the Commonwealth in the assignment of counsel, but they clog the court, and overburden and drain its resources.
- Although *section 70C of chapter 277 MGL* allows District Attorneys to treat misdemeanors as civil infractions, prosecutors rarely exercise this option; triggering the requirement for the appointment of counsel.
- A strategy to deal with this reluctance to utilize existing options under the law, would be the passage of legislation, which treats non-serious misdemeanors as civil infractions, so that they can be dealt with in a noncriminal manner and eliminate the need for assignment of counsel.

Suggestion # 2 Continued

Facts and Figures

The Rogers Commission identified **over 22,000** cases between FY 00 and FY 04 that required assigned defense counsel to represent indigent persons charged with operating a motor vehicle after a license to operate or registration was suspended. For the same period, it also identified **13,590** case assignments of shoplifting, **11,641** case assignments for disorderly conduct/disturbing the peace, **4,268** case assignments for larceny by check, and **7,421** case assignments for trespassing. At that time, CPCS projected that it could have realized savings of approximately **\$8.5M**, if these cases were moved forward as civil infractions.

As already stated, CPCS is committed to working with the Administration, Legislature, Judiciary, District Attorneys, and the newly formed Civil Infraction Commission to review the vast number of minor misdemeanors that require appointment of counsel.

Suggestion # 2 Continued

Facts and Figures

- Today, approximately, **96,000** assignments in District Court are for misdemeanors. Of these, **90% [86,400 cases]** result in no sentence of incarceration. If a portion of these 86,400 cases were handled differently, as civil infractions, there would be no need for the assignment of any CPCS counsel [public or private]. The elimination of the need for counsel in these cases would realize far more than the \$8.5M CPCS projected in 2005 since the hourly rate at that time was \$30/hour, rather than the \$50/hour now in effect.
- At an cost of **\$493.00/case**, there is a potential for significant savings out of the **\$42.5M** now being spent on this 90%.

Suggestion # 3

Increase Audit and Oversight

By increasing CPCS's capacity for audit and oversight, it will have the ability to realize a conservative savings of **\$2.2M** over the next three years. This is with a roll out by December 1, 2012.

This would require the hiring of three staff [audit/attorney], at the cost of **\$213,111.00** [salary, fringe and overhead].

In addition to savings, the practical value of this cost saving measure is that as more auditors review more bills, more billing issues will be uncovered/addressed, and a stronger message will be sent of CPCS's insistence on **accurate and reasonable billing**.

Savings

- Year 1 [7 Months] - \$401,765.00 - 1/4 of 1% of all \$\$ spent on attorneys/vendors
- Year 2 [Full Year] - \$697,765.00 - 1/2 of 1% of all \$\$ spent on attorneys/vendors
- Year 3 [Full Year] - \$1,062,116.00 - 0.7% of 1% of all \$\$ spent on attorneys/vendors